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# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8637 of March 16, 2011**

## 150th Anniversary of the Unification of Italy, 2011

**By the President of the United States of America**

**A Proclamation**

On March 17, Italy celebrates the 150th anniversary of its unification as a single state. On this day, we join with Italians everywhere to honor the courage, sacrifice, and vision of the patriots who gave birth to the Italian nation. At a time when the United States was fighting for the preservation of our own Union, Giuseppe Garibaldi's campaign for the unification of Italy inspired many around the world in their own struggles, including the 39th New York Infantry, also known as "The Garibaldi Guard." Today, the legacy of Garibaldi and all those who unified Italy lives on in the millions of American women and men of Italian descent who strengthen and enrich our Nation.

Italy and the United States are bound by friendship and common dedication to civil liberties, democratic principles, and the universal human rights our countries both respect and uphold. As we mark this important milestone in Italian history, we also honor the joint efforts of Americans and Italians to foster freedom, democracy, and our shared values throughout the world.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 17, 2011, as a day to celebrate the 150th Anniversary of the Unification of Italy. I encourage all Americans to learn more about the history of Italian unification and to honor the enduring friendship between the people of Italy and the people of the United States.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of March, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2011–6720
Filed 3–18–11; 8:45 am]
Billing code 3195–W1–P

# Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Part 94

**[Docket No. APHIS–2009–0034]**

**RIN 0579–AD12**

## Changes in Disease Status of the Brazilian State of Santa Catarina With Regard to Certain Ruminant and Swine Diseases; Technical Amendment

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** In a final rule that was published in the **Federal Register** on November 16, 2010, and effective on December 1, 2010, we added the Brazilian State of Santa Catarina to the list of regions we recognize as free of foot-and-mouth disease (FMD), rinderpest, swine vesicular disease (SVD), classical swine fever (CSF), and African swine fever. We also added Santa Catarina to the list of regions that are subject to certain import restrictions on meat and meat products because of their proximity to or trading relationships with rinderpest- or FMD-affected countries. In the final rule, we neglected to add Santa Catarina to the lists of regions that are subject to certain import restrictions on pork and pork products because of their proximity to or trading relationships with SVD- and CSF-affected countries. This document corrects that error.

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dr. Silvia Kreindel, Senior Staff Veterinarian, Regionalization Evaluation Services Staff, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737; (301) 734–4356 or (301) 734–8419.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation into the United States of specified animals and animal products in order to prevent the introduction of various animal diseases, including rinderpest, foot-and-mouth disease (FMD), African swine fever (ASF), classical swine fever (CSF), and swine vesicular disease (SVD). These are dangerous and destructive communicable diseases of swine and ruminants.

In a final rule [1] published in the **Federal Register** on November 16, 2010 (75 FR 69851–69857, Docket No. APHIS–2009–0034), with an effective date of December 1, 2010, we amended the regulations by adding the Brazilian State of Santa Catarina to the list in § 94.1 of regions that are free of rinderpest and FMD, the list in § 94.11 of regions that are declared to be free of rinderpest and FMD but that are subject to certain restrictions because of their proximity to or trading relationships with rinderpest or FMD-affected regions, the lists in §§ 94.9 and 94.10 of regions that are free of CSF, and the list in § 94.12 of regions that are free of SVD. We also excluded Santa Catarina from the list in § 94.8 of regions where ASF is known to or reasonably believed to exist.

Section 94.13 of the regulations lists regions of the world that have been determined to be free of SVD, but that are subject to certain restrictions because of their proximity to or trading relationships with SVD-affected regions. Section 94.25 of the regulations lists regions of the world that have been determined to be free of CSF, but that are subject to certain restrictions because of their proximity to or trading relationships with CSF-affected regions.

Because we have not declared the rest of Brazil to be free of SVD or CSF, the importation of pork and pork products into the United States from Santa Catarina are subject to these restrictions. In the final rule, we neglected to add Santa Catarina to the lists in § 94.13 and § 94.25 of regions that are subject to certain import restriction on pork and pork products because of their proximity to or trading relationships with SVD- and CSF-affected countries. Therefore, this document amends § 94.13, introductory text, and § 94.25, paragraph (a), to add Santa Catarina to those lists.

USDA's Food Safety and Inspection Service (FSIS) is responsible for regulating the importation of meat and meat products to ensure that they are safe for human consumption. Individual meat exporting establishments must be certified to FSIS in order to be eligible to export meat and meat products to the United States. FSIS has not certified any such establishments in Santa Catarina, and therefore no pork or pork products have been imported into the United States from Santa Catarina since the final rule became effective.

### List of Subjects in 7 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry, and poultry products, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR part 94 as follows:

## PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, SWINE VESICULAR DISEASE, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

■ 1. The authority citation for part 94 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

**§ 94.13 [Amended]**

■ 2. In § 94.13, introductory text, the first sentence is amended by adding the words "the Brazilian State of Santa Catarina," after the word "Belgium,".

**§ 94.25 [Amended]**

■ 3. In § 94.25, paragraph (a) is amended by adding the words "The Brazilian State of Santa Catarina," after the word "section:" and by adding a comma after the word "Chile".

[1] To view the final rule and related documents, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2009–0034.*

Done in Washington, DC, this 16th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–6538 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 129

**[Docket No. FAA–2009–0140; Amdt. No. 129–49–A]**

**RIN 2120–AJ45**

## Operations Specifications; Correction

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** The FAA is correcting a final rule published on February 10, 2011 (76 FR 7482). In that rule, the FAA amended its regulations to clarify and standardize the rules for applications by foreign air carriers and foreign persons for part 129 operations specifications and establish new standards for amendment, suspension, and termination of those operations specifications. This document corrects errors in the codified text of that document.

**DATES:** The final rule and this correction will become effective on April 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** For technical questions contact Darcy D. Reed, International Programs and Policy Division, AFS–50, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington DC 20591; *e-mail: Darcy.D.Reed@faa.gov; Telephone:* 202–385–8078. For legal questions contact Lorna John, Office of the Chief Counsel, Regulations Division, AGC–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *e-mail: Lorna.John@faa.gov; Telephone:* 202–267–3921.

**SUPPLEMENTARY INFORMATION:**

### Background

On February 10, 2011, the FAA published a final rule entitled, "Operations Specifications" (76 FR 7482).

In that final rule the FAA revised its regulations to clarify and standardize the rules for applications by foreign air carriers and foreign persons for part 129 operations specifications and establish new standards for amendment, suspension, and termination of those operations specifications. As part of the amendment, the FAA added new § 129.9(a)(2) and (b)(2) concerning the designation of an agent for service. The **DATES** section correctly listed the compliance date for § 129.9(a)(2) and (b)(2) as February 10, 2012. Section 129.9(a)(2) and (b)(2) in the regulatory text incorrectly stated that the compliance date was "Within 1 year after February 10, 2012."

### Correction

In FR Doc. 2011–2834, beginning on page 7484 in the **Federal Register** of February 10, 2011, make the following corrections:

### Corrections to Regulatory Text

**§ 129.9 [Corrected]**

1. On page 7489, in the third column, in § 129.9(a)(2) and (b)(2), remove the words "February 10, 2012" and add in their place the words "February 10, 2011".

Issued in Washington, DC, on March 15, 2011.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

[FR Doc. 2011–6489 Filed 3–18–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF JUSTICE

## 28 CFR Part 0

**[Tax Division Directive No. 139]**

## Redelegation of Authority to Compromise and Close Civil Claims

**AGENCY:** Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** This Tax Division directive delegates to a Principal Deputy Assistant Attorney General all of the Assistant Attorney General's authority to compromise and close civil claims, except when such action is opposed by the client agency or agencies. This Tax Division directive further delegates settlement authority of the Chiefs of the Civil Trial Sections, the Court of Federal Claims Section, the Appellate Section, the Office of Review, and the Deputy Assistant Attorneys General, to compromise and close civil claims. In addition, this directive allows discretionary redelegation of limited authority by a Section Chief to his or her Assistant Chiefs and Reviewers. This directive supersedes Directive No. 135.

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Deborah Meland, Tax Division, Department of Justice, Washington, DC 20530, (202) 307–6567.

**SUPPLEMENTARY INFORMATION:** This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. This regulation is not a significant rule within the meaning of Executive Order 13866, as amended, and therefore was not reviewed by the Office of Management and Budget. This regulation does not have an impact on small entities and, therefore, is not subject to the Regulatory Flexibility Act. This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

### List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies).

Accordingly, 28 CFR part 0 is amended as follows:

## PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority citation for part 0 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–19.

■ 2. The Appendix to subpart Y of part 0 is amended by removing Tax Division Directive No. 135 and adding in its place Tax Division Directive No. 139, to read as follows:

### Appendix to Subpart Y of Part 0—Redelegations of Authority To Compromise and Close Civil Claims

* * * * *

**[Tax Division Directive No. 139]**

By virtue of the authority vested in me by Part 0 of Title 28 of the Code of Federal Regulations, particularly Sections 0.70, 0.160, 0.162, 0.164, 0.166, and 0.168, it is hereby ordered as follows:

Section 1. The Chiefs of the Civil Trial Sections, the Court of Federal Claims Section, and the Appellate Section are authorized to reject offers in compromise, regardless of amount, provided that such action is not opposed by the agency or agencies involved.

Section 2. Subject to the conditions and limitations set forth in Section 11 hereof, the Chiefs of the Civil Trial Sections and the Court of Federal Claims Section are authorized to:

(A) Accept offers in compromise in, settle administratively, and close (other than by compromise or by entry of judgment), all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $500,000;

(B) Accept offers in compromise in injunction or declaratory judgment suits against the United States in which the principal amount of the related liability, if any, does not exceed $500,000; and

(C) Accept offers in compromise in all other nonmonetary cases;

provided that such action is not opposed by the agency or agencies involved, and provided further that the proposed compromise or concession is not subject to reference to the Joint Committee on Taxation.

Section 3. The Chiefs of the Civil Trial Sections and the Court of Federal Claims Section are authorized on a case-by-case basis to redelegate in writing to their respective Assistant Section Chiefs or Reviewers the authority delegated to them in Section 1 hereof to reject offers, and in Section 2 hereof, to accept offers in compromise in, settle administratively, and close (other than by compromise or by entry of judgment), all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $250,000; provided that such redelegation is not made to the attorney-of-record in the case. Redelegations pursuant to this section shall be by memorandum signed by the Section Chief, which shall be placed in the Department of Justice file for the applicable case.

Section 4. Subject to the conditions and limitations set forth in Section 11 hereof, the Chief of the Appellate Section is authorized to:

(A) Accept offers in compromise with reference to litigating hazards of the issue(s) on appeal in all civil cases (other than claims for attorneys' fees, litigation expenses and court costs) in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $500,000;

(B) Accept offers in compromise in injunction [see sec. 2(B)] or declaratory judgment suits against the United States in which the principal amount of the related liability, if any, does not exceed $500,000;

(C) Accept offers in compromise in, or settle administratively, all civil claims for attorneys' fees, litigation expenses and court costs in which the aggregate amount of the Government's concession on these claims does not exceed $200,000, and in which the aggregate amount of the Government's concession in the case, exclusive of statutory interest, does not exceed $500,000; and

(D) Accept offers in compromise in all other nonmonetary cases which do not involve issues concerning collectibility;

provided that (i) such acceptance is not opposed by the agency or agencies involved or the chief of the section in which the case originated, and (ii) the proposed compromise is not subject to reference to the Joint Committee on Taxation.

Section 5. The Chief of the Appellate Section is authorized on a case-by case basis to redelegate in writing to the Appellate Section's Assistant Section Chiefs the authority delegated to the Chief of the Appellate Section in Section 1 hereof to reject offers, and in Section 4 hereof, to:

(A) Accept offers in compromise with reference to litigation hazards of the issue(s) on appeal in all civil cases (other than claims for attorneys' fees, litigation expenses and court costs) in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $250,000; and

(B) Accept offers in compromise in, or settle administratively, all civil claims for attorneys' fees, litigation expenses and court costs in which the aggregate amount of the Government's concession on these claims does not exceed $100,000, and in which the aggregate amount of the Government's concession in the case, exclusive of statutory interest, does not exceed $250,000;

provided that such redelegation is not made to the attorney-of-record in the case. The redelegations pursuant to this section shall be by memorandum signed by the Chief of the Appellate Section, which shall be placed in the Department of Justice file for the applicable case.

Section 6. Subject to the conditions and limitations set forth in Section 11 hereof, the Chief of the Office of Review is authorized to:

(A) Accept offers in compromise and settle administratively claims against the United States in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $1,500,000; and

(B) Accept offers in compromise and close (other than by compromise or by entry of judgment), claims by the United States in all civil cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,500,000 or 15 percent of the original claim, whichever is greater;

(C) Accept offers in compromises in all nonmonetary cases; and

(D) Reject offers in compromise or disapprove concessions, regardless of amount;

provided that such action is not opposed by the agency or agencies involved or the chief of the section to which the case is assigned, and provided further that the proposed compromise or concession is not subject to reference to the Joint Committee on Taxation.

Section 7. The Chief, Office of Review, is authorized on a case-by-case basis to redelegate in writing to the office's Assistant Section Chief or Reviewer the authority delegated to the Chief, Office of Review in Section 6 hereof to reject offers, and in Section 6 hereof, to accept offers in compromise in, settle administratively, and close (other than by compromise or by entry of judgment), all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $750,000; provided that such redelegation is not made to the attorney-of-record in the case. The redelegations pursuant to this section shall be made by memorandum signed by the Section Chief, which shall be placed in the Department of Justice file for the applicable case.

Section 8. Subject to the conditions and limitations set forth in Section 11 hereof, each of the Deputy Assistant Attorneys General is authorized to:

(A) Accept offers in compromise and settle administratively claims against the United States in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $2,000,000;

(B) Accept offers in compromise and close (other than by compromise or by entry of judgment), claims by the United States in all civil cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $2,000,000 or 15 percent of the original claim, whichever is greater;

(C) Accept offers in compromise in all nonmonetary cases; and

(D) Reject offers in compromise or disapprove concessions, regardless of amount;

provided that such action is not opposed by the agency or agencies involved and the proposed compromise or concession is not subject to reference to the Joint Committee on Taxation.

Section 9. In addition to the actions authorized by Section 8 hereof, and subject to the conditions and limitations set forth in Section 10 hereof, a Principal Deputy Assistant Attorney General is authorized to:

(A) Accept offers in compromise and settle administratively claims against the United States in all civil cases, regardless of amount in all cases in which the Joint Committee on Taxation has indicated that it has no adverse criticism of the proposed settlement, provided that such action is not opposed by the agency or agencies involved.

(B) Consistent with, and subject to the limitations of, 28 CFR 0.168, and in the absence of an Assistant Attorney General, redelegate authority under this Directive to subordinate division officials and United States Attorneys.

Section 10. Subject to the conditions and limitations set forth in Section 11 hereof, United States Attorneys are authorized to:

(A) Reject offers in compromise of judgments in favor of the United States, regardless of the amount;

(B) Accept offers in compromise of judgments in favor of the United States where the amount of the judgment does not exceed $300,000; and

(C) Terminate collection activity by his or her office as to judgments in favor of the United States which do not exceed $300,000 if the United States Attorney concludes that the judgment is uncollectible;

provided that such action has the concurrence in writing of the agency or agencies involved, provided further that this authorization extends only to judgments which have been formally referred to the United States Attorney for collection.

Section 11. The authority redelegated herein shall be subject to the following conditions and limitations;

(A) When, for any reason, the compromise or concession of a particular claim, as a

practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated in Sections 2, 3, 4, 5, 6, 7, 8, 9, and 10 hereof, the case shall be forwarded for review at the appropriate level for the cumulative amount of the affected claims;

(B) When, because of the importance of a question of law or policy presented, the position taken by the agency or agencies or by the United States Attorney involved, or any other considerations, the person otherwise authorized herein to take final action is of the opinion that the proposed disposition should be reviewed at a higher level, the case shall be forwarded for such review;

(C) If the Department has previously submitted a case to the Joint Committee on Taxation leaving one or more issues unresolved, any subsequent compromise or concession in that case must be submitted to the Joint Committee, whether or not the overpayment exceeds the amount specified in Section 6405 of the Internal Revenue Code;

(D) Nothing in this Directive shall be construed as altering any provision of Subpart Y of Part 0 of Title 28 of the Code of Federal Regulations requiring the submission of certain cases to the Attorney General, the Associate Attorney General, or the Solicitor General;

(E) Authority to approve recommendations that the Government confess error in or to concede cases on appeal is excepted from the foregoing redelegations; and

(F) The Assistant Attorney General, at any time, may withdraw any authority delegated by this Directive as it relates to any particular case or category of cases, or to any part thereof.

Section 12. With respect to a claim by the United States (also sometimes referred to as a claim on behalf of the United States), the term "offer in compromise" as used in this Directive is any settlement of such a claim, except settlements in which the United States would receive nothing or virtually nothing in exchange for giving up its claim; and the term "to close (other than by compromise or entry of judgment)," refers to a settlement under which the United States would receive nothing, or virtually nothing in exchange for giving up its claim.

Section 13. For a claim against the United States, the term "offer in compromise" as used in this Directive is any settlement of such a claim, except settlements in which the United States would receive nothing, or virtually nothing, in exchange for conceding the claim against it; and the term to "settle administratively," means a settlement in which the United States would receive nothing, or virtually nothing, for conceding the claim against it.

Section 14. This Directive supersedes Tax Division Directive No. 135, which was effective November 21, 2007.

Section 15. This Directive shall become effective on March 21, 2011.

Dated: February 14, 2011.

**John A. DiCicco,**

*Acting Assistant Attorney General.*

[FR Doc. 2011–6530 Filed 3–18–11; 8:45 am]

**BILLING CODE 4410–16–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 100

**[Docket No. USCG–2010–1113]**

**RIN 1625–AA08**

## Special Local Regulations for Marine Events; Potomac River, Charles County, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing special local regulations during the "Potomac River Sharkfest Swim" amateur swim, a marine event to be held on the waters of the Potomac River. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Potomac River during the event.

**DATES:** This rule is effective from 7 a.m. until 12:30 p.m. on May 22, 2011.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–1113 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1113 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On January 10, 2011, we published a notice of proposed rulemaking (NPRM) entitled "Special Local Regulations for Marine Events; Potomac River, Charles County, MD" in the **Federal Register** (76 FR 1381). We received no comments on the proposed rule. No public meeting was requested, and none was held.

### Basis and Purpose

On May 22, 2011, Enviro-Sports Productions, Inc. of Stinson Beach, California, will sponsor an amateur swim across the Potomac River between Newburg, Maryland and King George, Virginia. The event consists of up to 500 swimmers on a course located upriver and parallel to the Governor Harry W. Nice Memorial (US–301) Bridge. The swimmers will be supported by sponsor-provided watercraft. The start will be located along the shore at the Aqua-Land Marina and the finish will be located along the shore at Dahlgren Wayside Park. A portion of the swim course will cross the Federal navigation channel. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

### Discussion of Comments and Changes

The Coast Guard received no comments in response to the NPRM and SNPRM. No public meeting was requested and none was held.

### Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

### Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will prevent traffic from transiting a portion of the Potomac River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit safely through a portion of the regulated area, but only after the last participant has cleared that portion of the regulated area

and when the Coast Guard Patrol Commander deems it safe to do so.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the affected portions of the Potomac River during the event.

Although this regulation prevents traffic from transiting a portion of the Potomac River near the Governor Harry W. Nice Memorial (US–301) Bridge during the event, this rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule would be in effect for only a limited period. Though the regulated area extends across the entire width of the river, vessel traffic may be permitted to safely transit a portion of the regulated area, but only after all participants have safely cleared that portion of the regulated area and when the Coast Guard Patrol Commander deems it safe for vessel traffic to do so. All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz). Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**Collection of Information**

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, 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.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human

environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 100**

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

## PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

■ 2. Add a temporary section, § 100.35–T05–1113 to read as follows:

**§ 100.35–T05–1113 Special Local Regulations for Marine Events; Potomac River, Charles County, MD.**

(a) *Regulated area.* The following location is a regulated area: All waters of the Potomac River, within lines connecting the following positions: from latitude 38°22′05″ N, longitude 076°59′03″ W, thence to latitude 38°21′50″ N, longitude 077°00′54″ W, and from latitude 38°21′29″ N, longitude 077°00′54″ W to latitude 38°21′45″ N, longitude 076°58′59″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) The Coast Guard Patrol Commander may forbid and control the movement of all vessels and persons in the regulated area. When hailed or signaled by an official patrol vessel, a vessel or person in the regulated area shall immediately comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(2) All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) *Enforcement period:* This section will be enforced from 7 a.m. until 12:30 p.m. on May 22, 2011.

Dated: February 28, 2011.

**Mark P. O'Malley,**

*Captain, U.S. Coast Guard, Captain of the Port Baltimore.*

[FR Doc. 2011–6587 Filed 3–18–11; 8:45 am]

**BILLING CODE 9110–04–P**

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket No. USCG–2011–0038]**

**RIN 1625–AA87**

## Security Zones; Cruise Ships, Port of San Diego, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is amending its regulations for Security Zones; Cruise Ships, Port of San Diego, California, by providing a common description of all security zones created by this section to encompass only navigable waters within a 100 yard radius around any cruise ship that is located within the San Diego port area landward of the sea buoys bounding the Port of San Diego. This final rule removes a reference to shore area that is no longer necessary to provide for the safety of the cruise ship, vessels, and users of the waterway. Entry into these security zones will be prohibited unless specifically authorized by the Captain of the Port (COTP) San Diego, or a COTP designated representative.

**DATES:** This rule is effective April 20, 2011.

**ADDRESSES:** The contents of the online docket for this rulemaking, USCG–2011–0038, may be viewed by going to *http://www.regulations.gov,* inserting USCG–2011–0038 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Commander Michael B. Dolan, Prevention, Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7261, e-mail *Michael.B.Dolan@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**Regulatory Information**

On January 27, 2011, we published a notice of proposed rulemaking (NPRM) entitled Security Zones; Cruise Ships, Port of San Diego, California in the **Federal Register** (76 FR 4833). We received no comments on the proposed rule, either through the electronic docket office, or directly to Coast Guard Sector San Diego. A public meeting was not requested, and none were held. The telephone number listed in the proposed rule to contact the Captain of the Port listed was incorrect. We have corrected it in this final rule.

**Basis and Purpose**

Based on experience with actual security zone enforcement operations, the COTP San Diego has concluded that a security zone encompassing all navigable waters, extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is within the San Diego port area inside the sea buoys bounding the Port of San Diego would provide for the safety of the cruise ship, vessels, and users of the waterway. Therefore, no reference to shore area in security zones for moored cruise ships is required.

**Background**

The Coast Guard is establishing a permanent security zone regulation. The security zones created by this rule will encompass all navigable waters, extending from the surface to the sea floor, within a 100 yard radius around any cruise ship that is within the San Diego port area inside the sea buoys bounding the Port of San Diego. These security zones are necessary to provide for the safety of the cruise ship, other vessels and users of the waterway. Entry into these zones will be prohibited unless specifically authorized by the

Captain of the Port (COTP) San Diego, or a COTP designated representative.

Paragraph (b)(2) of the existing 33 CFR 165.1108 includes reference to the shore area. The COTP has determined that security zones for moored cruise ships in San Diego Harbor need not include any shore area, as the shore side passenger terminals used for cruise ship operations are regulated under regulations in 33 CFR part 105 issued under authority of the Maritime Transportation Security Act of 2002 (Pub. L. 107–295). These MTSA regulations were published July 1 (68 FR 39315) and October 22, 2003 (68 FR 60515), months after the final rule establishing 33 CFR 165.1108 was published on January 8, 2003 (68 FR 1005).

The Coast Guard issued a temporary final rule that suspends § 165.1108 (b)(2) through June 20, 2011. See 75 FR 82243, December 30, 2010. With the issuance of this final rule, the temporary final rule of December 30, 2010, is no longer needed. This final rule will remove that section.

Further, this rule amends both 33 CFR 165.1108 (b) and (c). In addition to clarifying the area covered by security zones created by § 165.1108 (b), this rule simplifies the regulation by not distinguishing between anchored cruise ships, moored cruise ships and cruise ships underway. Also, paragraph (c) is amended to make it clearer that persons and vessels may not enter these security zones without first obtaining permission of the Captain of the Port San Diego.

## Discussion of Comments and Changes

There were no comments submitted to the electronic docket or to Coast Guard Sector San Diego. No changes were made from the proposed regulation, except to correct the telephone number listed to contact the Captain of the Port.

## Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

## Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS). We expect the economic impact of this rule to be so minimal that full Regulatory Evaluation is unnecessary. Most of the entities likely to be affected are pleasure craft engaged in recreational activities and sightseeing. In addition, due to National Security interests, the implementation of this security zone regulation is necessary for the protection of the United States and its people. The size of the zones is the minimum necessary to provide adequate protection for cruise ships.

## Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in San Diego Bay within a 100-yard radius of cruise ships covered by this rule.

This security zone regulation will not have a significant economic impact on a substantial number of small entities because vessel traffic can pass safely around the zones.

## Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

## Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

## Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

## Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

## Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

## Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

## Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

## Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, 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.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves amending a security zone regulation by removing the reference to shore area in security zones for moored cruise ships. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 165.1108, reinstate temporarily suspended paragraph (b)(2), and then revise paragraphs (b) and (c) to read as follows:

**§ 165.1108 Security Zones; Moored Cruise Ships, Port of San Diego, California.**

* * * * *

(b) *Location.* The following areas are security zones: All navigable waters, extending from the surface to the sea floor, within a 100-yard radius around any cruise ship that is located within the San Diego port area landward of the sea buoys bounding the Port of San Diego.

(c) *Regulations.* Under regulations in 33 CFR part 165, subpart D, a person or vessel may not enter into or remain in the security zones created by this section unless authorized by the Coast Guard Captain of the Port, San Diego (COTP) or a COTP designated representative. Persons desiring to transit these security zones may contact the COTP at telephone number (619) 278–7033 or on VHF–FM channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

* * * * *

**§ 165.T11–386 [Removed]**

■ 3. Remove § 165.T11–386.

Dated: March 7, 2011.

**T.H. Farris,**

*Captain, U.S. Coast Guard, Captain of the Port San Diego.*

[FR Doc. 2011–6579 Filed 3–16–11; 4:15 pm]

BILLING CODE 9110–04–P

## POSTAL SERVICE

## 39 CFR Part 965

## Rules of Practice in Proceedings Relative to Mail Disputes

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service is amending the rules of practice of the Office of the Judicial Officer to clarify that parties may submit arguments as well as sworn statements in support of their claims to disputed mail. In addition, the rules are being amended to clarify some provisions and update obsolete language.

**DATES:** *Effective Date:* March 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** Administrative Judge Gary E. Shapiro, (703) 812–1910.

**SUPPLEMENTARY INFORMATION:**

*Supporting statements.* The rules governing proceedings relative to mail disputes are found in 39 CFR part 965. Formerly, § 965.5 provided that each party shall file a sworn statement of the facts supporting its claim to the disputed mail together with a copy of each document on which it relies in making such claim. The revised rule clarifies that the submission also may include argument as to why the factual statement and supporting documents should result in that party's claim to the disputed mail being accepted. The change concerning inclusion of argument in the parties' mail dispute submissions is intended to reflect longstanding practice to that effect. Clarifying this matter should avoid confusion from unclear wording that could, and in one recent case did lead a disputant to believe that only factual presentation and not argument is permitted by the rules. Corresponding changes are made to section 965.6.

*Editorial changes.* Several other changes are made to various sections of the rules for the purpose of clarifying the rules, updating the rules, or conforming the rules to current practice. None of the changes affects the substantive rights of disputants. Changes in sections 965.1, 965.2, 965.3, 965.4(b)(2), 965.8(a), and 965.14 reflect current practice and eliminate reference to obsolete language. Section 965.9(c) is eliminated as unnecessary.

*Effective date.* These revisions are changes in agency rules of practice before the Judicial Officer and do not substantially affect any rights or obligations of private parties. Therefore, it is appropriate for their adoption by the Postal Service to become effective at an early date; and these revised rules

will govern proceedings docketed on or after March 30, 2011.

**List of Subjects in 39 CFR Part 965**

Administrative practice and procedure, Mail disputes, Postal Service.

Accordingly, the Postal Service adopts amendments to 39 CFR part 965 as set forth below.

## PART 965—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO MAIL DISPUTES

■ 1. The authority citation for part 965 continues to read as follows:

**Authority:** 39 U.S.C. 204, 401.

■ 2. Section 965.1 is revised to read as follows:

**§ 965.1 Authority for rules.**

These rules of practice are issued by the Judicial Officer of the U.S. Postal Service pursuant to authority delegated by the Postmaster General.

■ 3. Section 965.2 is revised to read as follows:

**§ 965.2 Scope of rules.**

The rules in this part shall be applicable to mail dispute cases forwarded to the Judicial Officer pursuant to Postal Operations Manual section 616.21.

■ 4. Section 965.3 is revised to read as follows:

**§ 965.3 Notice to parties.**

Upon receipt of a mail dispute case, the Recorder, Office of the Judicial Officer, United States Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, will send a notice of docketing and submission due date to the parties together with a copy of these rules.

■ 5. Section 965.4 is amended by revising paragraph (b)(2) to read as follows:

**§ 965.4 Presiding officers.**

* * * * *

(b) * * *

(2) Render an initial decision, if the presiding officer is not the Judicial Officer; or if the presiding officer is the Judicial Officer, issue a tentative or a final decision or order.

■ 6. Section 965.5 is revised to read as follows:

**§ 965.5 Initial submissions by parties.**

Within 15 days after receipt of the Recorder's notice, each party shall file with the Recorder a sworn statement of the facts supporting its claim to receipt of the mail together with a copy of each document on which it relies in making such claim, and any arguments supporting its claim.

■ 7. Section 965.6 is revised to read as follows:

**§ 965.6 Comments by parties.**

Within 10 days of receipt of the other party's initial submission under § 965.5, each party may file with the Recorder an additional statement or rebuttal argument setting forth in detail its disagreements, if any, with its opponent's initial submission. Such rebuttal may include any additional documents relevant to the dispute.

■ 8. Section 965.8 is amended by revising paragraph (a) to read as follows:

**§ 965.8 Hearings.**

(a) Generally, mail dispute cases are resolved based on written submissions. However, in the discretion of the presiding officer an oral hearing may be conducted where in the opinion of the presiding officer, the case cannot be resolved by a review of the documentary evidence.

* * * * *

**§ 965.9 [Amended]**

■ 9. Section 965.9 is amended by removing paragraph (c).

■ 10. Section 965.12 is revised to read as follows:

**§ 965.12 Appeal.**

Within 10 days after receipt by the parties of the initial or tentative decision, either party may file an appeal to the Judicial Officer. The Judicial Officer, or by delegation the Associate Judicial Officer, in his or her sole discretion, also may review the initial or tentative decision on his or her own initiative. If an appeal is denied, the initial or tentative decision becomes the final agency decision upon the issuance of such denial. If an appeal is not filed and the Judicial Officer, or by delegation the Associate Judicial Officer does not review the initial or tentative decision on his or her own initiative, a final order will be issued. The Judicial Officer's decision on appeal or his or her final order is the final agency decision with no further agency review or appeal rights.

■ 11. Section 965.14 is revised to read as follows:

**§ 965.14 Public information.**

The Librarian of the Postal Service maintains for public inspection in the Library copies of all initial, tentative, and final agency decisions and orders. Copies of decisions also are available on the Judicial Officer's section of the official Web site of the U.S. Postal Service. The Recorder maintains the complete official record of every proceeding.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

[FR Doc. 2011–6332 Filed 3–18–11; 8:45 am]

BILLING CODE 7710–12–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 81

**[EPA–R09–OAR–2008–0306; FRL–9284–3]**

## Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Technical Amendment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; technical amendment.

**SUMMARY:** EPA is making a technical amendment to the Code of Federal Regulations to reflect the final actions published by the Agency on November 12, 2008 in connection with the designations of the San Joaquin Valley Air Basin and East Kern areas for particulate matter of ten microns or less (PM–10).

**DATES:** This technical amendment is effective on March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Doris Lo, EPA Region IX, (415) 972–3959, *lo.doris@epa.gov*.

**SUPPLEMENTARY INFORMATION:** On November 12, 2008, among other actions, EPA approved the State of California's request under the Clean Air Act (CAA or the Act) to revise the designation for the San Joaquin Valley serious nonattainment area for particulate matter of ten microns or less (PM–10) by splitting the area into two separate nonattainment areas: The San Joaquin Valley Air Basin (SJVAB) serious nonattainment area and the East Kern serious nonattainment area. See 73 FR 66759 (November 12, 2008). In the November 12, 2008 final rule, EPA also redesignated the SJVAB to attainment for the PM–10 national ambient air quality standard (NAAQS).

In relevant part, the amendatory language on page 66773 of the November 12, 2008 final rule states: "In § 81.305 the "California—PM–10" table is amended under Fresno, Kern, Kings,

Madera, Merced, San Joaquin, Stanislaus, Tulare Counties by revising the entry for the "San Joaquin Valley planning area" to read as follows." Following this amendatory language, in the PM–10 table itself, the final rule retains the entry for the Indian Wells Valley planning area (which was unaffected by EPA's November 12, 2008 final rule) by use of asterisks and identifies the two areas, East Kern and San Joaquin Valley Air Basin, and their respective designations and classifications for the PM–10 NAAQS consistent with the final Agency actions published in the November 12, 2008 final rule, that EPA intended as a replacement for the then-existing entry for the "San Joaquin Valley planning area."

With one exception, the descriptions of the areas and their designations and classifications are correct as set forth in the final rule; however, the amendatory language introducing the change to part 81 and referring to a revision of the entry for the "San Joaquin Valley planning area" was unclear to the Office of the Federal Register, and as a result, the electronic version of the CFR ("e-CFR") and hard-copy publication of "Parts 81 and 84" of title 40 in years 2009 and 2010 do not identify East Kern as a PM–10 nonttainment area.[1] EPA is today issuing a technical amendment to reconcile the CFR with the Agency's November 12, 2008 final rule, and to do so, EPA is adding East Kern as a PM–10 area under the entry "Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare Counties" in the "California—PM–10" table in 40 CFR 81.305. Today's technical amendment makes no changes to the substance of the November 12, 2008 final rule.

**List of Subjects in 40 CFR Part 81**

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: March 11, 2011.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

Part 81, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

## PART 81—[AMENDED]

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

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

■ 2. Section 81.305 of the "California-PM–10" table is amended under Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare Counties by revising the entries for "Indian Wells Valley planning" and "San Joaquin Valley Air Basin" and by adding "East Kern" to read as follows:

**§ 81.305 California.**

* * * * *

CALIFORNIA—PM–10

| Designated Area | Designation | | Classification | |
|---|---|---|---|---|
| | Date | Type | Date | Type |
| * * * * * | | * | | * |
| Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare Counties: | | | | |
| Indian Wells Valley planning area: That portion of Kern County contained within Hydrologic Unit #18090205. | 6/6/03 | Attainment | | |
| San Joaquin Valley Air Basin; Fresno County, Kings County, Madera County, Merced County, San Joaquin County, Stanislaus County, Tulare County, and that portion of Kern County which lies west and north of a line described as follows: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Libre Land Grant to the point of intersection with the range line common to R. 16 W. and R. 17 W., 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 Land Grant to the northwest corner of S. 3, T. 11 N., R. 17 W.; 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 S. 34, T. 32 S., R. 30 E., Mount Diablo Base and Meridian; then north to the northwest corner of S. 35, T. 31 S., R. 30 E.; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of S. 18, T. 31 S., R. 31 E.; then east to the southeast corner of S. 13, T. 31 S., R. 31 E.; then north along the range line common to R. 31 E. and R. 32 E., Mount Diablo Base and Meridian, to the northwest corner of S. 6, T. 29 S., R. 32 E.; then east to the southwest corner of S. 31, T. 28 S., R. 32 E.; then north along the range line common to R. 31 E. and R. 32 E. to the northwest corner of S. 6, T. 28 S., R. 32 E., then west to the southeast corner of S. 36, T. 27 S., R. 31 E., then north along the range line common to R. 31 E. and R. 32 E. to the Kern-Tulare County boundary. | 12/12/08 | Attainment | | |
| East Kern: That portion of Kern County which lies between the following two lines (with the exception of that portion in Hydrologic Unit Number 18090205—the Indian Wells Valley): | 11/15/90 | Nonattainment | 02/08/93 | Serious. |

[1] The one exception is the entry of "11/15/90" as the date for East Kern's classification as a "serious" PM–10 nonattainment area. 73 FR 66759, at 66774 (November 12, 2008). The correct date is "02/08/93." See 58 FR 3334 (January 8, 1993). Today's technical amendment includes the correct date for East Kern's classification as a "serious" PM–10 nonattainment.

CALIFORNIA—PM–10—Continued

| Designated Area | Designation | | Classification | |
|---|---|---|---|---|
| | Date | Type | Date | Type |
| (1) West and north of a line described as follows: Beginning at the southwest corner of section 31, T. 10 N 16 W and running east to the northwest boundary of the Rancho La Liebre Land Grant; then 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 R. 15 W. and R. 16 W., San Bernardino Base and Meridian; then north along the range line to the northwest corner of section 2, T. 32 S., R. 32 E., Mount Diablo Base and Meridian; then east along the township line common to T. 32 S. and T. 31 S.; then north along the range line common to R. 35 E. and R. 34 E.; then east along the township line common to T. 29 S. and T. 28 S.; then north along the range line common to R. 36 E. and R. 35 E.; then east along the township line common to T. 28 S. and T. 27 S.; then north along the range line common to R. 37 E. and R. 36 E. to the Kern-Tulare County boundary. | | | | |
| (2) East and south of a line of a line described as follows: Beginning at the southwest corner of section 31, T. 10 N 16 W and running north along the range line common to R. 16 W. and R. 17 W., 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 Land Grant to the northwest corner of S. 3, T. 11 N., R. 17 W.; 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 S. 34, T. 32 S., R. 30 E., Mount Diablo Base and Meridian; then north to the northwest corner of S. 35, T. 31 S., R. 30 E.; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of S. 18, T. 31 S., R. 31 E.; then east to the southeast corner of S. 13, T. 31 S., R. 31 E.; then north along the range line common to R. 31 E. and R. 32 E., Mount Diablo Base and Meridian, to the northwest corner of S. 6, T. 29 S., R. 32 E.; then east to the southwest corner of S. 31, T. 28 S., R. 32 E.; then north along the range line common to R. 31 E. and R. 32 E. to the northwest corner of S. 6, T. 28 S., R. 32 E., then west to the southeast corner of S. 36, T. 27 S., R. 31 E., then north along the range line common to R. 31 E. and R. 32 E. to the Kern-Tulare County boundary. | | | | |
| * * * * * * * | | | | |

[FR Doc. 2011–6559 Filed 3–18–11; 8:45 am]
BILLING CODE 6560–50–P

## DEPARTMENT OF TRANSPORTATION

### 49 CFR Part 1

**[Docket No. DOT–OST–1999–6189]**

**RIN 9991–AA56**

## Organization and Delegation of Powers and Duties; Assistant Secretary for Administration

**AGENCY:** Office of the Secretary of Transportation.

**ACTION:** Final rule.

**SUMMARY:** This rule delegates authorities vested in the Secretary of Transportation (Secretary) by the Energy Independence and Security Act of 2007 (Act) (Pub. L. 110–140; December 19, 2007) to the Assistant Secretary for Administration.

**DATES:** This rule is effective March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Eugene Tumblin in the Office of Facilities, Information, and Asset Management at (202) 366–0266 or Brett Jortland in the Office of the General Counsel at (202) 366–9314.

**SUPPLEMENTARY INFORMATION:** On December 19, 2007, the Act was signed into law. Title 49 of the Code of Federal Regulations (CFR) 1.59 delegates to the Assistant Secretary for Administration the authority to carry out various functions and activities related to the mission of the agency vested in or delegated to the Secretary. The Secretary has determined that certain authority vested in the Secretary under the Act concerning DOT fleet management activities should be delegated to the Assistant Secretary for Administration. This rulemaking adds subparagraph (a)(7) to § 1.59 to reflect these delegations.

Since this amendment relates to departmental management, organization, procedure, and practice, notice and comment are unnecessary under 5 U.S.C. 553(b). Further, since the amendment expedites the Department's ability to meet the statutory intent of the applicable laws and regulations covered by this delegation, the Secretary finds good cause under 5 U.S.C. 553(d)(3) for the final rule to be effective on the date of publication in the **Federal Register**.

### Regulatory Analyses and Notices

*A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

The final rule is not considered a significant regulatory action under Executive Order 12866 and DOT Regulatory Policies and Procedures (44 FR 11034). There are no costs associated with this rule.

*B. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the consultation requirements of Executive Order 13132 do not apply.

*C. Executive Order 13175*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect the

communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

*D. Regulatory Flexibility Act*

No notice of proposed rulemaking is required for this rule under the Administrative Procedure Act, 5 U.S.C. 553, so the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This rule will impose no costs on small entities because it simply delegates authority from one official to another. Therefore, I certify this final rule will not have a significant economic impact on a substantial number of small businesses.

*E. Paperwork Reduction Act*

This rule contains no information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

*F. Unfunded Mandates Reform Act*

The Department of Transportation has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

**List of Subjects in 49 CFR Part 1**

Authority delegations (Government agencies), Organization and functions (Government agencies).

For the reasons set forth in the preamble, the Office of the Secretary of Transportation amends 49 CFR part 1 as follows:

## PART 1—[AMENDED]

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

**Authority:** 49 U.S.C. 322; 46 U.S.C. 2104(a); 28 U.S.C. 2672; 31 U.S.C. 3711(a)(2); Pub. L. 101–552, 104 Stat. 2736; Pub. L. 106–159, 113 Stat. 1748; Pub. L. 107–71, 115 Stat. 597; Pub. L. 107–295, 116 Stat. 2064; Pub. L. 108–136, 117 Stat. 1392; Pub. L. 101–115, 103 Stat. 691; Pub. L. 108–293, 118 Stat. 1028; Pub. L. 109–364, 120 Stat. 2083; Pub. L. 110–140, 121 Stat. 1492; Pub. L. 110–432, 122 Stat. 4848.

■ 2. In § 1.59, add paragraph (a)(7) to read as follows:

**§ 1.50 Delegations to the Assistant Secretary for Administration.**

* * * * *

(a) * * *

(7) Carry out the duties and responsibilities of the agency head for departmental fleet management, acquisition and replacement of vehicles pursuant to the Energy Independence and Security Act of 2007.

* * * * *

Dated: February 28, 2011.

**Ray LaHood,**

*Secretary of Transportation.*

[FR Doc. 2011–6519 Filed 3–18–11; 8:45 am]

BILLING CODE 4910–9X–P

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 665

**[Docket No. 101210611–1185–02]**

**RIN 0648–BA58**

## Hawaii Bottomfish and Seamount Groundfish Fisheries; Modification of Fishery Closures

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

**ACTION:** Final rule.

**SUMMARY:** This final rule changes the advance notification period for in-season closure of the main Hawaiian Islands (MHI) Deep-7 bottomfish fishery from 14 to 7 days. The intent of the change is to enhance administration of the fishery.

**DATES:** This final rule is effective April 20, 2011.

**ADDRESSES:** Copies of the Fishery Ecosystem Plan for the Hawaiian Archipelago are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, *http://www.wpcouncil.org.*

**FOR FURTHER INFORMATION CONTACT:** Jarad Makaiau, NMFS PIR Sustainable Fisheries, 808–944–2108.

**SUPPLEMENTARY INFORMATION:** The fishery for main Hawaiian Islands Deep 7 bottomfish is managed under a total allowable catch (TAC) limit. NMFS and the State of Hawaii monitor progress towards the TAC based on records of commercial bottomfish landings collected by the State. When bottomfish landings approach the TAC, NMFS, the State, and the Council determine the date the TAC is projected to be reached, and the commercial and non-commercial fisheries for Deep 7 bottomfish will be closed.

Federal regulations at 50 CFR 665.211 require NMFS to notify fishermen and the public of the date when the fisheries will close through a notice in the **Federal Register** and other means. This final rule changes the minimum required advance notification period from 14 to 7 days. The objective of this final rule is to enhance administration of the fishery by streamlining the advanced notification.

Additional background information on this final rule is found in the preamble to the proposed rule published on February 14, 2011 (76 FR 8330). Briefly, reducing the advance notification period for a closure of the Deep 7 bottomfish fishery will allow NMFS to more accurately determine the closure date, while still providing fishermen with sufficient notice of the impending closure. The comment period for the proposed rule ended on March 1, 2011, and NMFS did not receive any comments.

**Changes From the Proposed Rule**

There are no changes from the proposed rule in this final rule.

**Classification**

The Administrator, Pacific Islands Region, NMFS, determined that this final rule is necessary for the conservation and management of the Hawaii bottomfish fishery, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

**List of Subjects in 50 CFR Part 665**

Bottomfish, Fishing, Hawaii.

Dated: March 15, 2011.

**John Oliver,**

*Deputy Assistant Administrator For Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 665 is amended as follows:

## PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for part 665 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

■ 2. In § 665.211, revise paragraph (c) to read as follows:

**§ 665.211 Total allowable catch (TAC) limit.**

* * * * *

(c) When the TAC limit specified in this section is projected to be reached based on analyses of available information, the Regional Administrator shall publish a notice to that effect in the **Federal Register** and shall use other means to notify permit holders. The notice will include an advisement that the fishery will be closed beginning at a specified date, which is not earlier than 7 days after the date of filing the closure notice for public inspection at the Office of the **Federal Register**, until the end of the fishing year in which the TAC is reached.

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[FR Doc. 2011–6580 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 76, No. 54
Monday, March 21, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF LABOR

### 5 CFR Chapter XLII

### 20 CFR Chapters IV, V, VI, VII, and IX

### 29 CFR Subtitle A and Chapters II, IV, V, XVII, and XXV

### 30 CFR Chapter I

### 41 CFR Chapters 50, 60, and 61

### 48 CFR Chapter 29

## Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

**AGENCY:** Office of the Secretary, Labor.

**ACTION:** Request for Information.

**SUMMARY:** In response to the President's Executive Order 13563 on improving regulation and regulatory review, the Department of Labor (DOL or the Department) is preparing a preliminary plan to review its existing significant regulations. The purpose of this notice is to invite public comment on how the Department can improve any of its significant regulations by modifying, streamlining, expanding, or repealing them.

**DATES:** Comments must be received on or before March 31, 2011.

**ADDRESSES:** You may submit comments through the Department's Regulations Portal at *http://www.dol.gov/regulations/regreview.htm.*

All comments will be available for public inspection at *http://www.dol.gov/regulations/regreview.htm.*

**FOR FURTHER INFORMATION CONTACT:** e. christi cunningham, Associate Assistant Secretary for Regulatory Policy, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–2312, Washington, DC 20210, *cunningham.christi@dol.gov,* (202) 693–5959 (this is not a toll-free number). Individuals with hearing impairments may call 1–800–877–8339 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** On January 18, 2011, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review." The Order explains the Administration's goal of creating a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation" while using "the best, most innovative, and least burdensome tools to achieve regulatory ends." The Executive Order requires agencies to develop and submit a preliminary plan within 120 days from the January 18 issuance date that explains how each agency will review existing significant regulations to identify whether any regulations may be made more effective or less burdensome.

### Request for Comments

As a first step in developing its regulatory review plan, the Department is requesting public comment on how the Department can increase the effectiveness of its significant regulations while minimizing the burden on regulated entities. The Department recognizes the knowledge of programs and their implementing regulations that exists within our regulated communities, academia and the public, and therefore is requesting public comment on how the Department can foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights in ways that are more effective and less burdensome.

This request for public input will inform development of the Department's plan to review its existing significant regulations. To facilitate receipt of the information, the Department has created an Internet portal specifically designed to capture your input and suggestions, *http://www.dol.gov/regulations/regreview.htm.* The portal contains a series of questions designed to gather information on how DOL can best meet the requirements of the Executive Order. The portal will be open to receive comments from March 16, 2011 through March 31, 2011.

### Questions for the Public

The Department intends the questions on the portal to represent a starting point for discussion of the criteria that can be used to prioritize its regulatory review. The questions are meant to initiate public dialogue, and are not intended to restrict the issues that may be raised or addressed. The questions were developed with the intent to probe a range of areas, including tools that can be used to prioritize regulations for review; strategies that can be used to increase flexibility of regulations; and ensuring scientific integrity of data. Please note that these questions do not pertain to DOL rulemakings currently open for public comment. To comment on an open rulemaking, please visit regulations.gov and submit comments by the deadline indicated in that rulemaking.

When addressing these questions, the Department requests that commenters identify with specificity the regulation or reporting requirement at issue, providing legal citation(s) where available. The Department also requests that submitters provide, in as much detail as possible, an explanation of why a regulation or reporting requirement should be modified, streamlined, expanded, or repealed, as well as specific suggestions of ways the Department can better achieve its regulatory objectives. Whenever possible, please provide empirical evidence and data to support your response.

The Department will consider public comment as we develop this plan to periodically review the Department's significant rules. The Department is issuing this request solely to seek useful information as it develops its review plan. While responses to this request do not bind the Department to any further actions related to the response, all submissions will be made available to the public on *http://www.dol.gov/regulations/regreview.htm.*

**Authority:** E.O. 13653, 76 FR 3821, Jan. 21, 2011; E.O. 12866, 58 FR 51735, Oct. 4, 1993.

Dated: March 15, 2011.

**Seth D. Harris,**

*Deputy Secretary.*

[FR Doc. 2011–6576 Filed 3–18–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### 7 CFR Parts 210 and 220

### Incorporating the 2010 Dietary Guidelines for Americans Into the Proposed School Meal Patterns

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Request for comments.

**SUMMARY:** This document informs the public about a change in the Dietary Guidelines for Americans that affects the proposed rule "Nutrition Standards in the National School Lunch and School Breakfast Programs" issued by the Department of Agriculture and published in the **Federal Register** on January 13, 2011. Members of the public are asked to address this change when writing comments on the above referenced rule to assist the Department in updating the school meal patterns and nutrition standards according to the latest dietary recommendations.

**DATES:** The public comment period for the proposed rule closes on April 13, 2011.

**ADDRESSES:** All comments should be submitted under the proposed rule, "Nutrition Standards in the National School Lunch and School Breakfast Programs," (FNS–2007–0038), which is posted at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 703–305–2590, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 9 of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1758, requires that meals served under the National School Lunch Program and the School Breakfast Program reflect the most recent Dietary Guidelines for Americans (DGAs). The DGAs are the federal government's evidence-based nutritional guidance to promote health, reduce the risk of chronic diseases, and reduce the prevalence of overweight and obesity through improved nutrition and physical activity.

The Department of Agriculture (USDA) published a proposed rule on January 13, 2011 (76 FR 2494), to align the school meal patterns and nutrition standards with the 2005 DGAs, the most current at the time of publication. On January 31, 2011, USDA and the Department of Health and Human Services released the 2010 DGA recommendations. The 2010 DGA recommendations contain two changes from the 2005 recommendations which could affect the proposed school meal patterns.

The 2010 DGAs include a new Red-Orange vegetable subgroup, while the proposed meal patterns include an Orange vegetable subgroup and group the Red vegetables under the category of Other vegetables (consistent with the 2005 DGAs). However, the proposed meal patterns do reflect the emphasis on consuming a variety of vegetables, which is a key recommendation of the 2005 and 2010 DGAs. Consuming a variety of vegetables provides children with a number of nutrients that are under consumed in the United States, including dietary fiber, folate, magnesium, potassium, and vitamins A, C, and K.

The 2010 DGAs also advise consuming protein from a variety of sources, and recommend weekly amounts from three Protein foods (formerly Lean meat and beans) subgroups: (1) Seafood; (2) meat, poultry, and eggs; and (3) nuts, seeds, and soy products. The proposed meal patterns contain weekly and daily amounts of meats/meat alternates, but do not specify amounts for subgroups introduced by the 2010 DGAs. Consumption of a balanced variety of protein foods can contribute to improved nutrient intake and health benefits.

Therefore, this document requests the public to:

1. Consider the impact of the new Red-Orange vegetable subgroup and the new protein foods subgroups on the proposed school meal patterns,
2. Evaluate the need to revise the proposed meal patterns to reflect the new vegetable subgroup and protein foods subgroups, and
3. Address how the new vegetable subgroup and protein foods subgroups may be incorporated into the proposed meal patterns in a sound and practical manner.

Individuals wishing to address the effect of these changes, or any other issues, on the proposed rule "Nutrition Standards in the National School Lunch and School Breakfast Programs" (76 FR 2494), may submit their comments when providing comments on the above-referenced proposed rule.

Dated: March 14, 2011.

**Julia Paradis,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2011–6403 Filed 3–18–11; 8:45 am]

BILLING CODE 3410–30–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 319

**[Docket No. APHIS–2010–0018]**

**RIN 0579–AD37**

### Importation of Fresh Baby Kiwi From Chile Under a Systems Approach

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the fruits and vegetables regulations to allow the importation into the continental United States of baby kiwi fruit from Chile, subject to a systems approach. Under this systems approach, the fruit would have to be grown in a place of production that is registered with the Government of Chile and certified as having a low prevalence of *Brevipalpus chilensis.* The fruit would have to undergo pre-harvest sampling at the registered production site. Following post-harvest processing, the fruit would have to be inspected in Chile at an approved inspection site. Each consignment of fruit would have to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit had been found free of *Brevipalpus chilensis* based on field and packinghouse inspections. This proposed rule would allow for the safe importation of fresh baby kiwi from Chile using mitigation measures other than fumigation with methyl bromide.

**DATES:** We will consider all comments that we receive on or before May 20, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0018* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0018, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0018.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the

USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. David B. Lamb, Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 734–0627.

**SUPPLEMENTARY INFORMATION:**

## Background

The regulations in "Subpart-Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–50, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

Currently, the importation into the United States of fresh baby kiwi (*Actinidia arguta*) from Chile is allowed if the fruit is fumigated with methyl bromide. The Animal and Plant Health Inspection Service (APHIS) also received a request from the national plant protection organization (NPPO) of Chile to allow the fresh baby kiwi fruit from Chile to be imported into the continental United States (the lower 48 States, the District of Columbia, and Alaska) without methyl bromide fumigation, but subject instead to a systems approach. As part of our evaluation of Chile's request, we prepared a pest risk assessment (PRA) and a risk management document. Copies of the PRA and the risk management document may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (*see* **ADDRESSES** above for instructions for accessing Regulations.gov).

The PRA, titled "Pest Risk Assessment for Fresh Fruits of Baby Kiwi (*Actinidia arguta*) from Chile Imported into the Continental United States" (May 2008), evaluates the risks associated with the importation of baby kiwi into the continental United States from Chile. The risk management document lists the phytosanitary measures necessary to ensure the safe importation into the United States of baby kiwi from Chile.

The PRA identifies one quarantine pest that could be introduced into the United States in consignments of baby kiwi from Chile: *Brevipalpus chilensis* (false red mite). A quarantine pest is defined in § 319.56–2 as "a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled." In the PRA, the likelihood and consequences of introducing this pest to the United States are considered, and *B. chilensis* is rated as having a medium pest risk potential. Pests receiving a rating within the medium range may necessitate specific phytosanitary measures in addition to standard port-of-entry inspection of the commodity being imported into the United States.

Based on the findings of our PRA and risk management document, we are proposing to allow the importation of fresh baby kiwi from Chile into the continental United States, subject to a systems approach. Under a systems approach, a set of phytosanitary conditions, at least two of which have an independent effect in mitigating the pest risk associated with the movement of commodities, is specified, whereby fruits and vegetables may be imported into the United States from countries that are not free of certain plant pests. The systems approach for fresh baby kiwi from Chile would require the fruit to be grown in a place of production that is registered with the NPPO of Chile. The fruit would have to undergo pre-harvest sampling at the registered production site under the direction of the NPPO of Chile and, once harvested, placed in field cartons or containers marked to allow for traceback to the production site. The NPPO of Chile would present a list of production sites certified as having a low prevalence of *B. chilensis* to APHIS. Following post-harvest processing, the fruit would have to be inspected in Chile at an APHIS-approved inspection site under the direction of APHIS inspectors in coordination with the NPPO of Chile. Each consignment of the fruit would have to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit had been found free of *B. chilensis* based on field and packinghouse inspections.

The mitigation measures in the proposed systems approach are discussed in greater detail below, as well as in the risk management document.

### *Production Site Registration*

The production site where the fruit is grown would have to be registered with the NPPO of Chile. Harvested baby kiwi would have to be placed in field cartons or containers that are marked to show the official registration number of the production site. Registration would have to be renewed annually.

Registration of production sites with the NPPO of Chile and marking of field cartons or containers with the registration numbers would allow traceback to the production site if pest problems were found on fruit shipped to the United States. Problem production sites could then be removed from the program until further mitigation measures were taken to reduce pest populations.

### *Low-Prevalence Production Site Certification*

Between 1 and 30 days prior to harvest, random samples of fruit would have to be collected from each registered production site under the direction of the NPPO of Chile. These samples would have to undergo a pest detection and evaluation method as follows: The fruit would have to be washed using a flushing method, placed in a 20-mesh sieve on top of a 200-mesh sieve, sprinkled with a liquid soap and water solution, washed with water at high pressure, and washed with water at low pressure. The process would then be repeated. The contents of the 200-mesh sieve would then be placed on a petri dish and analyzed for the presence of live *B. chilensis* mites. If a single live *B. chilensis* mite were found, the production site would not qualify for certification as a low-prevalence production site. Each production site would have only one opportunity per season to qualify as a low-prevalence production site, and certification of low prevalence would be valid for one harvest season only. The NPPO of Chile would be required to present a list of certified production sites to APHIS.

Production site low-prevalence certification would identify problem production sites and prevent the shipment of fruit with *B. chilensis* mites from such sites. This mite sampling method has been tested in Chile and found to be successful in identifying grape and citrus production areas with high and low populations of mites.

### *Post-Harvest Processing*

After harvest, all damaged or diseased fruits would have to be culled at the packinghouse, and the remaining fruit would have to be packed into new, clean boxes, crates, or other APHIS-approved packing containers. Each container would have to have a label identifying the registered production site where the fruit originated and the packing shed where it was packed.

Post-harvest processing procedures, such as culling damaged fruit and sampling for mites, would remove fruit that could contain pests from consignments being shipped to the United States. Culling is a standard procedure to produce quality fruit without pests. Labeling of containers to identify both production site and packing shed would aid in traceback.

*Phytosanitary Inspection*

The fruit would have to be inspected in Chile at an APHIS-approved inspection site under the direction of APHIS inspectors in coordination with the NPPO of Chile following any post-harvest processing. A biometric sample would have to be drawn from each consignment. In order to be eligible for shipment to the continental United States, the fruit in the consignment would have to pass inspection by meeting the following requirements:

- Fruit presented for inspection would have to be identified in the shipping documents accompanying each lot of fruit to specify the production site(s) where the fruit was produced and the packing shed(s) where the fruit was processed. This identification would have to be maintained until the fruit is released for entry into the United States.

- The biometric sample, referred to above, of the boxes, crates, or other APHIS-approved packing containers from each consignment would be selected by the NPPO of Chile, and the fruit from these boxes, crates, or other APHIS-approved packing containers would be visually inspected for quarantine pests. A portion of the fruit would have to be washed with soapy water and the collected filtrate microscopically examined for *B. chilensis.* If a single live *B. chilensis* mite were found during the inspection process, the certified low-prevalence production site where the fruit was grown would lose its certification.

The proposed requirements for the identification in shipping documents of the baby kiwi to their production sites and packing sheds would aid in traceback if pests were found. The proposed requirements for visual inspection and biometric sampling of the fruit would provide additional layers of protection against the possibility of baby kiwi infested with quarantine pests being shipped from Chile to the United States. These methods have proved effective when employed to inspect consignments of citrus from Chile.

*Phytosanitary Certificate*

Each consignment of fruit would have to be accompanied by a phytosanitary certificate issued by the NPPO of Chile that contains an additional declaration stating that the fruit in the consignment was inspected and found free of *B. chilensis* based on field and packinghouse inspections.

Requiring a phytosanitary certificate would ensure that the NPPO of Chile has inspected the fruit and certified that the fruit meets the conditions for export to the United States.

**Executive Order 12866 and Regulatory Flexibility Act**

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

This proposed rule would allow the importation into the continental United States of baby kiwi fruit from Chile, subject to a systems approach. The systems approach would provide an alternative to fumigation with methyl bromide of baby kiwi imported from Chile into the continental United States.

Domestic growers of fresh baby kiwi fruit are the entities that could be affected by this proposed rule. The currently available information indicates that almost all U.S. growers of baby kiwi fruit are small in size, by the standards of the Small Business Administration.

The impact of fresh baby kiwi fruit imports from Chile is expected to be minimal for domestic producers due to timing differences (baby kiwi would likely be imported from Chile during the off-season for U.S. producers) and the small quantity expected to be imported. Therefore, we do not expect the proposed rule to have any significant impact on U.S. baby kiwi fruit growers, regardless of the size of operation.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

**Executive Order 12988**

This proposed rule would allow fresh baby kiwi to be imported into the continental United States from Chile, subject to a systems approach. If this proposed rule is adopted, State and local laws and regulations regarding fresh baby kiwi imported under this rule would be preempted while the fruit is in foreign commerce. Fresh baby kiwi are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2010–0018. Please send a copy of your comments to: (1) Docket No. APHIS–2010–0018, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, Room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This proposed rule would allow the importation into the continental United States of baby kiwi fruit from Chile, subject to a systems approach. For the systems approach to work effectively, certain information-collection activities must be performed. These activities include the registration of production sites with the NPPO of Chile, the post-harvest labeling of containers so that the fruit can be identified back to the registered production site, and the completion of phytosanitary certificates.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency s functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses).

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 0.253434 hours per response.

*Respondents:* Kiwi fruit production sites, packinghouses, and the NPPO of Chile.

*Estimated annual number of respondents:* 4.

*Estimated annual number of responses per respondent:* 91.

*Estimated annual number of responses:* 364.

*Estimated total annual burden on respondents:* 92.25 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**E-Government Act Compliance**

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**List of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

## PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56–51 is added to read as follows:

### § 319.56–51 Fresh baby kiwi from Chile.

Fresh baby kiwi (*Actinidia arguta*) may be imported into the continental United States from Chile under the following conditions:

(a) *Production site registration.* The production site where the fruit is grown must be registered with the national plant protection organization (NPPO) of Chile. Harvested baby kiwi must be placed in field cartons or containers that are marked to show the official registration number of the production site. Registration must be renewed annually.

(b) *Low-prevalence production site certification.* The fruit must originate from a low-prevalence production site to be imported under the conditions in this section. Between 1 and 30 days prior to harvest, random samples of fruit must be collected from each registered production site under the direction of the NPPO of Chile. These samples must undergo a pest detection and evaluation method as follows: The fruit must be washed using a flushing method, placed in a 20-mesh sieve on top of a 200-mesh sieve, sprinkled with a liquid soap and water solution, washed with water at high pressure, and washed with water at low pressure. The process must then be repeated. The contents of the 200-mesh sieve must then be placed on a petri dish and analyzed for the presence of live *Brevipalpus chilensis* mites. If a single live *B. chilensis* mite is found, the production site will not qualify for certification as a low-prevalence production site. Each production site may have only one opportunity per season to qualify as a low-prevalence production site, and certification of low prevalence will be valid for one harvest season only. The NPPO of Chile will present a list of certified production sites to APHIS.

(c) *Post-harvest processing.* After harvest, all damaged or diseased fruits must be culled at the packinghouse and must be packed into new, clean boxes, crates, or other APHIS-approved packing containers. Each container must have a label identifying the registered production site where the fruit originated and the packing shed where it was packed.

(d) *Phytosanitary inspection.* Fruit must be inspected in Chile at an APHIS-approved inspection site under the direction of APHIS inspectors in coordination with the NPPO of Chile following any post-harvest processing. A biometric sample must be drawn and examined from each consignment. Baby kiwi in any consignment may be shipped to the continental United States under the conditions of this section only if the consignment passes inspection as follows:

(1) Fruit presented for inspection must be identified in the shipping documents accompanying each lot of fruit to specify the production site or sites in which the fruit was produced and the packing shed or sheds in which the fruit was processed. This identification must be maintained until the fruit is released for entry into the United States.

(2) A biometric sample of the boxes, crates, or other APHIS-approved packing containers from each consignment will be selected by the NPPO of Chile, and the fruit from these boxes, crates, or other APHIS-approved packing containers will be visually inspected for quarantine pests. A portion of the fruit must be washed with soapy water and the collected filtrate must be microscopically examined for *B. chilensis.* If a single live *B. chilensis* mite is found during the inspection process, the certified low-prevalence production site where the fruit was grown will lose its certification.

(e) *Phytosanitary certificate.* Each consignment of fresh baby kiwi must be accompanied by a phytosanitary certificate issued by the NPPO of Chile that contains an additional declaration stating that the fruit in the consignment was inspected and found free of *Brevipalpus chilensis* based on field and packinghouse inspections.

Done in Washington, DC, this 15th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–6492 Filed 3–18–11; 8:45 am]

BILLING CODE 3410–34–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2011–0223; Directorate Identifier 2010–NM–161–AD]**

**RIN 2120–AA64**

# Airworthiness Directives; Goodrich Evacuation Systems Approved Under Technical Standard Order (TSO) TSO–C69b and Installed on Airbus Model A330–200 and –300 Series Airplanes, Model A340–200 and –300 Series Airplanes, and Model A340–541 and –642 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede an existing airworthiness directive (AD) that applies to Goodrich evacuation systems approved under TSO–C69b and installed on certain Model A330–200 and –300 series airplanes, Model A340–200 and –300 series airplanes, and Model A340–541 and –642 airplanes. The existing AD currently requires inspecting to determine the part number of the pressure relief valves on the affected Goodrich evacuation systems, and corrective action if necessary. Since we issued that AD, we have received reports that during workshop testing, certain pressure relief valves, which were required by the existing AD, did not seal and allowed the pressure in slides/rafts to fall below the minimum raft mode pressure for the unit. This proposed AD would require inspecting to determine the part number of the pressure relief valves on the affected Goodrich evacuation systems and replacing certain pressure relief valves. This proposed AD would also add airplanes to the applicability. We are proposing this AD to prevent loss of pressure in the escape slides/rafts after an emergency evacuation, which could result in inadequate buoyancy to support the raft's passenger capacity during ditching and increase the chance for injury to raft passengers.

**DATES:** We must receive comments on this proposed AD by May 5, 2011.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Goodrich Corporation, Aircraft Interior Products, ATTN: Technical Publications, 3414 South Fifth Street, Phoenix, Arizona 85040; phone: 602–243–2270; e-mail: *george.yribarren@goodrich.com*; Internet: *http://www.goodrich.com/TechPubs*; for service information identified in this proposed AD. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

## Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Tracy Ton, Aerospace Engineer, Cabin Safety/Mechanical and Environmental Systems Branch, ANM–150L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: 562–627–5352; fax: 562–627–5210; e-mail: *Tracy.Ton@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0223; Directorate Identifier 2010–NM–161–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

## Discussion

On October 27, 2007, we issued AD 2007–23–01, Amendment 39–15247 (72 FR 62568 November 6, 2007), for Goodrich evacuation systems approved under TSO–C69b and installed on certain Model A330–200 and –300 series airplanes, Model A340–200 and –300 series airplanes, and Model A340–541 and –642 airplanes. That AD requires inspecting to determine the part number of the pressure relief valves on the affected Goodrich evacuation systems, and corrective action if necessary. That AD resulted from a report indicating that, during maintenance testing, the pressure relief valves on the affected Goodrich evacuation systems did not seal when activated, which caused the pressure in the escape slide/raft to drop below the minimum allowable raft mode pressure. We issued that AD to prevent loss of pressure in the escape slides/rafts after an emergency evacuation, which could result in inadequate buoyancy to support the raft's passenger capacity during ditching and increase the chance for injury to raft passengers.

## Actions Since Existing AD Was Issued

Since we issued AD 2007–23–01, we have received reports that during workshop testing the pressure relief valves required by AD 2007–23–01 did not seal and allowed the pressure in some Model A330 and A340 series airplane slides/rafts to fall below the minimum raft mode pressure for the unit.

## Relevant Service Information

We reviewed Goodrich Service Bulletin 7A1508/09/10/39–25–373, Revision 2, dated May 8, 2009; and Goodrich Service Bulletin 4A3928/4A3934–25–374, Revision 1, dated May 8, 2009. The service information describes, among other things, procedures for replacing certain pressure relief valves with new improved valves for applicable airplanes and doors as shown in the following table, and for marking the system identification placard on the girt.

SERVICE BULLETIN AIRPLANE MODEL VALVE LOCATIONS

| Service bulletin | Affected airplanes | Doors |
|---|---|---|
| Goodrich Service Bulletin 7A1508/09/10/39–25–373. | Airbus Model A330–200 and –300 series airplanes, Model A340-200 and –300 series airplanes. | Doors 1, 2, 3, and 4. |
| Goodrich Service Bulletin 7A1508/09/10/39–25–373. | Airbus Model A340-541 and –642 airplanes ..... | Doors 1, 2, and 4. |
| Goodrich Service Bulletin 4A3928/4A3934–25–374 | Airbus Model A340-541 and –642 airplanes ..... | Door 3. |

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would retain none of the requirements of AD 2007–23–01. This proposed AD would require inspecting to determine the part number of the pressure relief valves on the affected Goodrich evacuation systems, replacing certain pressure relief valves with new improved valves, and marking the system identification placard on the girt of the replaced part. This proposed AD would also add Airbus Model A330–223F and –243F airplanes to the applicability.

**Differences Between the Proposed AD and the Service Information**

Goodrich Service Bulletin 4A3928/4A3934–25–374, Revision 1, dated May 8, 2009, specifies replacing certain firing pin cables with an improved firing pin cable, which is not included in this proposed AD.

**Costs of Compliance**

We estimate that this proposed AD affects 41 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspection to determine part numbers .. | 1 work-hour × $85 per hour = $85 ..... | $0 | $85 | Up to $3,485. |

We estimate the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these replacements.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Valve replacement ..... | 1 work-hour × $85 per hour = $85 ..... | $775 | $860 per slide. |

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect 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.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

### § 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2007–23–01, Amendment 39–15247 (72 FR 62568, November 6, 2007), and adding the following new AD:

**Goodrich (Formerly BF Goodrich):** Docket No. FAA–2011–0223; Directorate Identifier 2010–NM–161–AD.

**Comments Due Date**

(a) The FAA must receive comments on this AD action by May 5, 2011.

**Affected ADs**

(b) This AD supersedes AD 2007–23–01, Amendment 39–15247.

**Applicability**

(c) This AD applies to Goodrich evacuation systems approved under Technical Standard Order (TSO) TSO–C69b, as installed on the Airbus airplanes, certificated in any category, identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –321, –322, –323, –341, –342, and –343 airplanes; as identified in Goodrich Service Bulletin 7A1508/09/10/39–25–373, Revision 2, dated May 8, 2009.

(2) Model A340–211, –212, –213, –311, –312, and –313 airplanes; as identified in Goodrich Service Bulletin 7A1508/09/10/39–25–373, Revision 2, dated May 8, 2009.

(3) Model A340–541 and –642 airplanes, as identified in Goodrich Service Bulletins 7A1508/09/10/39–25–373, Revision 2, dated May 8, 2009; and 4A3928/4A3934–25–374, Revision 1, dated May 8, 2009.

**Subject**

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 2560, Emergency Equipment.

**Unsafe Condition**

(e) This AD was prompted by reports that during workshop testing, certain pressure relief valves did not seal and allowed the pressure in certain slides/rafts to fall below the minimum raft mode pressure for the unit. We are issuing this AD to prevent loss of pressure in the escape slides/rafts after an emergency evacuation, which could result in inadequate buoyancy to support the raft's passenger capacity during ditching and increase the chance for injury to raft passengers.

**Compliance**

(f) Comply with this AD within the compliance times specified, unless already done.

**Part Replacement**

(g) Within 36 months after the effective date of this AD, inspect the evacuation systems to determine whether any pressure relief valve having part number (P/N) 4A3641–1, 4A3791–3, 4A3641–26, or 4A3791–6 is installed. A review of airplane maintenance records or the system identification placard on the girt is acceptable in lieu of this inspection if the part number of the pressure relief valves can be conclusively determined from that review.

(h) If any valve having part number (P/N) 4A3641–1, 4A3791–3, 4A3641–26, or 4A3791–6 is identified during the inspection or review specified in paragraph (g) of this AD: Before further flight, do the applicable actions required by paragraphs (h)(1) and (h)(2) of this AD.

(1) Replace all pressure relief valves P/Ns 4A3641–1 and 4A3791–3 with pressure relief valves having P/N 115815–1, and mark the system identification placard on the girt, in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 7A1508/09/10/39–25–373, Revision 2, dated May 8, 2009.

(2) Replace all pressure relief valves having P/Ns 4A3641–26 and 4A3791–6 with pressure relief valves having P/N 115815–1 (for evacuation systems having P/N 4A3934 series units) or 115815–2 (for evacuation systems P/N 4A3928 series units); and mark the system identification placard on the girt; in accordance with the Accomplishment Instructions of Goodrich Service Bulletin 4A3928/4A3934–25–374, Revision 1, dated May 8, 2009.

**Parts Installation**

(i) As of the effective date of this AD, no person may install a pressure relief valve having part number 4A3641–1, 4A3791–3, 4A3791–6, or 4A3641–26 in the evacuation system on any airplane.

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(j) Actions accomplished before the effective date of this AD in accordance with Goodrich Service Bulletin 7A1508/09/10/39–25–373, dated March 31, 2008, or Goodrich Service Bulletin 7A1508/09/10/39–25–373, Revision 1, dated August 1, 2008; or Goodrich Service Bulletin 4A3928/4A3934–25–374, dated July 18, 2008; as applicable; are acceptable for compliance with the corresponding requirements of this AD.

**Alternative Methods of Compliance (AMOCs)**

(k)(1) The Manager, Los Angeles Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

**Related Information**

(l) For more information about this AD, contact Tracy Ton, Aerospace Engineer, Cabin Safety/Mechanical and Environmental Systems Branch, ANM–150L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: 562–627–5352; fax: 562–627–5210; e-mail: *Tracy.Ton@faa.gov.*

(m) For service information identified in this AD, contact Goodrich Corporation, Aircraft Interior Products, ATTN: Technical Publications, 3414 South Fifth Street, Phoenix, Arizona 85040; phone: 602–243–2270; e-mail: *george.yribarren@goodrich.com;* Internet: *http://www.goodrich.com/TechPubs.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on March 9, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2011–6500 Filed 3–18–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**Docket No. FAA–2010–1241; Airspace Docket No. 10–AWP–22**

## Proposed Amendment of Class D and E Airspace; Palmdale, CA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class D airspace and Class E airspace at Palmdale, CA, to accommodate aircraft using Instrument Landing System (ILS) Localizer (LOC) standard instrument approach procedures at Palmdale Regional Airport/USAF Plant 42. This action would enhance the safety and management of aircraft operations at Palmdale Regional Airport/USAF Plant 42. This action would also correct the name of the airport.

**DATES:** Comments must be received on or before May 5, 2011.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2010–1241; Airspace

Docket No. 10–AWP–22, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2010–1241 and Airspace Docket No. 10–AWP–22) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–1241 and Airspace Docket No. 10–AWP–22". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

## Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

## The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class D airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface, at Palmdale Regional Airport/USAF Plant 42, Palmdale, CA. Controlled airspace is necessary to accommodate aircraft using the ILS LOC standard instrument approach procedures at the airport. This action would enhance the safety and management of aircraft operations at Palmdale Regional Airport/USAF Plant 42, Palmdale, CA. This would also correct the airport name from Palmdale Production Flight/Test Installation Air Force Plant Number 42 Airport, to Palmdale Regional Airport/USAF Plant 42.

Class D and Class E airspace designations are published in paragraph 5000, 6004 and 6005, respectively, of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class D airspace and the Class E airspace designations listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Palmdale Regional Airport/USAF Plant 42, Palmdale, CA.

## List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

## The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

### § 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

*Paragraph 5000 Class D airspace.*

* * * * *

**AWP CA D Palmdale, CA [Amended]**

Palmdale Regional Airport/USAF Plant 42
(Lat. 34°37′46″ N., long. 118°05′04″ W.)

That airspace extending upward from the surface to and including 5,000 feet MSL

within a 4.3-mile radius of Palmdale Regional Airport/USAF Plant 42. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

*Paragraph 6004 Class E Airspace Designated as an Extension to a Class D Surface Area.*

* * * * *

**AWP CA E4 Palmdale, CA [Amended]**

Palmdale Regional Airport/USAF Plant 42
(Lat. 34°37′46″ N., long. 118°05′04″ W.)
Palmdale VORTAC
(Lat. 34°37′53″ N., long. 118°03′50″ W.)

That airspace extending upward from the surface within 2.6 miles each side of the ILS localizer east course, extending from the 4.3-mile radius of Palmdale Regional Airport/USAF Plant 42 to 6.5 miles east of the LOM, and within 1.8 miles south of and parallel to the Palmdale VORTAC 099° radial extending from the 4.3-mile radius of the airport to 7 miles east of the VORTAC. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

*Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.*

* * * * *

**AWP CA E5 Palmdale, CA [Modify]**

Palmdale Regional Airport/USAF Plant 42
(Lat. 34°37′46″ N., long. 118°05′04″ W.)
Palmdale VORTAC
(Lat. 34°37′53″ N., long. 118°03′50″ W.)
Lancaster, Gen. William J. Fox Airfield, CA
(Lat. 34°44′28″ N., long. 118°13′07″ W.)

That airspace extending upward from 700 feet above the surface within 1.8 miles south and 6.1 miles north of the Palmdale VORTAC 298° radial extending from the VORTAC to 15.6 miles northwest, and within 1.8 miles each side of the 310° bearing from the Gen. William. J. Fox Airfield extending from a 4-mile radius of Gen. William J. Fox Airfield to 9.1 miles northwest of the Airfield, and within 5.2 miles south and 10.4 miles north of the Palmdale VORTAC 298° and 118° radials extending from 9.6 miles northwest to 11.3 miles southeast of the VORTAC, and within 8 miles south and 4 miles north of the 086° bearing from Palmdale Regional Airport/USAF Plant 42 extending 21.7 miles east of Palmdale Regional Airport/USAF Plant 42. That airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 35°36′30″ N., long. 118°45′03″ W.; to lat. 35°44′00″ N., long. 117°53′03″ W.; to lat. 36°07′00″ N., long. 117°53′03″ W.; to lat. 36°07′00″ N., long. 117°35′03″ W.; to lat. 35°47′46″ N., long. 116°55′23″ W.; to lat. 35°21′36″ N., long. 116°55′23″ W.; to lat. 35°34′30″ N., long. 116°29′43″ W.; to lat. 35°34′30″ N., long. 116°23′33″ W.; to lat. 35°28′35″ N., long. 116°18′48″ W.; to lat. 35°21′30″ N., long. 116°13′03″ W.; to lat. 34°43′00″ N., long. 116°13′03″ W.; thence west along lat. 34°43′00″ N., to the southeast boundary of V–21, thence along the southeast boundary of V–21 to lat. 34°30′00″ N., thence west along lat. 34°30′00″ N., to long. 118°20′03″ W.; thence north along long. 118°20′03″ W., to the south boundary of V–137, thence west along the south boundary of V–137 to long. 118°45′03″ W.; thence to the point of beginning.

Issued in Seattle, Washington, on March 8, 2011.

**John Warner,**

*Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2011–6336 Filed 3–18–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF COMMERCE

## International Trade Administration

## 19 CFR Part 351

**[Docket No. 110315198–1198–01]**

**RIN 0625–AA86**

## Proposed Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Proposed Modification to Regulation; Request for Comments.

**SUMMARY:** The Department of Commerce (“the Department”) proposes to modify our regulations which govern the revocation of antidumping and countervailing duty orders, in whole or in part, and the termination of suspended antidumping and countervailing duty investigations. The modification, if adopted, would eliminate the provision for revocation of an antidumping or countervailing duty order with respect to individual exporters or producers based on those individual exporters or producers having received antidumping margins of zero for three consecutive years, or countervailing duty rates of zero for five consecutive years.

**DATES:** To be assured of consideration, comments must be received no later than April 20, 2011.

*Submission of Comments:* As specified above, to be assured of consideration, comments must be received no later than April 20, 2011. All comments must be submitted through the Federal eRulemaking Portal at *http://www.regulations.gov*, Docket No. ITA–2011–0001, unless the commenter does not have access to the Internet. Commenters that do not have access to the Internet may submit the original and two copies of each set of comments by mail or hand delivery/courier. All comments should be addressed to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230. The comments should also be identified by Regulation Identifier Number (RIN) 0625–AA86.

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available for inspection at Import Administration’s Central Records Unit (Room 7046 of the Herbert C. Hoover Building) and online at *http://www.Regulations.gov* and on the Department’s Web site at *http://www.trade.gov/ia/*.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482–0866, e-mail address: *webmaster-support@ita.doc.gov*.

**FOR FURTHER INFORMATION CONTACT:** James Maeder at (202) 482–3330, Mark Ross at (202) 482–4794, or Jonathan Zielinski at (202) 482–4384.

**SUPPLEMENTARY INFORMATION:**

### Background

The Department proposes to modify its regulations that provide for revocation of antidumping and countervailing duty orders pursuant to the Tariff Act of 1930, as amended (the Act). Currently, 19 CFR 351.222 provides requirements and procedures for the Department to determine in the context of an administrative review, based on an absence of dumping or countervailable subsidization, whether to (1) revoke an order in whole, or (2) partially revoke an order with respect to an individual exporter or producer. The Department proposes to eliminate the latter category of revocations as it pertains to revocations from an antidumping or countervailing duty order based on individual exporters or producers having received antidumping margins of zero for three consecutive years, or countervailing duty rates of zero for five consecutive years. The Department will retain, with some

conforming modifications, the former category of revocations. The Department is not proposing any change with respect to revocations as described under paragraphs (g) through (l) of 19 CFR 351.222. To implement this modification, the Department would withdraw 19 CFR 351.222(b)(2) and (3) (dumping) and 351.222(c)(3) and (4) (countervailable subsidy), and make conforming modifications as necessary to the remaining paragraphs of 19 CFR 351.222.

Company-specific revocations are not required by the Act. Accordingly, the Department has considered several factors in issuing this proposal. First, pursuant to the existing regulation, the Department is required to expend additional resources, including additional mandatory verifications, in conducting administrative reviews where a request for company-specific revocation is being considered. Second, while the Department annually conducts administrative reviews of hundreds of foreign companies subject to antidumping or countervailing duty orders, only a small fraction of the reviewed companies are ultimately found to be eligible for a company-specific revocation under the regulations at issue here. Third, to the extent that eligible companies maintain antidumping duty or countervailing duty rates of zero percent, the proposal would not change the amount of duties applied to entries subject to antidumping or countervailing duty orders. Finally, the Department has considered the fact that many of the companies for which reviews have been requested may not have the opportunity to amass the three antidumping rates of zero percent (demonstrating an absence of dumping for three consecutive years) or five countervailing duty rates of zero percent (demonstrating an absence of countervailable subsidies for five consecutive years) necessary to be eligible for a company-specific revocation. Pursuant to the Act, the Department frequently limits the examination of companies for which reviews have been requested, as it is not practicable to examine all companies. Companies not selected for review will normally receive an antidumping or countervailing duty rate based upon the average of the rates calculated for the individually reviewed companies. Rather than administering the company-specific revocation regulations in a manner that does not afford equitable opportunity to all companies to seek revocation, and in light of the additional factors noted, the Department proposes to eliminate the company-specific revocation regulations.

In addition, the Department proposes to clarify 19 CFR 351.222(f)(2) to make it clear that a request for revocation that does not conform with the requirements of paragraph (e) does not require the Secretary to undertake the actions provided for in paragraphs (f)(2)(i) through (f)(2)(vi). Finally, the Department proposes to correct a grammatical error in the third sentence of 19 CFR 351.222(a) (change "have" to "has") and delete 19 CFR 351.222(m) (a transition rule related to the Uruguay Round Agreements Act that is no longer applicable).

## Classification

*Executive Order 12866*

The rule has been determined to be not significant for purposes of Executive Order 12866.

*Regulatory Flexibility Act*

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small business entities. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble, and is not repeated here.

The entities upon which this rulemaking could have an impact include foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Some of these entities may be considered small entities under the SBA small business size standard. Although the Department is not able to estimate the number of small entities this proposed rule will affect, the Department anticipates that it will not be a substantial number. For example, while the Department annually conducts administrative reviews of hundreds of foreign companies subject to antidumping or countervailing duty orders, only a small fraction of the reviewed companies could be considered eligible for a company-specific revocation under the regulations at issue here (*i.e.,* 19 CFR 351.222(b)(2) and (3) (dumping) and 351.222(c)(3) and (4) (countervailable subsidy)). In the past five years, despite conducting administrative reviews of well over five hundred companies, only 15 companies (of various sizes) have obtained a company-specific revocation under the relevant portions of 19 CFR 351.222. Also, in relation to the proposed rule's economic impact on small entities, the Department does not anticipate it will be significant because the proposed rule will have no effect on any antidumping or countervailing duty liability determined for any party. This is because the proposed rule does not involve any aspect of the calculation of an antidumping or countervailing duty margin. Rather, as explained above, the proposed rule eliminates the possibility for foreign exporters or producers to obtain company-specific revocations based upon an absence of dumping for three consecutive years or countervailable subsidization for five consecutive years. Consequently, the amount of duties applied to entries subject to antidumping or countervailing duty orders will not change as a result of the proposed rule.

Since this proposed modification to 19 CFR 351.222, if adopted, will not have a significant economic impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis is not required and, therefore, has not been prepared.

*Paperwork Reduction Act*

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

## List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: March 8, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

For the reasons stated, 19 CFR part 351 is proposed to be amended as follows:

## PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

1. The authority citation for 19 CFR part 351 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

2. In § 351.222, revise paragraphs (a), (b), (c), and (f), remove paragraph (m), and redesignate paragraph (n) as paragraph (m) to read as follows:

### § 351.222 Revocation of orders; termination of suspended investigations.

(a) *Introduction.* "Revocation" is a term of art that refers to the end of an

antidumping or countervailing proceeding in which an order has been issued. "Termination" is the companion term for the end of a proceeding in which the investigation was suspended due to the acceptance of a suspension agreement. Generally, a revocation or termination may occur only after the Department or the Commission has conducted one or more reviews under section 751 of the Act. This section contains rules regarding requirements for a revocation or termination; and procedures that the Department will follow in determining whether to revoke an order or terminate a suspended investigation.

(b) Revocation or termination based on absence of dumping. (1) In determining whether to revoke an antidumping duty order or terminate a suspended antidumping investigation, the Secretary will consider:

(i) Whether all exporters and producers covered at the time of revocation by the order or the suspension agreement have sold the subject merchandise at not less than normal value for a period of at least three consecutive years; and

(ii) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

(2) If the Secretary determines, based upon the criteria in paragraphs (b)(1)(i) and (ii) of this section, that the antidumping duty order or suspension of the antidumping duty investigation is no longer warranted, the Secretary will revoke the order or terminate the investigation.

(c) Revocation or termination based on absence of countervailable subsidy. (1)(i) In determining whether to revoke a countervailing duty order or terminate a suspended countervailing duty investigation, the Secretary will consider:

(A) Whether the government of the affected country has eliminated all countervailable subsidies on the subject merchandise by abolishing for the subject merchandise, for a period of at least three consecutive years, all programs that the Secretary has found countervailable;

(B) Whether exporters and producers of the subject merchandise are continuing to receive any net countervailable subsidy from an abolished program referred to in paragraph (c)(1)(i)(A) of this section; and

(C) Whether the continued application of the countervailing duty order or suspension of countervailing duty investigation is otherwise necessary to offset subsidization.

(ii) If the Secretary determines, based upon the criteria in paragraphs (c)(1)(i)(A) through (C) of this section, that the countervailing duty order or suspension of the countervailing duty investigation is no longer warranted, the Secretary will revoke the order or terminate the suspended investigation.

(2)(i) In determining whether to revoke a countervailing duty order or terminate a suspended countervailing duty investigation, the Secretary will consider:

(A) Whether all exporters and producers covered at the time of revocation by the order or the suspension agreement have not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years; and

(B) Whether the continued application of the countervailing duty order or suspension of the countervailing duty investigation is otherwise necessary to offset subsidization.

(ii) If the Secretary determines, based upon the criteria in paragraphs (c)(2)(i)(A) and (B) of this section, that the countervailing duty order or the suspension of the countervailing duty investigation is no longer warranted, the Secretary will revoke the order or terminate the suspended investigation.

* * * * *

(e) Request for revocation or termination—(1) *Antidumping proceeding.* During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension of an antidumping investigation, *any* exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section if the person submits with the request:

(i) Certifications for all exporters and producers covered by the order or suspension agreement that they sold the subject merchandise at not less than normal value during the period of review described in Sec. 351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value; *and*

(ii) Certifications for all exporters and producers covered by the order or suspension agreement that, during each of the consecutive years referred to in paragraph (b) of this section, they sold the subject merchandise to the United States in commercial quantities.

(2) *Countervailing duty proceeding.* (i) During the third and subsequent annual anniversary months of the publication of a countervailing duty order or suspension of a countervailing duty investigation, the government of the affected country may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (c)(1) of this section if the government submits with the request its certification that it has satisfied, during the period of review described in § 351.213(e)(2), the requirements of paragraph (c)(1)(i) of this section regarding the abolition of countervailable subsidy programs, and that it will not reinstate for the subject merchandise those programs or substitute other countervailable subsidy programs;

(ii) During the fifth and subsequent annual anniversary months of the publication of a countervailing duty order or suspended countervailing duty investigation, the government of the affected country may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (c)(2) of this section if the government submits with the request:

(A) Certifications for all exporters and producers covered by the order or suspension agreement that they have not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years (*see* paragraph (c)(2)(i) of this section);

(B) Those exporters' and producers' certifications that they will not apply for or receive any net countervailable subsidy on the subject merchandise from any program the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs (*see* paragraph (c)(2)(ii) of this section); and

(C) A certification from each exporter or producer that, during each of the consecutive years referred to in paragraph (c)(2) of this section, that person sold the subject merchandise to the United States in commercial quantities.

(f) Procedures. (1) Upon receipt of a timely request for revocation or termination under paragraph (e) of this section, the Secretary will consider the request as including a request for an administrative review and will initiate and conduct a review under § 351.213.

(2) When the Secretary is considering a request for revocation or termination under paragraph (e) of this section, in addition to the requirements of § 351.221 regarding the conduct of an administrative review, the Secretary will:

(i) Publish with the notice of initiation under § 351.221(b)(1), notice of "Request for Revocation of Order" or

"Request for Termination of Suspended Investigation" (whichever is applicable);

(ii) Conduct a verification under § 351.307;

(iii) Include in the preliminary results of review under § 351.221(b)(4) the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination are met;

(iv) If the Secretary decides that there is a reasonable basis to believe that the requirements for revocation or termination are met, publish with the notice of preliminary results of review under § 351.221(b)(4) notice of "Intent to Revoke Order" or "Intent to Terminate Suspended Investigation" (whichever is applicable);

(v) Include in the final results of review under § 351.221(b)(5) the Secretary's final decision whether the requirements for revocation or termination are met; and

(vi) If the Secretary determines that the requirements for revocation or termination are met, publish with the notice of final results of review under § 351.221(b)(5) notice of "Revocation of Order" or "Termination of Suspended Investigation" (whichever is applicable).

(3) If the Secretary revokes an order, the Secretary will order the suspension of liquidation terminated for the merchandise covered by the revocation on the first day after the period under review, and will instruct the Customs Service to release any cash deposit or bond.

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[FR Doc. 2011–6019 Filed 3–18–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF JUSTICE

### 28 CFR Part 16

**[Docket No. OAG 140; AG Order No. 3259–2011]**

**RIN 1105–AB27**

## Freedom of Information Act Regulations

**AGENCY:** Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes revisions to the Department's regulations under the Freedom of Information Act (FOIA). The regulations are being revised to update and streamline the language of several procedural provisions, and to incorporate certain of the changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007. Additionally, the regulations are being updated to reflect developments in the case law and to include current cost figures to be used in calculating and charging fees.

**DATES:** Written comments must be postmarked and electronic comments must be submitted on or before April 20, 2011. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System will accept comments until Midnight Eastern Time at the end of that day.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http// www.regulations.gov.*
- *FAX:* (202) 514–1009. Send your comments to the attention of Caroline A. Smith.
- *Mail:* Caroline A. Smith, Office of Information Policy, U.S. Department of Justice, 1425 New York Ave., Suite 11050, Washington, DC 20530–0001.

To ensure proper handling, please reference OAG Docket No. 140 on your correspondence.

*See* **SUPPLEMENTARY INFORMATION** for further instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Caroline A. Smith, 202–514–3642.

**SUPPLEMENTARY INFORMATION:**

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http:// www.regulations.gov.*

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please *see* the **FOR FURTHER INFORMATION CONTACT** paragraph.

The reason that the Department is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS) which receives electronic comments terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

### Discussion

This rule proposes revisions to the Department's regulations under the FOIA to update and streamline the language of several procedural provisions and to incorporate certain of the changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007, Public Law 110–175, 121 Stat. 2524. Additionally, the regulations are being updated to reflect developments in the case law and to include current cost figures to be used in calculating and charging fees.

The revisions of the FOIA regulations in subpart A of part 16 incorporate changes to the language and structure of the regulations. Revised provisions include § 16.1 (General Provisions), § 16.2 (Proactive disclosure of Department records), § 16.3 (Requirements for making requests), § 16.5 (Timing of responses to requests), § 16.6 (Responses to requests), § 16.7 (Confidential commercial information), and § 16.8 (Administrative appeals). In addition, current § 16.7 (Classified Information) is to be deleted and subsequent sections renumbered accordingly.

Proposed revisions of the Department's fee schedule can be found at § 16.10(c) and (d). The duplication charge for photocopying will decrease to

five cents a page, while document search and review charges will increase to $16.50 and $13.00 per quarter hour for professional and administrative time, respectively. The amount at or below which the Department will not charge a fee will increase from $14.00 to $25.00.

**Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by the Department are nominal. Further, the "small entities" that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

**Executive Order 12866**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The Office of Management and Budget has determined that this rule is a "significant regulatory action" under Executive Order 12866, § 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by that Office.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects in 28 CFR Part 16**

Administrative practice and procedure, Freedom of Information, Privacy.

For the reasons stated in the preamble, the Department of Justice proposes to amend 28 CFR Chapter 1, part 16, as follows:

## PART 16—DISCLOSURE OR PRODUCTION OF MATERIAL OR INFORMATION

1. The authority citation for part 16 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

2. Subpart A of part 16 is revised to read as follows:

### Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

16.1 General provisions.
16.2 Proactive disclosures of Department records.
16.3 Requirements for making requests.
16.4 Responsibility for responding to requests.
16.5 Timing of responses to requests.
16.6 Responses to requests.
16.7 Confidential business information.
16.8 Administrative appeals.
16.9 Preservation of records.
16.10 Fees.
16.11 Other rights and services.

## Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

**§ 16.1 General provisions.**

(a) This subpart contains the rules that the Department of Justice follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (Mar. 27, 1987) (hereinafter "OMB Guidelines"). Additionally, the Department's "FOIA Reference Guide" and its attachments contain information about the specific procedures particular to the Department with respect to making FOIA requests and descriptions of the types of records maintained by different Department components. This resource is available at *http://www.justice.gov/oip/04_3.html.* Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under subpart D of part 16 as well as under this subpart.

(b) As referenced in this subpart, component means the FOIA office of each separate bureau, office, division, commission, service, center, or administration that is designated by the Department as a primary organizational entity.

**§ 16.2 Proactive disclosure of Department records.**

Records that are required by the FOIA to be made available for public inspection and copying are accessible on the Department's Web site, *http://www.justice.gov.* Each component is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records. Each component has a FOIA Public Liaison who can assist individuals in locating records particular to a component. A list of the Department's FOIA Public Liaisons is available at *http://www.justice.gov/oip/servicecenters.htm.*

**§ 16.3 Requirements for making requests.**

(a) *General information.*

(1) To make a request for records of the Department, a requester must write directly to the FOIA office of the Department component that maintains those records. Each component's FOIA office and any additional requirements for submitting a request to a given component are listed in Appendix I of this part. Further details are provided in Attachments B and C of the Department's FOIA Reference Guide. Those Attachments contain detailed descriptions of each component's functions, as well as their major information systems. Part 0 of this chapter summarizes the functions of each component. These references can be used by requesters to determine where to send their request within the Department.

(2) When a requester is unable to determine the proper Department component to which to direct a request, the requester may send the request to the FOIA/PA Mail Referral Unit, Justice Management Division, Department of Justice, Washington, DC 20530–0001. The Mail Referral Unit will forward the request to the component(s) that it determines to be most likely to maintain the records that are sought.

(3) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in subpart D of this part.

(4) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed

by that individual or a declaration by that individual made in compliance with the requirements set forth in 28 U.S.C. 1746 authorizing disclosure of the records to the requester, or submits proof that the individual is deceased (*e.g.,* a copy of a death certificate or an obituary). As an exercise of its administrative discretion, each component can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Addressing requests.* Requests should be addressed to the FOIA office of the component that maintains the requested records. Attachment B of the FOIA Reference Guide lists the addresses of each FOIA office and the methods for submitting requests to each component.

(c) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable Department personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist a component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Requesters should refer to Appendix I of this part for additional component-specific requirements. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. If the requester fails to reasonably describe the records sought, the component shall inform the requester what additional information is needed or why the request is deficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the component's designated FOIA contact or its FOIA Public Liaison. When a requester fails to provide sufficient detail after having been asked to clarify a request, the component shall notify the requester that the request has not been properly made and that no further action will be taken.

**§ 16.4 Responsibility for responding to requests.**

(a) *In general.* Except in the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record and maintains that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), shall not be considered responsive to a request.

(b) *Authority to grant or deny requests.* The head of a component, or designee, is authorized to grant or to deny any requests for records that are maintained by that component.

(c) *Consultations and referrals.* A component in receipt of a request shall determine whether another component or another agency of the Federal government is in a better position to decide whether any records responsive to the request are exempt from disclosure under the FOIA and, if so, whether they should be released on a discretionary basis. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines to the contrary, then it shall either:

(1) Respond to the request, after consulting with the component or the agency that has a substantial interest in the records involved; or

(2) Refer the responsibility for responding to the request or portion of the request to the component best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially acquired the record will be presumed to be best able to make the disclosure assessment. The referring component shall document the referral and maintain a copy of the records that it refers.

(d) *Classified information.* On receipt of any request involving classified information, the component shall take appropriate action to ensure compliance with part 17 of this title. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another component or agency under any applicable executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or should consider the information for classification. Whenever a component's record contains information that has been derivatively classified, *i.e.,* it contains information classified by another component or agency, the component shall refer the responsibility for responding to that portion of the request to the component or agency that classified the underlying information.

(e) *Notice of referral.* Whenever a component refers any part of the responsibility for responding to a request to another component or agency, it will notify the requester of the referral and inform the requester of the name of each component or agency to which the records were referred, unless identifying the recipient will itself disclose a sensitive, exempt fact.

(f) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Department will be handled according to the date that the FOIA request initially was received by the first component or agency, not any later date.

(g) *Agreements regarding consultations and referrals.* Components may establish agreements with other components or agencies to eliminate the need for consultations or referrals with respect to particular types of records.

**§ 16.5 Timing of responses to requests.**

(a) *In general.* Components ordinarily will respond to requests according to their order of receipt. Appendix I to this part contains the list of the Department components that are designated to accept requests. In instances involving misdirected requests, *i.e.,* where a request is sent to one of the Department components designated in Appendix I but is actually seeking records maintained by another Department component, the response time will commence on the date that the request is received by the appropriate component, but in any event not later than ten working days after the request is first received.

(b) *Multitrack processing.* All components must designate a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. A component may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. A component can consider factors such as the number of pages involved in processing the request or the need for consultations or referrals. Components shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limits for processing

a request cannot be met because of "unusual circumstances," as defined in the FOIA, and the component extends the time limits on that basis, the component shall, before expiration of the twenty-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds ten working days, the component shall, as described by the FOIA, provide the requester with an opportunity to modify the request or agree to an alternative time period for processing. The component shall make available its designated FOIA contact and its FOIA Public Liaison for this purpose.

(d) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, components may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Components will not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) Requests and appeals will be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i), (ii), and (iii) of this section must be submitted to the component that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the Office of Information Policy. Requests for expedited processing that are based on paragraph (e)(1)(iv) of this section must be submitted to the Director of Public Affairs at the Office of Public Affairs, Department of Justice, 950 Pennsylvania Avenue, NW., Washington, DC 20530–0001. A component that receives a misdirected request for expedited processing under the standard set forth in paragraph (e)(1)(iv) of this section shall forward it immediately to the Office of Public Affairs for its determination. The time period for making the determination on the request for expedited processing under paragraph (e)(1)(iv) of this section shall commence on the date that the Office of Public Affairs receives the request, provided that it is routed within ten working days.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (d)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that he or she is a person whose primary professional activity or occupation is information dissemination. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. A requester cannot satisfy the "urgency to inform" requirement solely by demonstrating that numerous articles have been published on a given subject. As a matter of administrative discretion, a component may waive the formal certification requirement.

(4) A component shall notify the requester within ten calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a component denies expedited processing, any appeal of that decision which complies with the procedures set forth in § 16.8 of this subpart shall be acted on expeditiously.

**§ 16.6 Responses to requests.**

(a) *Acknowledgments of requests.* Upon receipt of a request that will take longer than ten days to process, a component shall send the requester an acknowledgment letter that assigns the request an individualized tracking number.

(b) *Grants of requests.* Once a component makes a determination to grant a request in full or in part, it shall notify the requester in writing. The component also shall inform the requester of any fees charged under § 16.10 of this subpart and shall disclose the requested records to the requester promptly upon payment of any applicable fees.

(c) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(d) *Content of denial letter.* The denial letter shall be signed by the head of the component, or designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the component in denying the request; and

(3) An estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation. This estimation is not required, if the volume is otherwise indicated by deletions marked on records that are disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption.

(4) A statement that the denial may be appealed under § 16.8(a) of this subpart, and a description of the requirements set forth therein.

(e) *Markings on released documents.* Markings on released documents must be clearly visible to the requester.

(f) *Use of record exclusions.*

(1) In the event that a component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the head of the FOIA office of that component must confer with the Office of Information Policy (OIP) to obtain approval to apply the exclusion.

(2) When a component applies an exclusion to exclude records from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component utilizing the exclusion will respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component.

(3) Any component invoking an exclusion shall maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

**§ 16.7 Confidential commercial information.**

(a) *Definitions.* (1) *Confidential commercial information* means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) *Submitter* means any person or entity from whom the Department obtains confidential commercial information, directly or indirectly.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.*

(1) A component shall promptly provide written notice to a submitter whenever:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4.

(2) The notice shall either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The component determines that the information is exempt under the FOIA;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous, except that, in such a case, the component shall give the submitter written notice of any final decision to disclose the information and must provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) A component will specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret, or commercial or financial information that is privileged or confidential.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the component after the date of any disclosure decision will not be considered by the component. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* A component shall consider a submitter's objections and specific grounds for nondislosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever a component decides to disclose information over the objection of a submitter, the component shall provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the component shall promptly notify the submitter.

(i) *Requester notification.* The component shall notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

**§ 16.8 Administrative appeals.**

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations denying his or her request to the Office of Information Policy. The contact information for the Office of Information Policy is contained in the FOIA Reference Guide. Examples of adverse determinations are provided in § 16.6(c) of this subpart. The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 45 calendar days after the date of the letter denying the request. Appeals that have not been postmarked or transmitted within the specified timeframe will be considered untimely and will be administratively closed with notice to the requester. The appeal letter should clearly identify the component's determination that is being appealed and the assigned request number. The requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The Director of the Office of Information Policy or designee will act on behalf of the Attorney General on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the Office of Information Policy shall take appropriate action to ensure compliance with part 17 of this title.

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds a component's determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied, and will provide the requester with notification of the statutory right to file a lawsuit. If a component's decision is remanded or modified on appeal the requester will be notified of that determination in writing. The component will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *When appeal is required.* Before seeking review by a court of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

**§ 16.9 Preservation of records.**

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. Records that are identified as responsive to a request will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

**§ 16.10 Fees.**

(a) *In general.* Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, a component may contact a requester for additional information. A component ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial-use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation.

(2) *Direct costs* are those expenses that an agency expends in searching for and duplicating (and, in the case of commercial-use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.,* the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Components shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing a copy of a record or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this category must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. Records requested for the intention of fulfilling credit requirements are not considered to be sought for a scholarly purpose.

(5) *Noncommercial scientific institution* is an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and not for a commercial use.

(6) *Representative of the news media* is any person or entity organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast "news" to the public at large and publishers of periodicals that disseminate "news" and make their products available through a variety of means to the general public. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use. "Freelance" journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as working for that entity. A publishing contract would provide the clearest evidence that publication is expected; however, components shall also consider a requester's past publication record in making this determination. A component's decision to grant a requester media status will be made on a case-by-case basis based upon the requester's intended use.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 16.7 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records; and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, components shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, components should not add any additional costs to those charges.

(1) *Search.* (i) Search fees shall be charged for all requests subject to the restrictions of paragraph (d) of this section. Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be as follows: Professional—$16.50; and administrative—$13.00.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new program to locate the requested records.

(iv) For requests that require the retrieval of records stored by an agency at a Federal records center operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (d) of this section. A component shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the component in the form or format requested. Where photocopies are supplied, the component will provide one copy per request at a cost of five cents per page. For copies of records produced on tapes, disks, or other

electronic media, components will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, components will charge the direct costs.

(3) *Review.* Review fees will be charged to requesters who make commercial-use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.,* the review conducted by a component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, when the appellate authority determines that a particular exemption no longer applies, any costs associated with a component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) No search fees will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media. When the component fails to comply with the time limits in which to respond to a request, and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, it may not charge search fees, or, in the instances of requests from requesters defined in paragraphs (b)(4), (b)(5) and (b)(6) of this section, may not charge duplication fees.

(2) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, components will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(4) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is $25.00 or less for any request, no fee will be charged.

(e) *Notice of anticipated fees in excess of $25.00.* When a component determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the component shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester accordingly. In cases in which a requester has been notified that the actual or estimated fees are in excess of $25.00, the request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee. Such a commitment must be made by the requester in writing, must indicate a given dollar amount, and must be received by the component within 30 calendar days from the date of notification of the fee estimate. If a commitment is not received within this period, the request shall be closed. Components will make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request in an effort to reduce fees. Components are not required to accept payments in installments.

(f) *Charges for other services.* Although not required to provide special services, if a component chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Public Law 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) and (i)(3) of this section, a component shall not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.,* payment before copies are sent to a requester) is not an advance payment.

(2) When a component determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. A component may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any component or agency within 30 calendar days of the billing date, a component may require that the requester pay the full amount due, plus any applicable interest on that prior request and the component may require that the requester make an advance payment of the full amount of any anticipated fee, before the component begins to process a new request or continues to process a pending request or any pending appeal. Where a component has a reasonable basis to believe that a requester has misrepresented his or her identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which a component requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the component's fee letter, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the component will inform the requester

of the contact information for that source.

(k) *Requirements for waiver or reduction of fees.*

(1) Records responsive to a request shall be furnished without charge or at a reduced rate below that established under paragraph (c) of this section, where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government, components will consider the following factors:

(i) The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as his or her ability and intention to effectively convey information to the public shall be considered. It shall ordinarily be presumed that a representative of the news media satisfies this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, components shall not make value judgments about whether the information at issue is "important" enough to be made public.

(3) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components will consider the following factors:

(i) Components shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for a waiver or reduction of fees should be made when the request is first submitted to the component and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester will be required to pay any costs incurred up to the date the fee waiver request was received.

**§ 16.11 Other rights and services.**

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

3. Appendix I to part 16 is revised to read as follows:

## Appendix I to Part 16—Components of the Department of Justice

Please consult Attachment B of the Department of Justice Freedom of Information Act Reference Guide for the contact information and a detailed description of the types of records maintained by each Department component. The FOIA Reference Guide is available at *http://www.justice.gov/oip/referenceguide.htm* or upon request to the Office of Information Policy.

The FOIA Offices of Department components and any component-specific requirements for making a FOIA request are listed below. The Certification of Identity form available at *http://www.justice.gov/oip/forms/cert_ind.pdf* may be used by individuals who are making requests for records pertaining to themselves. For each of the components marked with an asterisk, FOIA and Privacy Act ("PA") access requests must be sent to the Office of Information Policy, which handles initial requests for those seven components.

**A**

Office of the Attorney General*
Office of the Deputy Attorney General*
Office of the Associate Attorney General*

**B**

Antitrust Division, FOIA/PA Unit
Bureau of Alcohol, Tobacco, Firearms, and Explosives, Disclosure Division
Civil Division, FOIA/PA Officer
Requests for records from case files must include a case caption or name, civil action number, and judicial district.
Civil Rights Division, FOIA/PA Branch
Community Relations Service, FOIA/PA Coordinator
Criminal Division, FOIA/PA Unit
Requests for records from criminal case files must include the case caption or name, civil action number, judicial district, dates of arrest or conviction, and Federal offenses involved.
Drug Enforcement Administration, Freedom of Information Operations Unit, FOI/Records Management Section
Environment and Natural Resources Division, FOIA Coordinator, Law and Policy Section
Requests for records from case files must include the case caption or name, civil action number, and judicial district.
Executive Office for Immigration Review, Office of the General Counsel
When applicable, requesters must include an alien registration number. If the "A" number is not known or the case occurred before 1988, the date of the Order to Show Cause, country of origin, and location of the immigration hearing must be provided.
Executive Office for United States Attorneys, FOIA/Privacy Unit
Requests for records from case files must include the judicial district in which the investigation/prosecution or other litigation occurred.
Executive Office for United States Trustees, FOIA/PA Counsel, Office of the General Counsel
Requests for records from bankruptcy case files must include the case caption or name, case number, and judicial district.
Federal Bureau of Investigation, Record/Information Dissemination Section, Records Management Division
Federal Bureau of Prisons, FOIA/PA Section
Foreign Claims Settlement Commission
INTERPOL—U.S. National Central Bureau, FOIA/PA Specialist, Office of General Counsel
Justice Management Division, FOIA Contact
National Drug Intelligence Center, FOIA Coordinator
National Security Division, FOIA Initiatives Coordinator
Office of Community Oriented Policing Services, FOIA Officer, Legal Division
Office of Dispute Resolution, FOIA Officer
Office of the Federal Detention Trustee, Office of General Counsel
Office of Information Policy
Office of the Inspector General, Office of the General Counsel
Office of Intergovernmental and Public Liaison*
Office of Justice Programs, Office of the General Counsel
Office of Legal Counsel
Office of Legal Policy*
Office of Legislative Affairs*
Office of the Pardon Attorney, FOIA Officer
Office of Professional Responsibility, Special Counsel for Freedom of Information and Privacy Acts

Office of Public Affairs*
Office of the Solicitor General
Requests for records from case files must include the case name, docket number or citation to case.
Office on Violence Against Women
Professional Responsibility Advisory Office, Information Management Specialist
Tax Division, Division Counsel for FOIA and PA Matters
Requests for records from case files must include the case caption or name, civil action number, and judicial district.
United States Marshals Service, Office of the General Counsel
Requests for records pertaining to individuals must include the judicial district. Requests for records related to prisoner transportation must include the date and trip number. Requests for records concerning seized property must specify the judicial district, civil action number, asset identification number, or an accurate description of the property.
United States Parole Commission, FOIA/PA Specialist

Dated: March 14, 2011.

**Eric H. Holder, Jr.,**

*Attorney General.*

[FR Doc. 2011–6473 Filed 3–18–11; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 100

**[Docket No. USCG–2011–0126]**

**RIN 1625–AA08**

## Special Local Regulations for Marine Events; Chester River, Chestertown, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish special local regulations during the reenactment portion of the "Chestertown Tea Party Festival", a marine event to be held on the waters of the Chester River, Chestertown, Maryland. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Chester River during the event.

**DATES:** Comments and related material must be received by the Coast Guard on or before April 20, 2011.

**ADDRESSES:** You may submit comments identified by docket number USCG–2011–0126 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

### Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0126), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2010–0126" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

### Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0126" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

### Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

### Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time

and place announced by a later notice in the **Federal Register**.

**Background and Purpose**

On May 28, 2011, the Chestertown Tea Party Festival will sponsor a reenactment in the Chester River at Chestertown, Maryland. The key component of the event consists of the Schooner SULTANA departing from its berth in Chestertown, transiting 200 yards to an anchorage location, embarking and disembarking Tea Party actors by dinghy, and then returning to its berth. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

**Discussion of Proposed Rule**

The Coast Guard proposes to establish temporary special local regulations on specified waters of the Chester River, Chestertown, MD. The regulations will be in effect from 10 a.m. to 5 p.m. on May 28, 2011. The regulated area, approximately 350 yards in length and 150 yards in width, includes all waters of the Chester River, within a line connecting the following positions: latitude 39°12′27″ N, longitude 076°03′46″ W; thence to latitude 39°12′19″ N, longitude 076°03′53″ W; thence to latitude 39°12′25″ N, longitude 076°03′41″ W; thence to latitude 39°12′16″ N, longitude 076°03′48″ W; thence to the point of origin at latitude 39°12′27″ N, longitude 076°03′46″ W. The effect of this proposed rule will be to restrict general navigation in the regulated area during the event. Except for persons or vessels authorized by the Coast Guard Patrol Commander or designated representative, no person or vessel may enter or remain in the regulated area. Spectator vessels will be allowed to view the event from outside the regulated area, but may not block the navigable channel. Other vessels intending to transit the Chester River will be allowed to safely transit around the regulated area. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

**Regulatory Analyses**

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Regulatory Planning and Review**

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation will prevent traffic from transiting a portion of the Chester River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit safely around the regulated area.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in the effected portions of the Chester River during the event.

Although this regulation prevents traffic from transiting a portion of the Chester River at Chestertown, MD during the event, this proposed rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would be in effect for only a limited period. The regulated area is of limited size. Vessel traffic will be able to transit safely around the regulated area. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Coast Guard Sector Baltimore, MD. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

**Collection of Information**

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental

Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

**Indian Tribal Governments**

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, 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.

**Energy Effects**

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 33 CFR Part 100**

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

## PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

2. Add a temporary section, § 100.35–T05–0126 to read as follows:

**§ 100.35–T05–0126 Special Local Regulations for Marine Events; Chester River, Chestertown, MD.**

(a) *Regulated area.* The following locations are regulated areas: All waters of the Chester River, within a line connecting the following positions: latitude 39°12′27″ N, longitude 076°03′46″ W; thence to latitude 39°12′19″ N, longitude 076°03′53″ W; thence to latitude 39°12′25″ N, longitude 076°03′41″ W; thence to latitude 39°12′16″ N, longitude 076°03′48″ W; thence to the point of origin at latitude 39°12′27″ N, longitude 076°03′46″ W, located at Chestertown, Maryland. All coordinates reference Datum NAD 1983.

(b) *Definitions.*

(1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations.*

(1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must:

(i) Stop the vessel immediately when directed to do so by the Coast Guard Patrol Commander or any Official Patrol.

(ii) Proceed as directed by the Coast Guard Patrol Commander or any Official Patrol.

(d) *Enforcement period.* This section will be enforced from 10 a.m. until 5 p.m. on May 28, 2011.

(1) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(2) [Reserved]

Dated: March 4, 2011.

**Mark P. O'Malley,**

*Captain, U.S. Coast Guard, Captain of the Port Baltimore, Maryland.*

[FR Doc. 2011–6588 Filed 3–18–11; 8:45 am]

BILLING CODE 9110–04–P

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 110

**[Docket No. USCG–2009–1131]**

**RIN 1625–AA01**

## Anchorage Regulations; Narragansett Bay and Rhode Island Sound, RI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to remove an obsolete Naval explosives

anchorage in Narragansett Bay, Rhode Island, and to add an offshore anchorage in Rhode Island Sound south of Brenton Point, Rhode Island, for use by vessels waiting to enter Narragansett Bay.

**DATES:** Comments and related material must be received by the Coast Guard on or before April 20, 2011.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG–2009–1131 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, *see* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call Mr. Edward G. LeBlanc at Coast Guard Sector Southeastern New England, 401–435–2351. If you have questions on viewing or submitting material to the docket, please call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

## Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–1131), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert "USCG–2009–1131" in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

## Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert USCG–2009–1131 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

## Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

## Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

## Basis and Purpose

The Secretary of Homeland Security has delegated to the Coast Guard the authority to establish and regulate anchorage grounds in accordance with 33 U.S.C. 471; 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1. This proposed rule would remove an obsolete and no longer used anchorage in Narragansett Bay from the Code of Federal Regulations (CFR), and formalize and codify an area of Rhode Island Sound that under current informal practice is routinely used by mariners as an anchorage while waiting to enter Narragansett Bay.

## Discussion of Proposed Rule

This proposed rule would remove the Naval explosives anchorage described in 33 CFR 110.145(a)(2)(ii). Naval Station Newport, Rhode Island, had indicated to the Coast Guard that this anchorage is obsolete and no longer necessary for naval purposes. Leaving this obsolete anchorage in the CFR, and on navigation charts, leaves mariners with the mistaken impression that the area is reserved for a special purpose (*i.e.,* explosives vessel anchoring) when in fact, it is no longer used or needed for that purpose.

The proposed rule also would add a new anchorage to formalize and codify the current practice of commercial vessels that anchor in an area south of Brenton Point, Newport, Rhode Island, while waiting to enter Narragansett Bay. Establishing this anchorage in the CFR, and placing it on navigation charts, will remove ambiguity and clarify for mariners the preferred and safest area in which to anchor offshore when waiting to enter Narragansett Bay.

This proposed anchorage area would encroach on a Navy Restricted Area (33 CFR 334.78) used as a naval practice minefield. We asked the Navy if this Restricted Area is still required and they have advised us that it is now considered obsolete and we can request that it be removed from the CFR and the charts. We have engaged the Army Corps of Engineers (ACOE) requesting that this Navy Restricted Area be removed from the CFR as well as the charts.

Prior to anchoring in the proposed anchorage area all vessels would be required to notify the COTP and unless otherwise approved by the COTP, all vessels must depart the anchorage area within 96 hours. This is necessary to ensure that an adequate anchorage area remains available close to the entrance to Narragansett Bay for vessels waiting

to enter Narragansett Bay. This anchorage is not intended to be a longer term anchorage, but rather it is intended to be a short term anchorage available for vessels intending to enter Narragansett Bay within 96 hours and to facilitate their easy and safe entrance into Narragansett Bay. All vessels anchored in the proposed anchorage must be within the anchorage area at all times to ensure that they do not swing out into the nearby Traffic Lanes creating a high risk of collision with commercial vessels that transit past this Anchorage Area especially at night and during times of inclement weather. Additionally, to ensure completely open entrance to Narragansett Bay when necessary, as deemed by the COTP, all vessels anchored in the proposed anchorage must be able to get underway within two hours.

**Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Regulatory Planning and Review**

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect minimal additional cost impacts to the industry because this rule is not imposing fees, permits, or specialized requirements for the maritime industry to utilize this anchorage area. The effect of this rule would not be significant as it removes one obsolete anchorage that is no longer used by the U.S. Navy, and documents and codifies another area that is currently used by commercial vessels. This would represent an improvement on the safety of vessels using the anchorage grounds and would facilitate the transit of deep draft vessels through the area.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. This proposed rule may affect the following entities, some of which might be small entities: the owners or operators of vessels that have a need to anchor in Narragansett Bay or Rhode Island Sound at the entrance to Narragansett Bay.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons: this rule would only codify current navigation practices that are already in use by small entities in this area. The anchorage would not affect vessels' schedules or their ability to freely transit within these areas of Narragansett Bay or Rhode Island Sound. The anchorage would impose no monetary expenses on small entities because it does not require them to purchase any new equipment, hire additional crew, or make any other expenditures.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES** above) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Mr. Edward G. LeBlanc at Coast Guard Sector Southeastern New England, 401–435–2351. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

**Collection of Information**

This proposed rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a state, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, 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.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions

Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule removes one anchorage area and establishes one new anchorage area where commercial vessels already regularly anchor. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule. A preliminary environmental analysis checklist is available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 110**

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

## PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

**Authority:** 33 U.S.C. 471; 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Remove and reserve § 110.145(a)(2)(ii), consisting of introductory text and paragraphs (a) through (e).

3. Add § 110.149 to subpart B to read as follows:

**§ 110.149 Narragansett Bay, RI**

(a) Brenton Point anchorage ground. An area bounded by the following coordinates: 41°22′37.1″ N, 71°14′40.3″ W; thence to 41°20′42.8″ N, 71°14′40.3″ W; thence to 41°18′24.1″ N, 71°20′32.5″ W; thence to 41°20′22.6″ N, 71°20′32.5″ W; thence back to point of origin.

(b) The following regulations apply in the Brenton Point anchorage ground.

(1) Prior to anchoring within the anchorage area, all vessels shall notify the Coast Guard Captain of the Port via VHF–FM Channel 16.

(2) Except as otherwise provided, no vessel may occupy this anchorage ground for a period of time in excess of 96 hours without prior approval of the Captain of the Port.

(3) If a request is made for the long-term layup of a vessel, the Captain of the Port may establish special conditions with which the vessel must comply in order for such a request to be approved.

(4) No vessel in such condition that it is likely to sink or otherwise become a menace or obstruction to navigation or anchorage of other vessels shall occupy an anchorage except in cases where unforeseen circumstances create conditions of imminent peril to personnel and then only for such period as may be authorized by the Captain of the Port.

(5) Anchors shall be placed well within the anchorage areas so that no portion of the hull or rigging will at any time extend outside of the anchorage area.

(6) The Coast Guard Captain of the Port may close the anchorage area and direct vessels to depart the anchorage during periods of adverse weather or at other times as deemed necessary in the interest of port safety and security.

(7) Any vessel anchored in these grounds must be capable of getting underway if ordered by the Captain of the Port and must be able to do so within two hours of notification by the Captain of the Port. If a vessel will not be able to get underway within two hours of notification, permission must be requested from the Captain of the Port to remain in the anchorage. No vessel shall anchor in a "dead ship" status (propulsion or control unavailable for normal operations) without prior approval of the Captain of the Port.

(8) Brenton Point anchorage ground is a general anchorage area reserved primarily for commercial vessels waiting to enter Narragansett Bay.

(9) Temporary floats or buoys for marking anchors or moorings in place will be allowed in this area. Fixed mooring piles or stakes will not be allowed.

(10) All coordinates referenced use datum: NAD 83.

Dated: March 3, 2011.

**Daniel A. Neptun,**

*Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.*

[FR Doc. 2011–6498 Filed 3–18–11; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Parts 51, 52, 70, and 71**

**[EPA–HQ–OAR–2011–0083; FRL–9283–8]**

**RIN 2060–AQ79**

## Deferral for $CO_2$ Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs: Proposed Rule

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This action proposes to defer for a period of three (3) years the application of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements to biogenic carbon dioxide ($CO_2$) emissions from bioenergy and other biogenic stationary sources. This action is being taken as part of the process of granting the Petition for Reconsideration filed by the National Alliance of Forest Owners (NAFO) on August 3, 2010, related to the PSD and Title V Greenhouse Gas Tailoring Rule.

**DATES:** *Comments.* Comments must be received on or before May 5, 2011.

*Public Hearing.* EPA will hold one hearing on this action. The hearing will

be conducted on April 5, 2011, in the Washington, DC area. The EPA will provide further information about the hearing on its Web page: *http://www.epa.gov/NSR/actions.html.* To register to speak at the hearing, please go to the Web page: *http://www.epa.gov/NSR/actions.html* or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0083 by one of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.

*E-mail: GHGbiogenic@epa.gov.* Include docket ID No. EPA–HQ–OAR–2011–0083 in the subject line of the message.

*Fax:* (202) 566–9744.

*Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 28221T, Attention Docket ID No. EPA–HQ–OAR–2011–0083, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

*Hand/Courier Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. Phone: (202) 566–1744. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0083. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI to only the mail or hand/courier delivery address listed above, attention: Docket ID No. EPA–HQ–OAR–2011–0083. The *http://www.regulations.gov* Web site is an "anonymous access" system, 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 *http://www.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 *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9334; fax number: (202) 343–2342; e-mail address: *biodeferralPSD@epa.gov.*

*Worldwide Web (WWW)*: In addition to being available in the docket, an electronic copy of today's proposal, memoranda to the docket, and all other related information will also be available through the WWW on EPA's Web site at *http://www.epa.gov/NSR/actions.html*

**SUPPLEMENTARY INFORMATION:** *Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

ANPR Advanced notice of proposed rulemaking
BACT Best Available Control Technology
BAU Business as Usual
CAA Clean Air Act
CAR U.S Climate Action Report
CBI Confidential Business Information
CFI Call for Information
CFR Code of Federal Regulations
$CH_4$ methane
$CO_2$ Carbon dioxide
$CO_2e$ Carbon dioxide equivalents
EO Executive Order
EPA U.S. Environmental Protection Agency
FR **Federal Register**
GHG Greenhouse gas
GWP Global warming potential
HFC Hydrofluorocarbon
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
LULUCF Land-Use, Land-Use Change and Forestry
MSW Municipal solid waste
$N_2O$ Nitrous oxide
NAFO National Alliance of Forest Owners
NAAQS National Ambient Air Quality Standards
$NO_X$ Nitrogen oxides
NSPS New Source Performance Standards
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management and Budget
PFC Perfluorocarbon
PSD Prevention of Significant Deterioration
PTE Potential to Emit
RFA Regulatory Flexibility Act
SMC Significant monitoring concentration
$SF_6$ sulfur hexafluoride
SIL Significant impact level
SIP State implementation plan
SMC Significant monitoring concentration
Tg Teragram
tpy Tons per year
U.S. United States
UMRA Unfunded Mandates Reform Act
UNFCCC United Nations Framework Convention on Climate Change
USDA U.S. Department of Agriculture
WWW Worldwide Web

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## I. General Information

### *A. What is the purpose of this action?*

This action proposes to defer for a period of three (3) years the consideration of $CO_2$ emissions from bioenergy and other biogenic sources (hereinafter referred to as "biogenic $CO_2$ emissions") when determining whether a stationary source meets the Prevention of Significant Deterioration (PSD) and Title V applicability thresholds, including those for the application of Best Available Control Technology (BACT). Stationary sources that combust biomass and construct or modify during the deferral period will avoid the application of PSD to the biogenic $CO_2$ emissions resulting from those actions. This deferral applies only to $CO_2$ emissions and does not affect non-GHG pollutants or other greenhouse gases (GHGs) (*e.g.*, methane ($CH_4$) and nitrous oxide ($N_2O$)) emitted from the combustion of biomass fuel. Also, this does not affect any other EPA programs that pertain to stationary sources, such as New Source Performance Standards (NSPS) or the GHG Reporting Program.

On January 12, 2011, EPA explained in letters to Members of Congress and to the National Alliance of Forest Owners (NAFO), the steps that the Agency intends to take to address the issues associated with biogenic $CO_2$ emissions from stationary sources.[1] First, EPA granted a Petition for Reconsideration filed by the NAFO on August 3, 2010, related to the PSD and Title V Greenhouse Gas Tailoring Rule (75 FR 31514, June 3, 2010) ("Tailoring Rule"). Second, the Agency is proposing this rule to defer for three years the application of the PSD and Title V permitting requirements to biogenic $CO_2$ emissions from stationary sources. Third, concurrent with this rulemaking, we are providing an interim guidance document (discussed further in section III.D.3) to help permitting authorities establish a basis for concluding that BACT for biogenic $CO_2$ emissions at stationary sources is the combustion of biomass fuels by itself. Fourth, EPA will be conducting a detailed examination of the science associated with biogenic $CO_2$ emissions from stationary sources. This examination will include discussion with partners and scientists both inside and outside the Federal government, as well as engagement with an independent scientific panel, to consider technical issues that the Agency must resolve in order to account for biogenic $CO_2$ emissions in ways that are scientifically sound and also manageable in practice (discussed further in section II.C and II.D). Finally, EPA intends to use the feedback from the scientific and technical review to develop a rulemaking on how these emissions should be treated and accounted for in PSD and Title V permitting.

### *B. Does this action apply to me?*

This action applies to stationary sources that emit biogenic $CO_2$.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

| Category | NAICS | Examples of affected facilities |
|---|---|---|
| Biomass combustion | 221 | Electric utilities burning biomass fuels. |
| | 321 | Wood products manufacturing, and wood pellet fuel manufacturing. |
| | 322 | Pulp and paper manufacturing. |
| Municipal solid waste combustion. | 562213 | Solid waste combustors and incinerators. |
| Sources/users of biogas | 112 | Animal production manure management operations. |
| | 221320 | Sewage treatment facilities. |
| | 562212 | Solid waste landfills. |
| Fermentation processes | 325193 | Ethanol manufacturing. |
| Other | 311/312 | Food/Beverage processors burning agricultural biomass residues, using fermentation processes, or producing/using biogas from anaerobic digestion of waste materials. |

Table 1 of this preamble lists the types of entities that potentially could be affected by the deferral covered by this proposal. This list is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Note that this rule does not make or infer any policy determination on the part of EPA as to whether, or what part of, emissions from any of these sources may be determined "fugitive" emissions for the purposes of accounting and applicability under air permitting requirements. Such determinations are not within the scope of this rule and are part of the case-by-case application and review process established under the regulations covering these permitting requirements. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

### *C. What are biogenic $CO_2$ emissions?*

Carbon dioxide emissions from bioenergy and other biogenic sources (hereinafter referred to as "biogenic $CO_2$ emissions") are generated during the combustion or decomposition of biologically-based material .[2] In this action we are addressing only the $CO_2$ emissions from biogenic sources, not emissions of other GHGs or non-GHG pollutants. The term "biogenic $CO_2$ emissions" is defined here as emissions of $CO_2$ from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels. Examples of "biogenic $CO_2$ emissions" include, but are not limited to:

[1] *See* Docket EPA–HQ–OAR–2011–0083 for copies of the letters or *http://www.epa.gov/nsr/actions.html#jan11*.

[2] Non-fossilized and biodegradable organic material originating from plants, animals or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

- $CO_2$ generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- $CO_2$ from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- $CO_2$ from fermentation during ethanol production;
- $CO_2$ from combustion of the biological fraction of municipal solid waste or biosolids;
- $CO_2$ from combustion of the biological fraction of tire-derived fuel; and
- $CO_2$ derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

For stationary sources co-firing fossil fuel and biologically-based fuel, and/or combusting mixed fuels (*e.g.,* tire-derived fuels, municipal solid waste (MSW), *etc.*), the biogenic $CO_2$ emissions from that combustion are included in this deferral. However, as stated above, the fossil $CO_2$ emissions are not. Various methods are available to calculate both the biogenic and fossil portions of $CO_2$ emissions, including those methods contained in the GHG Reporting Program (40 CFR part 98). EPA is requesting comment on whether this deferral should specify that stationary sources subject to the PSD and Title V programs use a specific method(s) for determining their biogenic $CO_2$ emissions. EPA also seeks comment on other ways to ensure there is an accurate estimate of how much biogenic $CO_2$ is subject to the deferral for a specific facility, particularly when combusting mixed fuels.

*D. What should I consider as I prepare my comments to EPA?*

1. Submitting CBI

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI to only the mail or hand/courier delivery address listed above, attention: Docket ID No. EPA–HQ–OAR–2011–0083.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

Identify the rulemaking by docket number and other identifying information (*e.g.,* subject heading, **Federal Register** date and page number).

Follow directions. EPA may ask you to respond to specific questions or organize comments by referencing a CFR part or section number.

Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

Describe any assumptions and provide any technical information and/or data that you used.

If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

Provide specific examples to illustrate your concerns and suggest alternatives.

Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

Make sure to submit your information and comments by the comment period deadline identified in the preceding section titled **DATES**. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

To expedite review of your comments by Agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Carole Cook, U.S. EPA, Office of Atmospheric Programs, Climate Change Division, Mail Code 6207–J, Washington, DC, 20460, telephone (202) 343–9263, e-mail *GHGbiogenic@epa.gov.* You are also encouraged to send a separate copy of your CBI information to Carole Cook at the provided mailing address in the **FOR FURTHER INFORMATION CONTACT** section. Please do not send CBI information to the electronic docket or by e-mail.

## II. Relevant Background

The purpose of this section is to provide relevant background on this action. Section II.A provides basic information on biogenic $CO_2$ emissions including the relevant information concerning carbon source and sink dynamics and how biogenic $CO_2$ emissions are accounted for in the *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (Inventory).[3] While we are presenting this information for context, as explained in that section and in later parts of this preamble, the Inventory is an annual report that tracks US GHG emissions and sinks at the national scale. The Inventory is not intended to quantify the net atmospheric impacts of a particular type of fuel from a stationary source over a specified time period that extends into the future.

Section II.B identifies general information concerning the PSD and Title V permitting programs and the steps EPA undertook in the GHG PSD and Title V Tailoring Rule to implement the requirements of those permitting programs in a common sense manner, given congressional intent and the overwhelming administrative burden that would otherwise have resulted if EPA were to apply the permitting programs to GHG at the statutory PSD and Title V thresholds. The relevant history and information concerning EPA's treatment of biomass under the Tailoring Rule and in subsequent GHG permitting guidance and other actions is also addressed.

Section II.C sets forth the complexities associated with determining the net atmospheric impact of biogenic $CO_2$ emissions and factors to consider to ensure the determinations are sound from a practical, predictable and scientific basis when accounting for these emissions in the PSD and Title V Programs.

Section II.D discusses information that is lacking and needed for EPA to determine how to account for the net atmospheric impact of $CO_2$ emissions from various types of feedstocks and facilities.

*A. Carbon Source and Sink Dynamics*

1. Cycling of $CO_2$ Between Plants and the Atmosphere

Through relatively rapid photosynthesis, plants absorb $CO_2$ from the atmosphere and add it to their biomass, which contains roughly 50% carbon by weight, through a process called sequestration. Some of the carbon absorbed by plants may eventually be

[3] "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008,." U.S. Environmental Protection Agency, EPA 430–R–10–006, (April 15, 2010). *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.* (incorporated by reference into Docket EPA–HQ–OAR–2011–0083)

transferred from dead organic matter to the soil where it can remain for long periods of time. Plant biomass, dead organic matter, and soil carbon are "pools" that together make up the carbon stock on a given area of land. Carbon can cycle fairly rapidly back to the atmosphere or it can remain stored on land. Stored carbon can be released naturally back into the atmosphere as $CO_2$ through decomposition or plant respiration.

When biological material such as plant biomass is harvested or cleared from the land, burned for energy, used as an input to an industrial process, or biodegraded as part of waste treatment processes, the material acts as a source of carbon, releasing its stored carbon back into the atmosphere as $CO_2$. Over large spatial scales such as States, regions, or continents, if more carbon is sequestered in plant biomass than is emitted to the atmosphere through processes such as harvest, fire, or natural decomposition, plant biomass acts as a net sink for carbon. Conversely, if more carbon is released than is sequestered, plant biomass acts as a net source for carbon. Soils can also be net sources or sinks depending on the balance of carbon added from biomass and lost through disturbances such as tillage or deforestation.

2. Treatment of Biogenic $CO_2$ Emissions in the U.S. GHG Inventory

National-level GHG inventories are a common starting point for quantification of the source and sink status for particular land areas. The Inventory tracks annual GHG emissions including emissions of $CO_2$, $CH_4$, $N_2O$, hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride ($SF_6$). The United States (U.S.) has submitted the Inventory to the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC) under its obligation as a Party to the Convention every year since 1993. The UNFCCC, ratified by the U.S. in 1992, defines the overall framework for intergovernmental efforts to tackle the challenge posed by climate change. The Inventory submitted by the U.S. is consistent with national inventory data submitted by other UNFCCC Parties, and uses internationally accepted methodologies established by the Intergovernmental Panel on Climate Change (IPCC).

The Revised 1996 IPCC Guidelines (IPCC Guidelines) [4] provide methodologies for estimating all anthropogenic sources and sinks of GHG emissions at the national scale, classified into six broad sectors: Energy, Industrial Processes, Solvents and Other Product Uses, Agriculture, Land-Use Change and Forestry (LUCF), and Waste.

The Energy Sector includes all GHGs emitted during the production, transformation, handling and consumption of energy commodities, including fuel combustion. The LULUCF Sector includes emissions and sequestration resulting from human activities that influence the way land is used or that affect the size of carbon stocks on land. According to the IPCC Guidelines, $CO_2$ emissions from biomass combustion:

> should not be included in national $CO_2$ emissions from fuel combustion. If energy use, or any other factor, is causing a long term decline in the total carbon embodied in standing biomass (*e.g.* forests), this net release of carbon should be evident in the calculation of $CO_2$ emissions described in the Land Use Change and Forestry chapter.[5]

Thus, at the national level, these $CO_2$ emissions are not included in the estimate of emissions from a country's Energy Sector, even though the emissions physically occur at the time and place in which useful energy is being generated (*i.e.,* at a power plant or other stationary source). The purpose of this accounting convention is to avoid double-counting of $CO_2$ emissions from the Energy Sector and LULUCF Sector that would provide a misleading characterization of a country's contribution to global GHG. Carbon dioxide emissions from a subset of bioenergy sources are reported as information items in the Energy Sector of the Inventory, but are not included in national fuel-combustion totals to avoid this double-counting at the national scale.[6]

The Inventory is a comprehensive report of emissions and sinks at the national scale. All biogenic $CO_2$ emissions, as defined in this deferral, are also included in the Inventory. However, because the Inventory is organized by broad sector, not by facility type, this deferral covers biogenic $CO_2$ emissions that may be reported in any sector of the Inventory.

3. Accounting for Carbon Stocks on Land in the U.S. GHG Inventory

The LULUCF Sector includes all of the land-based source categories of GHG emissions and sinks. In the Inventory, EPA's estimate of emissions and sinks from U.S. land areas is divided into forest land, crop land, grassland, wetlands, settlements, and other land. The largest stocks of carbon are found on forestlands.

Data from the U.S. Department of Agriculture (USDA) Forest Service Forest Inventory and Analysis Program are used to develop national-scale estimates of forest carbon stocks and carbon stock change. The methodology relies on annual or periodic surveys to assess changes in carbon stocks over the entire forest land base. The overall change in land-based forest carbon stocks from year to year represents the net carbon balance between atmosphere and forest land. Importantly, this measurement of the net change in forest carbon stocks integrates and inherently includes all of the factors that might influence forest carbon stocks, such as insect outbreaks, wildfire, prescribed fire, all types of harvest (including harvest for bioenergy uses), forest management, enhanced growth, and land use change. As noted earlier, when trees are harvested and combusted to generate bioenergy, the $CO_2$ combustion emissions do not occur in the forest but rather in a power plant or industrial facility. Following the convention established by the IPCC in the Guidelines, EPA counts these emissions as part of the LULUCF sector for the official US Inventory.

In assessing $CO_2$ emissions from the LULUCF Sector, EPA looks to the net change in carbon stocks. Over the time period of interest, if the net change in forest carbon stocks is positive, then more carbon was sequestered on land in carbon pools (such as those described in section II.A.1) than was lost to the atmosphere (through all of the processes previously described, such as decomposition, fire, and harvest). In this case the land is acting as a net carbon sink. If the net change in land-based carbon stocks is negative, over the time period of interest more carbon was emitted to the atmosphere than was sequestered on land, and the forest was a net source for carbon.

Averaged over the years 1990–2008, data from the Inventory show that the LULUCF sector in the U.S. has been a net sink of roughly 815 teragrams (Tg)

[4] "Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories," Intergovernmental Panel on Climate Change (IPCC), Prepared by the National Greenhouse Gas Inventories Programme. (1996.). *http://www.ipcc-nggip.iges.or.jp/public/gl/invs1.html.*

[5] "Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories," Intergovernmental Panel on Climate Change (IPCC), Prepared by the National Greenhouse Gas Inventories Programme (1996). *http://www.ipcc-nggip.iges.or.jp/public/gl/invs1.html.* Reference Manual (Vol. 3), Page 1.10.

[6] The Energy Sector of the Inventory does include emissions of $CH_4$ and $N_2O$ from the combustion of biomass for energy. These emissions are included in this sector because their magnitude is dependent on the specific way in which the fuel is burned (*i.e.,* combustion technology and operating conditions), which cannot be known by analyzing the changes in the amount of carbon in standing biomass.

carbon dioxide equivalent ($CO_2e$) per year.[7] This sink is about 12% of the average gross emissions from all other sources combined in the U.S. over the same time period.[8] Future national projections under business as usual (BAU), as reported in the Fifth U.S Climate Action Report (CAR) submitted to the UNFCCC in 2010, suggest that this LULUCF sink is likely to continue, if not increase in size, at least until 2020.[9]

In 2010, for the first time since EPA began tracking emissions and sinks, the Inventory included estimates of forest carbon stocks and stock change at the State level. Forestlands in seven (7) U.S. States (AZ, CT, ID, LA, MI, ND, and VT) were net sources of carbon averaged over the time period from 2000 to 2008. In one State (AK) the forestland was neither a source nor a sink.[10] Forestlands in all other States were net sinks for carbon over that time period.

The IPCC Guidelines, as utilized in the Inventory, seek to estimate net changes in carbon stocks on land for a given period of time that occurred in the past. However, neither the IPCC Guidelines nor the Inventory were designed to quantify the net atmospheric impacts of a particular type of fuel from a stationary source over a specified time period, that extends into the future.

4. Distinction Between Biogenic and Fossil $CO_2$ Carbon Reservoirs, and Between Biogenic $CO_2$ and Non-GHG Pollutants

Once $CO_2$ is emitted to the atmosphere, it is not possible to distinguish between the radiative forcing associated with a molecule of $CO_2$ originating from a biogenic source and one originating from the combustion of fossil fuel. Biogenic $CO_2$ differs qualitatively from fossil $CO_2$ in that there is a significant difference between fossil carbon and biogenic carbon in the length of time required to replenish the reservoirs where the carbon is stored. For example, many coal deposits in North America originated during the Carboniferous Period, hundreds of millions of years ago. In contrast, the reservoirs of carbon found on the surface of Earth, in pools such as tree biomass and cropland soils, have accumulated over decades, not millennia. Because these land-based biomass carbon stocks can be replenished more quickly than fossil carbon stocks, these biogenic carbon stocks can act as a sink on a far shorter time scale than fossil carbon.

Another way in which biogenic $CO_2$ differs from fossil $CO_2$, as well as from other regulated pollutants, is the sometimes ambiguous line between the net emissions caused by human activities and those that occur as part of the natural background emission fluxes. There are both natural biogenic $CO_2$ emissions and anthropogenic biogenic $CO_2$ emissions. For example, fires, decomposition, and plant respiration all result in substantial biogenic emissions of $CO_2$. These transfers of $CO_2$ between land and atmosphere are critical to the maintenance of life on Earth. However, human activities, such as forest and land management practices (*i.e.,* anthropogenic biogenic $CO_2$ emissions), can also influence the release of $CO_2$ from natural systems. There are challenges in categorizing the biogenic $CO_2$ emissions that would have occurred naturally and those attributable to human activity. While the Inventory accounts for all anthropogenic biogenic $CO_2$ emissions at the national level, this deferral and the Agency's intent to collaborate with Federal partners and the scientific community to conduct a detailed examination of the science associated with biogenic $CO_2$ emissions and technical issues in accounting for those emissions at stationary sources is our effort to better characterize these distinctions and the associated impacts.

*B. PSD, Title V, and Tailoring Rule*

Central to today's action are the PSD and Title V programs and their applicability requirements. This section provides background information on those programs as relevant for today's action.

1. The PSD Program

The PSD program is a preconstruction review and permitting program applicable to "new major stationary sources" and "major modifications" at existing major stationary sources, in the terminology of EPA's implementing regulations. The PSD program applies in areas meeting the health-based National Ambient Air Quality Standards (NAAQS) or for which there is insufficient information to determine whether the area meets the NAAQS. The applicability of the PSD program to a particular source is determined in advance of construction or modification. The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification.

Under the Clean Air Act (CAA), the PSD program applies to any "major emitting facility" that undertakes construction, and such facility is defined to include "any * * * stationary sources of air pollutants which emit, or have the potential to emit, one hundred [or, depending on the source category] two hundred and fifty tons per year or more of any air pollutant." CAA sections 165(a), 169(1). In this notice, we refer to these levels as the 100/250-tpy thresholds. In addition, Congress also applied PSD to any existing major emitting facility that undertakes a "modification," and defined that term to include "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA sections 165(a), 169(2)(C), 111(a)(4).

The EPA has included these CAA requirements in its long-standing regulations that implement PSD, although the Agency has interpreted these requirements so that they apply only with respect to air pollutants that are subject to regulation under the CAA. Specifically, under EPA's regulations, a "major stationary source" is any source type belonging to a specified list of 28 source categories which emits or has a potential to emit (PTE) 100 tpy or more of any pollutant subject to regulation under the CAA, or a source of any other type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. *See, e.g.,* 40 CFR 52.21(b)(1). A new source with a PTE at or above the applicable "major stationary source threshold" amount is subject to PSD.

The regulations also say that PSD applies to, not only new construction, but also to existing sources that undertake a "major modification," which is defined in terms of the following three criteria:

(1) A physical change in, or change in the method of operation of, a "major stationary source" must occur;

(2) The change must result in an increase in emissions that is "significant," that is,

[7] 84% of this amount is from carbon stock change in the forest source categories; the remainder comes from source categories such as Sequestration in Urban Trees and carbon stock changes in mineral soils on crop land and grassland. U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008" (*See data archived at http://www.epa.gov/climatechange/emissions/downloads10/2010–Inventory-Chapter-Tables.zip). See also* Tables 1 and 2, LULUCF sector C storage.pdf.

[8] *See* U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008.," Table ES–4.

[9] U.S. Dept. of State, U.S. Climate Action Report 2010., at 81. *http://www.state.gov/documents/organization/140636.pdf.*

[10] U.S. EPA., "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008.," Annex 3.12 (Table A–210). *http://www.epa.gov/climatechange/emissions/downloads10/US–GHG–Inventory-2010–Annex-3–Addtl-Source-Sink-Categories.pdf.*

equal to or above the significance level defined for the pollutant in question, *e.g.,* in 40 CFR 52.21(b)(23); and

(3) The increase in emissions resulting from the change must be a significant net emissions increase.

The level of emissions that is significant (also called the "significance levels" or the "significant emissions rate") is also defined in regulations. *See, e.g.* 40 CFR 52.21(b)(23). Generally, significance levels for PSD are pollutant specific emissions rates. For example, the significance level for emissions of nitrogen oxides ($NO_X$) is 40 tpy. *See, e.g.,* 40 CFR 52.21(b)(23)(i). Under the regulations, the increase in emissions that results from the modification project is added to other contemporaneous increases and decreases in actual emissions at the source, to determine if the net emissions increase is significant (equal to or above the significance level). 40 CFR 52.21(b)(23) and (b)(48).

Under the PSD program, one of the principal substantive requirements is that a new major source or major modification must meet an emissions limitation based on application of Best Available Control Technology (BACT). This emissions limitation must be based on the maximum amount of pollutant reduction that is achievable for each individual source on a case-by-case basis, taking into account cost and other factors. BACT applies to each "regulated NSR pollutant." While PSD applies if a source is determined to be "major" for any regulated pollutant, the BACT review for such a source must be performed for each regulated NSR pollutant whose emissions exceed or increase by more than its PSD significance level (excluding pollutants for which the area has been designated nonattainment). *See* 40 CFR 52.21(a)(2), (j)(2) and (3) and 40 CFR 52.21(b)(23).

To identify the pollutants covered by the PSD program, EPA regulations define the term "regulated NSR pollutant." This definition applies to determine both the pollutants subject to the BACT requirement and pollutants that are counted to determine whether a source is a major source required to obtain a PSD permit. The term "regulated NSR pollutant" is incorporated into the definition of BACT and definitions of "major stationary source" and "major modification." 40 CFR 52.21(b)(12); 40 CFR 52.21(b)(1)–(2). A "regulated NSR pollutant" includes any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under this 40 CFR (b)(50)(i) as a constituent or precursor for such pollutant; any pollutant that is subject to any standard promulgated under section 111 of the Act; any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

2. Title V

The Title V permit program establishes operating permit requirements that are intended to assure sources' compliance with applicable CAA requirements. Title V generally does not add new pollution control requirements, but it does require that each source subject to Title V obtain an operating permit that assures compliance with all pollution control requirements or "applicable requirements" required by the CAA (*e.g.,* NSPS, and State implementation plan (SIP) requirements, including PSD), and it requires that certain procedural requirements be followed, especially with respect to compliance with these requirements. "Applicable requirements" for Title V purposes include stationary source requirements, but do not include mobile source requirements. Other procedural requirements include providing review of permits by EPA, States, and the public, and requiring permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

The CAA applies Title V, through the definition of "major source," to "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA sections 502(a), 501(2)(B), 302(j). EPA codified in the Tailoring Rule its long-established interpretation that this definition applies only with respect to air pollutants that are subject to regulation under the CAA.[11]

3. Tailoring Rule

a. Rationale and Requirements

In the Tailoring Rule, EPA recognized that if the applicability provisions of the PSD and Title V programs were applied literally so that PSD and Title V requirements applied to GHG-emitting sources at the 100/250 tpy levels provided in the CAA, then the permitting authorities would be overwhelmed by the large numbers of permittees and many small sources would be unduly encumbered by the permitting demands. In light of those impacts, EPA concluded that, as a legal matter, Congress did not intend that the PSD and Title V applicability requirements be applied literally to all sources emitting GHGs over the major source thresholds as of January 2, 2011—the date by which EPA determined that GHGs become subject to regulation under the CAA due to the motor vehicle rule. Instead, EPA concluded that it is authorized to tailor those applicability requirements to apply PSD and Title V to such sources in a phased-in manner, starting with the largest sources first.

Specifically, in the Tailoring Rule, EPA has implemented these PSD and Title V applicability provisions by applying the familiar *Chevron*[12] two-step framework for interpreting administrative statutes, taking into account certain legal doctrines. Those doctrines, insofar as relevant to the Tailoring Rule, are (1) the "absurd results" doctrine, which authorizes agencies to apply statutory requirements differently than a literal reading would indicate, as necessary to effectuate congressional intent and avoid absurd results; and (2) the "administrative necessity" doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens.[13]

Under *Chevron,* the agency must, at step 1, determine whether Congress's intent as to the specific matter at issue is clear, and, if so, the agency must give effect to that intent.[14] If congressional intent is not clear, then, at step 2, the agency has discretion to fashion an interpretation that is a reasonable construction of the statute.

To determine congressional intent, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, in most cases, the agency must implement those requirements by their terms. However, under the "absurd results" doctrine, the

[11] Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (April 26, 1993).

[12] *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984).

[13] In the Tailoring Rule, EPA also considered a third doctrine, the "one-step-at-a-time" doctrine, which authorizes agencies to implement statutory requirements a step at a time. This doctrine is not relevant to the present rulemaking.

[14] *Chevron,* 467 U.S. at 842–43.

literal meaning of statutory requirements should not be considered to indicate congressional intent if that literal meaning would produce a result that is senseless or that is otherwise inconsistent with—and especially one that undermines—underlying congressional purpose. In these cases, if congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent. If congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute.

Under the "administrative necessity" doctrine, Congress is presumed, at *Chevron* step 1, to intend that its statutory directives to agencies be administrable, and not to have intended to have written statutory requirements that are impossible to administer. Therefore, under this doctrine, an agency may depart from statutory requirements that, by their terms, are impossible to administer, but the agency may depart no more than necessary to render the requirements administrable.

In the Tailoring Rule, EPA closely considered the burdens to the permitting authorities of applying PSD and Title V to GHG-emitting sources. For example, EPA calculated, on a national basis, the workload that GHG permit applications would entail, and compared that to the existing workload of permitting authorities. EPA concluded that permitting authorities would be overwhelmed by permit applications if the PSD and Title V applicability thresholds were applied literally as of January 2, 2011 to the GHG emissions from stationary sources. In addition, EPA calculated the cost to the sources of permitting requirements and concluded that many small sources would become subject to unduly high expenses.

Accordingly, in applying the *Chevron* analytical framework, in conjunction with the absurd results and administrative necessity doctrines, EPA concluded that Congress intended that PSD and Title V apply to the GHG-emissions from stationary sources, but that, in light of the burdens to the permitting authority and the costs to the sources of determining applicability of permitting requirements by applying the statutory thresholds to GHG emissions, the application of the permitting programs should be phased in, starting with the largest sources of GHG emissions first. EPA also concluded that the calculation of the amount of GHG emissions should be based on the amount of GHG pollutant emitted in tons per year, weighted by the global warming potential (GWP) of the particular GHG pollutant, normalized to the GWP of one ton of $CO_2$ over a 100-year period, which is called carbon dioxide equivalent ($CO_2e$).

Accordingly, in the Tailoring Rule, EPA established two steps to implement PSD and Title V, with Tailoring Rule Step 1 beginning on January 2, 2011. Step 1 applies to sources subject to PSD or Title V anyway due to emissions of pollutants other than GHGs (called "anyway" sources) and, as to PSD, to sources that emit 75,000 tpy $CO_2e$ (or increase emissions by that amount for modifications). Tailoring Rule Step 2, beginning on July 1, 2011, will apply to the largest GHG-emitting sources. Sources not otherwise subject to Title V will become subject to it as of July 1, 2011 if they emit or have the potential to emit at least 100,000 tpy CO2e. Sources that would not otherwise trigger PSD will trigger PSD on or after July 1, 2011 if they have emissions at the 100,000 tpy $CO_2e$ level and higher or emit at that level and modify to increase emissions by 75,000 tpy $CO_2e$ or more. In addition, EPA committed to promulgate by July 1, 2012 another rulemaking—in effect, Step 3 of the Tailoring Rule—that would consider whether to reduce the thresholds further. EPA also committed to promulgate another rulemaking after that, by April 1, 2016, that would consider still further action. As EPA stated in the Tailoring Rule, part of the purpose of the phase-in approach embodied in the Tailoring Rule is to allow permitting authorities time to acquire additional resources and to allow EPA time to develop streamlining methods and thereby enable the application of PSD and Title V to more sources in subsequent rulemakings.

b. Biomass

As noted previously, in the Tailoring Rule, EPA determined that the amount of each GHG emitted by a facility should be calculated by reference to the weight of the GHG emissions, in tons of $CO_2e$ per year. The Tailoring Rule proposal referenced EPA's Inventory submitted annually to the UNFCCC, for the applicable GWP values and guidance on how to calculate a source's GHG emissions in tpy $CO_2e$.[15] 75 FR 31514–31608. The Inventory includes emissions of the six GHGs in terms of $CO_2e$ units. By linking the calculation of $CO_2e$ for GHGs to GWP values, a facility could evaluate its total GHG emissions contribution based on a single metric. We solicited comment on the benefits and limitations of this proposed metric.

While we referred to the Inventory for GWP identification purposes only, several commenters appeared to misunderstand our intent, claiming that the Inventory excludes $CO_2$ emitted from biomass. These commenters requested that, in calculations of emissions for determining applicability of PSD and Title V, EPA exempt emissions from biogenic activities or biomass combustion or oxidation activities, including solid waste landfills, waste-to-energy projects, fermentation processes, combustion of renewable fuels, ethanol manufacturing, biodiesel production, and other alternative energy production that uses biomass feedstocks (*e.g.,* crops or trees). In particular, these commenters urged that EPA exclude emissions from biomass combustion in determining the applicability of PSD to such sources based on the notion that such combustion is "carbon neutral" (*i.e.,* that combustion or oxidation of such materials would cause no net increase in GHG emissions on a lifecycle basis).

In response, when finalizing the Tailoring Rule, we acknowledged the role that biomass or biogenic fuels and feedstocks could play in reducing anthropogenic GHG emissions, and did not dispute the commenters' observations that many State, Federal, and international rules and policies treat biogenic and fossil sources of $CO_2$ emissions differently. 75 FR 31514. Regarding commenters' claims that the Inventory excludes $CO_2$ emissions from biomass, the Inventory does not exclude these emissions (*see* section II.A.2). Rather, they are included in the LULUCF Sector rather than the Energy Sector to avoid double-counting at the national scale. The narrow reference to the use of the Inventory's GWP values for estimating GHG emissions was provided to offer consistent guidance on how to calculate these emissions and not as an indication, direct or implied, that biomass emissions would be excluded from permitting applicability merely by association with the national inventory, *see* 74 FR 55351, under the definition for "carbon dioxide equivalent." We determined that our application of the "absurd results," "administrative necessity," and one-step-at-a-time legal rationales supporting the Tailoring Rule, based on the expected overwhelming permitting burdens in its absence, did not provide sufficient basis to exclude emissions of

[15] U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2007," at ES–3 (*See also* the SAR GWPs (IPCC 1996) in table 1–2, p. 1–6. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

$CO_2$ from biogenic sources in determining permitting applicability provisions at that time. We reasoned that such an exclusion alone, while reducing burdens for some sources, would not address the overwhelming permitting burdens, and a threshold-based approach would still be needed. At that time, we had not examined burdens with respect to specific source categories impacted by the rule and thus had not analyzed the administrative burden of permitting projects that specifically involve biogenic $CO_2$ emissions taking account of the threshold-based approach. Commenters also did not provide information to demonstrate that an overwhelming permitting burden would still exist, justifying a temporary exclusion for biomass sources.

In the final Tailoring Rule we indicated that the decision not to provide this type of an exclusion at that time did not foreclose EPA's ability to either (1) provide this type of exclusion at a later time with additional information about overwhelming permitting burdens due to biomass sources, or (2) provide another type of exclusion or other treatment based on some other rationale. Although we did not take a final position, we noted that some commenters' observations about a different treatment of biomass combustion warranted further exploration as a possible rationale.

Therefore, although we did not establish a permanent exclusion from PSD or Title V applicability based on specific characteristics of biogenic $CO_2$, we indicated our intent to seek further comment on how we might address emissions of biogenic $CO_2$ under the PSD and Title V programs through a future action.

We further noted that, while not promulgating an applicability exclusion for biogenic emissions and biomass fuels or feedstocks in the final Tailoring Rule, flexibility exists to apply the existing regulations and policies regarding BACT in ways that take into account their net effects on atmospheric GHG concentrations. Without prejudging the outcome of our process to seek comment on whether and how we might address emissions of biogenic carbon under the PSD and Title V programs through a future action, we indicated that this issue warranted further exploration.

In order to explore the issue further following the promulgation of the Tailoring Rule, on July 15, 2010 EPA solicited views from the public through a Call for Information (CFI) on approaches to accounting for biogenic $CO_2$ emissions, including whether some or all of a source's biogenic $CO_2$ emissions could be discounted based on a determination that they are canceled out by the $CO_2$ absorption associated with growing the fuel. 75 FR 41173. Also, we solicited information on the means to estimate and measure $CO_2$ emissions from a variety of biogenic $CO_2$ sources that typically have not been part of emission inventories (*e.g.,* landfills, livestock management, and fermentation processes), as well as information on other biogenic sources that may be affected but which were not identified specifically in the CFI.

With promulgation of the Tailoring Rule we committed to issue technical and policy guidance for permitting of GHGs. Subsequently, the information gathered from stakeholders in response to the CFI provided diverse perspectives on treatment of biogenic $CO_2$ emissions in pre-construction and operating permit reviews, including many requests to exclude, either partially or wholly, biogenic $CO_2$ sources from PSD applicability determinations and BACT analyses on the basis of Inventory results and other considerations. On November 10, 2010, EPA issued the draft "PSD and Title V Permitting Guidance for Greenhouse Gases" which provides the basic information that permit writers and applicants need to address GHG emissions in permits.[16] Within the November guidance, EPA acknowledged the numerous stakeholder comments on biogenic $CO_2$ BACT analyses and provided general guidance to permitting authorities to consider environmental, energy, and economic benefits that may accrue from the use of certain types of biomass (*e.g.,* biogas from landfills for energy generation), consistent with existing air quality standards. We also committed to provide more detailed technical and policy guidance early in 2011 for completing Step 4 of a "top-down" BACT analyses for GHG emissions from certain types of biomass sources to enable permitting authorities to simplify and streamline BACT determinations for such sources. EPA accepted public comments on the November guidance through December 1, 2010, and the Agency is considering these comments while developing the detailed permitting guidance.

Noting that a variety of Federal and State policies have recognized that some types of biomass can be part of a national strategy to reduce dependence on fossil fuels and to reduce emissions of GHGs, EPA determined that it is appropriate for permitting authorities to account for both existing Federal and State policies and their underlying objectives in evaluating the environmental, energy and economic benefits of biomass fuel. Based on these considerations, permitting authorities might determine that the use of certain types of biomass alone meets the BACT requirement for GHGs.

On August 3, 2010, NAFO petitioned the EPA to reconsider and stay the implementation of the PSD and Title V GHG Tailoring Rule.[17] The petition alleged that the final Tailoring Rule declared, for the first time and without any prior proposal or notice to industry, that EPA would count $CO_2$ emissions from combustion of biomass toward the applicability thresholds established for the PSD and Title V permitting programs of the CAA. Petitioners further alleged that EPA's proposed rule had provided for the appropriate and opposite conclusion: That $CO_2$ emissions from combustion of biomass should not be counted. Petitioners stated that there is near-universal recognition that $CO_2$ emitted from combustion of fuels derived from biomass should be excluded from GHG regulations because production and combustion of such fuels do not increase atmospheric $CO_2$ levels. Pending reconsideration, petitioners requested that the application of the PSD and Title V permitting programs to emissions of $CO_2$ from biomass be stayed. We considered carefully the petitioners' assertions and noted that we also received comments through the CFI supporting the exclusion of biogenic $CO_2$ from stationary source permitting requirements. Through the CFI, however, EPA also received information supporting the position that biogenic $CO_2$ should not be excluded from permitting programs, and that the use of certain types of biomass as fuel could increase atmospheric $CO_2$ levels. Based on consideration of the petitioners' arguments, together with the weight of the comments received on the CFI, EPA has concluded that the issue of accounting for the net atmospheric impact of biogenic $CO_2$ emissions is complex enough that further consideration of this important issue is warranted. Therefore, EPA granted the petition on January 12, 2011.

However, EPA did not grant the request for an administrative stay of the Tailoring Rule, because the rule is critical for making overall

[16] *http://www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf.*

[17] National Alliance of Forest Owners' Petition To Reconsider the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule and To Stay the Rule Pending Reconsideration. EPA–HQ–OAR–2010–0841–0029.1.

implementation of the PSD program feasible. Furthermore, an administrative stay of the statements in the preamble of the Tailoring Rule that describe EPA's initial determination not to exempt emissions of $CO_2$ from biomass would not provide the requested relief of excluding emissions of $CO_2$ from biomass from the PSD and Title V permitting programs. The effect of a stay of this or any other aspect of the Tailoring Rule would be to return the legal regime that existed before EPA's issuance of a final Tailoring Rule. As no exemption for emissions of $CO_2$ from biomass existed prior to the final rule, an administrative stay would not result in an exemption from the requirements of PSD and Title V.

*C. Complexity of Determining Net Atmospheric Impact of $CO_2$ Emissions and Incorporating This Information Into the PSD and Title V Programs*

In this section we discuss the complexity of the issues associated with reconciling facility-based and land-based sequestration accounting systems, as well as with accounting for land-based sequestration. Based on comments received from stakeholders in the CFI, we discuss further some general principles for land-based accounting (*e.g.,* changes in the BAU baseline), and we present some of the proposed accounting methodologies (*e.g.,* case-by-case analysis, categorical exclusion, contingent exclusion, and feedstock-based approaches).

1. Reconciling Accounting Systems: Facility-Based Emissions and Land-Based Sequestration

Within the context of the PSD and Title V programs, the argument for treating $CO_2$ emissions from bioenergy and biogenic sources differently from fossil-based $CO_2$ emissions at the facility relies on the premise that sequestration occurs offsite, outside the boundaries of the facility. Therefore, when considering application of this premise to the PSD and Title V programs, it is important that the sequestration be accounted for at a level of spatial and temporal resolution that is meaningful and practical for purposes of facility-based permitting. Such an accounting system must also be predictable, so that it can be utilized effectively by facilities and permitting authorities. Finally, the accounting system should be scientifically sound to allow for accurate accounting of net $CO_2$ emissions to the atmosphere.

In addition to those commenters suggesting a categorical approach (*i.e.,* as discussed below, an exclusion for all biogenic $CO_2$ emissions based on a finding of a net sink in the LULUCF section of the Inventory) other comments in response to the CFI repeatedly explained that different types of biological material (*e.g.,* feedstocks) have different effects on atmospheric carbon emissions. Comments also underscored the importance of reconciling the facility-based permitting requirements under PSD and Title V with an accounting approach that relies upon estimates of land-based sequestration. This reconciliation will require careful attention to issues of spatial and temporal scale, to ensure that the principles of practicality, predictability, and scientific soundness are met.

2. Complexity in Accounting for Land-Based Sequestration

Establishing an accounting system for the net atmospheric impact of biogenic $CO_2$ emissions from stationary sources is complex. As mentioned above and below, commenters to the CFI made suggestions ranging from a categorical exclusion of facility-based emissions to a case-by-case analysis approach. Multiple factors need to be considered to accurately assess the net atmospheric impacts of the use of a particular type of fuel by a stationary source over a specified time period, that extends into the future: Net emissions to the atmosphere (emissions from the facility and sequestration elsewhere) of carbon from the biomass used for bioenergy; the time scale against which net emissions should be measured; delineation of geographic areas for measurement; and leakage.

Many of these factors are driven by or determined at the local or regional level. Bioenergy production may result in dramatic changes in one region's carbon stock, for example, and very little change in another's. Regional variability is also inherent in natural systems, for example in rates of plant growth and disturbance frequencies. Some areas are more prone to disturbances such as drought and fire, while other areas experience warmer temperatures and unpredictable precipitation patterns. Some areas receive more atmospheric nitrogen deposition than others, or are more susceptible to insect outbreaks. Species-specific variations are important as well. Some plant species simply grow more quickly than others.

As mentioned above, considerations of spatial and temporal scale become increasingly important in an accounting system that seeks to reconcile facility-based emissions with land-based sequestration. How large an area should be considered when developing an accounting system—should it be facility-level, ownership-level, State-level, regional, or national? What is the appropriate period of time to be considered in the accounting system—should it roughly parallel the length of time required for plant biomass to re-sequester the amount of $CO_2$ released during the biomass combustion? How might this time period differ for various biomass types? Can the issues of spatial and temporal scale be considered together, such that the time period considered for the analysis varies depending on where the land is located or how large an area is considered?

Given the inherent variability in biological processes, as well as the variability in spatial and temporal scales that can influence estimates of sequestration, general principles that can be broadly applicable to all aspects of accounting for $CO_2$ emissions from bioenergy and other biogenic sources will likely be most helpful.

3. General Principles

The level of sequestration that occurs naturally on the landscape without additional intervention can be considered as the "baseline." In other words, this level of sequestration (or emissions) will likely continue into the future without additional action. For example, if favorable conditions for plant growth cause sequestration to increase beyond what is incorporated into the baseline for that region, then net atmospheric carbon levels will be lower than anticipated under "business as usual" (BAU). If sustainable forestry is practiced, then neither gain nor loss from carbon stocks on forestland would be expected over time, and net atmospheric carbon levels would not deviate from those expected in the BAU case. However, if logging is accelerated from a particular region over a certain period of time, and $CO_2$ emissions from the forest are thereby increased, then the net atmospheric carbon levels will be higher than anticipated in the BAU case.

In the context of bioenergy and biogenic emissions, where such a wide variety of potential feedstocks exists, the baseline might be considered the emissions that "would have happened anyway" in the BAU case. Using this approach, it is necessary to determine the extent to which a policy action or an activity increases or reduces $CO_2$ emissions above or below what would have occurred in comparison with the baseline. From the perspective of bioenergy and other biogenic emissions, emissions that would have occurred anyway—regardless of whether or not the facility captured the energy from the biofuel use or carried out the process using biological material as a

feedstock—might be treated differently than emissions that would not have occurred anyway (*i.e.,* new emissions generated as the result of policy-based bioenergy incentives). For example, some commenters to the CFI suggested that utilizing logging residue to generate energy, rather than leaving the residue to decompose on the forest floor following harvesting, likely would not cause emissions over and above that which would have taken place if the energy use did not occur, while also noting the length of time required for the residue to decompose (for example, 10–15 years).

Land use change has a separate set of considerations under the baseline case. For example, if the rate of land use transition from forest to agricultural use were to increase over and above that which was expected in the BAU case, and if this increase were attributable to market demand for a bioenergy crop, then it would be possible that these emissions would be additional to the emissions expected under BAU. In that situation, the bioenergy use might result in increased atmospheric $CO_2$ levels.

4. Complexity in Developing Accounting Methodology

In response to the CFI, commenters suggested various approaches to accounting for $CO_2$ emissions from bioenergy and other biogenic sources.

a. Case-by-Case Analysis

Some commenters suggested that analysis of PSD applicability should rely on a case-by-case, facility-specific assessment of the net atmospheric impact of the intended biomass fuels. This would require facility-level accounting for the emissions associated with the full chain of fuel production and use. Commenters indicated that this type of facility-specific approach would be the most scientifically sound approach for assessing the net carbon cycle impact of specific biomass fuels.

However, other commenters noted that the case-by-case approach, in which a complete analysis would be conducted for each permit application, would likely be prohibitively time-consuming and complex for facilities and permitting authorities.

b. Categorical Exclusion

Some commenters suggested that a categorical exclusion for all bioenergy and biogenic sources would be appropriate. Using this approach, no emissions from any such sources would be counted for PSD and Title V applicability. According to commenters supporting this option, the rationale for such an exclusion rests on the idea that all biological sources are part of the "active carbon cycle," in which $CO_2$ is cycled between the land and atmosphere on a relatively short timeframe.

c. Contingent Exclusion

In other comments, stakeholders suggested that a categorical exclusion for all bioenergy and other biogenic sources would be appropriate with an added contingency. For example, all bioenergy and other biogenic emissions could be excluded from PSD and Title V applicability as long as forest land in the U.S. remains a net carbon sink, such that sequestration remains greater than emissions at the national scale. Some commenters suggested that this contingency might also be expressed at a State scale, such that all facilities that emit $CO_2$ from bioenergy or other biogenic sources would be excluded from applicability as long as the forest land within that State acts as a net carbon sink.

d. Feedstock-Based Approach

An important area of consensus from commenters was the idea that feedstocks are different, and that the net impact of bioenergy and other biogenic emissions may be traceable to the feedstock that is used. For example, commenters indicated that it would be preferable to distinguish various categories of woody biomass feedstocks, such as wood waste, logging residue, forest treatment thinnings, biomass crops, and whole-tree chips from expanded harvest operations. Various other feedstock categorizations for different types of material were also proposed.[18]

*D. Designing and Implementing an Accounting Approach*

As described in section III below, EPA is proposing to defer the applicability of the PSD and Title V program to biogenic $CO_2$ emissions from stationary sources for three years in order to allow time for a detailed examination of the science associated with biogenic $CO_2$ emissions and to consider the technical issues that the Agency must resolve in order to account for biogenic $CO_2$ emissions in ways that are scientifically sound and also manageable in practice. As part of that examination we intend to engage with an independent scientific panel, as well as with partners inside and outside the Federal government with relevant expertise, to ensure a robust review of the scientific and technical issues associated with this type of accounting. During this time period the Agency can develop an appropriate accounting methodology that satisfies the principles of predictability, practicality, and scientific soundness. Should it be necessary, EPA proposes to implement the appropriate accounting methodology through notice-and-comment rulemaking within the three-year timeframe.

## III. Interim Deferral of Biogenic $CO_2$ Emissions Under the PSD and Title V Permitting Programs

As stated above, one critical reason for the proposed deferral is to give EPA time to conduct a detailed examination of the science, to engage with an independent scientific panel and then, if appropriate, to initiate a notice and comment rulemaking to implement an accounting approach all within the proposed three year timeframe.

Another important reason for the three-year deferral period, described in Section III.C below, is to allow sufficient time to consider the unique characteristics and attributes of biogenic $CO_2$ feedstocks, using the results from the detailed examination mentioned previously, within both the State permitting agencies and affected facilities. We concluded that, absent this deferral, there would be significant additional and unique complexities, as described in more detail in section II.C. As a result there would be additional permitting burden in terms of time and resources requirements, resulting from the associated analysis that would be required for permitting entities that are sources of biogenic $CO_2$ emissions under Step 2 of the Tailoring Rule, which is scheduled to begin on July 1, 2011.

While the interim guidance described in section III.D will help alleviate some of this burden, we expect that more and more diverse users of biomass combustion or other biogenic $CO_2$ sources are likely to be affected under Step 2 of the Tailoring Rule because,

[18] Though this proposed rule concerns emissions from stationary sources, we note that various motor vehicle fuels are derived from plant material. For example, ethanol can be produced from plant starch or cellulose, and diesel fuel can be produced from various plant oils. The Energy Independence and Security Act of 2007 (EISA) required EPA, in the context of implementing the renewable fuel program under section 211(o) of the CAA, to evaluate the lifecycle greenhouse gas emissions of these and other motor vehicle fuels. EPA's analysis of the various fuels demonstrated that multiple factors, including the type of feedstock used, resulted in a wide variation in their associated lifecycle GHG emissions. For example, from a lifecycle perspective some of the analyzed motor vehicle fuels result in very large reductions in GHG emissions compared to the fossil fuel they replace, while others do not. The lifecycle analyses of the motor vehicle fuels took into account a wide range of factors, including the carbon sequestration associated with the biomass. *See* 75 FR 14670, 14764–799 (March 26, 2010).

under Step 2, these sources can trigger permitting requirements based solely on their GHG emissions with no pre-requisite requirement that they otherwise trigger PSD or Title V permitting requirements for a non-GHG pollutant. We believe, absent the deferral period and the completion of EPA's full analysis of the unique technical issues associated with these diverse facilities emitting biogenic $CO_2$, it would be particularly challenging for permitting authorities and facilities to process permits involving these emissions.

Also, as described in section III.D, this proposed deferral is intended to temporarily exclude biogenic $CO_2$ emissions from the definition of "subject to regulation," as that term was defined for purposes of the Tailoring Rule, for a period of three years, while EPA further considers, through notice and comment rulemaking, the approach to accounting for these emissions on a permanent basis.

*A. General Rationale and Legal Justification for Interim Deferral*

1. Applicability of PSD and Title V to Biogenic $CO_2$ Emissions From Major Stationary Sources

As currently written, the PSD and Title V regulations apply to biogenic $CO_2$ emissions from major sources or major modifications at such sources according to provisions included under the definition of "subject to regulation" in the SIP regulations at 40 CFR 51.166 and the Title V State program regulations at 40 CFR 70.2, as well as the Federal Implementation Plan requirements at 40 CFR 52.21 and the Title V Federal program regulations at 40 CFR 71.2. Thus, revisions to these regulations are necessary to defer application of the PSD and Title V programs to such sources of biogenic $CO_2$.

Specifically, with respect to PSD, EPA's regulations implement the PSD provisions of the CAA, and the language of these statutory provisions is broad enough to cover biogenic $CO_2$ emissions. The 100/250 tpy thresholds previously described originate from section 169 of the CAA, which applies PSD to any "major emitting facility" [19] and defines the term to include any source with a potential to emit "any air pollutant" in an amount over 100 or 250 tpy, depending on source category. EPA's long-standing regulations interpret the PSD applicability provision that refers to "any air pollutant" to refer to any "regulated NSR pollutant," which in turn includes any air pollutant "subject to regulation." Similarly, under sections 165(a)(4) and 169(3) of the CAA, the BACT requirement applies to "each pollutant subject to regulation" under the CAA. As noted in other recent EPA actions, GHG are currently "subject to regulation" under the CAA, subject to specific limitations reflected in the definition of that term that EPA adopted in the Tailoring Rule. Thus, emissions of GHG (including $CO_2$) must be considered in determining whether a source is a major emitting facility subject to PSD, as a result of construction or modification, and whether the BACT requirement applies to GHG (including $CO_2$ as a component of GHG). In light of the way these regulations are currently written, EPA is unable to exclude biogenic $CO_2$ emissions from PSD review without amending the regulations.

Stationary sources of air pollutants, including sources of biogenic $CO_2$ emissions, are currently subject to PSD requirements if they emit more than 100 or 250 tpy of a regulated NSR pollutant other than GHG and have triggered PSD as a result of these emissions. We call these sources "anyway" PSD sources, and bioenergy and other sources of biogenic $CO_2$ emissions may be among them based on emissions of pollutants other than GHG. Under the Tailoring Rule, since January 2, 2011 (the beginning of step 1 of the Rule), PSD permits for such a source have had to meet emissions limitations based on application of BACT for GHG if the source is newly constructed and has the potential to emit 75,000 tpy or more of this pollutant on a $CO_2e$ basis; or is an existing source which, as a result of a modification, increases GHG emissions by 75,000 tpy or more on a $CO_2e$ basis and by any amount on a mass basis. In addition, starting on July 1, 2011 (the beginning of step 2 of the Tailoring Rule), a source that is not an "anyway" PSD source, but that newly constructs and emits at least 100,000 tpy $CO_2e$ GHG, or that is an existing source that emits at least 100,000 GHG tpy $CO_2e$ and that modifies and increases its GHG emissions by at least 75,000 tpy $CO_2e$ GHG and any amount on a mass basis, will need a PSD permit for its GHG, including any biogenic $CO_2$.

With respect to Title V, as noted previously, Title V applies to sources, among others, that emit 100 tons per year of specified quantities of "any air pollutant," *see* CAA section 502(a), 501(2)(B), 302(g). In the Tailoring Rule, EPA codified its longstanding interpretation that this requirement only extends to major sources of air pollutants subject to regulation, and further defined "subject to regulation" such that it may include GHGs at sources which emit or have the potential to emit 100,000 tpy CO2e as of July 1, 2011. As described immediately above, GHG are currently "subject to regulation" under the CAA (again, subject to specific limitations reflected in the definition of that term that EPA adopted in the Tailoring Rule), and as a result, emissions of GHG, including biogenic $CO_2$ emissions, are considered in determining whether a source is subject to Title V as of July 1, 2011.

Under the Tailoring Rule, since January 2, 2011 (again, the beginning of step 1), sources that are subject to Title V anyway—which we call "anyway" Title V sources and which include existing sources with Title V permits, or new sources obtaining Title V permits, due to their non-GHG emission—have been required to address GHG, including GHG from biomass, to the extent there are Title V requirements relevant to GHG. This means that their Title V permits must contain, at the appropriate time, conditions necessary to assure compliance with any applicable requirements concerning their GHG emissions. As of July 1, 2011 (again, the beginning of step 2), new or existing sources that are not "anyway" Title V sources, that emit or have the potential to emit at least 100,000 GHG tpy $CO_2e$ (and 100 tpy on a mass basis), and are subject to an approved or EPA-promulgated title V program, will become subject to Title V requirements.

Therefore, absent some further regulatory action, EPA is unable to exclude biogenic $CO_2$ emissions from the applicability of Title V.

2. Authority To Exempt *de minimis* Emissions

As noted, since the relevant provisions of the Act apply to "any air pollutant" or any "air pollutant subject to regulation," the terms of the CAA suggest that the PSD and Title V requirements should apply to $CO_2$ emissions from bioenergy or other biogenic sources in the same manner as they apply to emissions of $CO_2$ from any other type of source, since such emissions are constituents of the regulated pollutant GHG. However, as discussed elsewhere in this preamble, EPA believes it has the authority to exclude biogenic $CO_2$ emissions from the PSD and Title V requirements for the proposed three-year deferral period and will be exploring whether a permanent exemption is permissible for at least some and perhaps all types of feedstocks.

[19] EPA's regulations employ the term "major stationary source" in lieu of "major emitting facility." *e.g.,* 40 CFR 52.21(a)(2)(i), (b)(1)(i).

Courts have recognized that administrative agencies have the implied authority to establish exemptions "when the burdens of regulation yield a gain of trivial or no value." *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (DC Cir. 1980). In this decision that specifically addressed the requirements of the PSD program, the DC Circuit described this principle as follows:

> Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.
> *Id.* (internal citations omitted).

In an earlier case cited by the court in *Alabama Power,* the court described the doctrine as follows:

> The 'de minimis' doctrine that was developed to prevent trivial items from draining the time of the courts has room for sound application to administration by the Government of its regulatory programs. * * * The ability, which we describe here, to exempt de minimis situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. *District of Columbia* v. *Orleans,* 406 F.2d 957, 959 (1968).

In this respect, the *Alabama Power* opinion observed in a footnote that the *de minimis* principle "is a cousin of the doctrine that, notwithstanding the 'plain meaning' of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results.'" *Id.* at 360 n. 89 (citations omitted).

To apply an exclusion based on the *de minimis* doctrine, "the agency will bear the burden of making the required showing" that a matter is truly *de minimis* which naturally will turn on the assessment of particular circumstances. *Id.* The *Alabama Power* opinion concluded that "most regulatory statutes, including the CAA, permit such agency showings in appropriate cases." *Id.*

A notable limitation on the *de minimis* doctrine is that it does not authorize the agency to exclude something on the basis of a cost-benefit analysis. As the court explained, this "implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." *Id.* The court held that any "implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history." *Id.*

Since the early years of the PSD program, EPA has applied this *de minimis* principle to establish various types of values in the PSD regulations that may be used to exempt a source from all or part of the PSD program requirements. These include the significance levels (described previously), which are also called significant emissions rates, and air quality screening values called significant impact levels (SILs) and significant monitoring concentrations (SMCs).

The significant emission rates reflect levels below which EPA considers an emissions increase to be *de minimis.* 45 FR 52676, 52705–07. They are applied to allow modifications having minimal impact to proceed without the need for obtaining a PSD permit. *See* also 40 CFR 51.166(b)(23); 40 CFR 52.21(b)(23). In addition, these values may be used to eliminate the need for a permit to contain BACT limitations for a particular pollutant or to require a source to prepare an ambient air quality analysis for a particular pollutant that is not emitted or increased by significant amounts.

EPA has also relied on the *de minimis* doctrine to establish values that permitting authorities can use to show that a source that requires a PSD permit meets the necessary criteria to obtain a permit. Significant impact levels may be used in particular ways identified in prior EPA rules and guidance as part of an assessment of whether a source causes or contributes to a violation of air quality standards. Significant monitoring concentrations may be used to exempt sources from pre-construction monitoring requirements. *See* 75 FR 64864, 64890–97 (October 20, 2010).

3. Potential for Some Biomass Feedstocks To Have a *de minimis* Impact on Carbon Levels in the Atmosphere

As discussed previously in this preamble, EPA has sufficient information at this time to conclude that at least some biomass feedstocks that may be utilized to produce energy have a negligible impact on the net carbon cycle, such as residue material (*e.g.,* sawdust from milling operations) that would have decomposed under natural circumstances in a relatively short period of time (*e.g.,* 10–15 years). Given this negligible impact on the carbon cycle, the gain from regulating emissions from combustion of this feedstock for bioenergy could be considered to be trivial.

It appears that the potential may exist for EPA to determine that other types of biomass feedstocks would have a negligible impact on the net carbon cycle impact after further detailed examination of the science associated with biogenic $CO_2$ emissions. Thus, if EPA were to require all bioenergy facilities to limit emissions of $CO_2$ before this assessment is complete, it may later determine that such actions have yielded trivial gain. To avoid this outcome, and because of the administrative burdens described elsewhere in this preamble, EPA believes an initial deferral of the PSD requirements for bioenergy and other biogenic sources is justified at this time. However, the possibility also remains that more detailed examination of the science of biogenic $CO_2$ will demonstrate that the utilization of some biomass feedstocks for bioenergy production will have a significant impact on the net carbon cycle, making application of the PSD program requirements to such emissions necessary to fulfill Congressional intent. Thus, EPA is proposing only a temporary, rather than a permanent, deferral of PSD requirements for such sources at this time.

4. Given the Burden of Case-by-Case Analysis and Potential for *de minimis* Impact, Regulation at This Time Is Not Justified

Since finalizing the Tailoring Rule, EPA has gathered additional information concerning biomass through the CFI. The information collected to this point indicates that at present, attempting to determine the net carbon cycle impact of particular facilities combusting particular types of biomass feedstocks would require extensive analysis and would therefore entail extensive workload requirements. Further, methodologies are not sufficiently developed to assure that various permitting authorities would be able to reasonably and consistently perform the necessary calculations to determine the net atmospheric impact in particular instances.

The extensive workload requirements that PSD and Title V permit applications for bioenergy facilities and other sources of biogenic $CO_2$ emissions would entail would necessarily strain permitting authority resources and result in delays in processing permits for other applicants. Moreover, at present, devoting these limited permitting authority resources to biomass would not be productive in

light of the previously described possibility that EPA may ultimately determine that the utilization of some biomass feedstocks for bioenergy has a negligible or *de minimis* impact on the net carbon cycle.

Therefore, the information EPA has collected since promulgating the Tailoring Rule indicates that it is consistent with the rationale of the Tailoring Rule to defer on a temporary basis biogenic $CO_2$ emissions from PSD and Title V applicability, pending the detailed examination of the science associated with biogenic $CO_2$ emissions from stationary sources, including engaging with an independent scientific panel, and considering technical issues, that the Agency must resolve in order to account for biogenic $CO_2$ emissions in ways that are scientifically sound and also manageable in practice. As noted previously, EPA based the Tailoring Rule on the extreme administrative burdens to permitting authorities, and undue costs to sources, that would result from a literal application of the PSD and Title V 100/250 tpy statutory thresholds, as of January 2, 2011, when those requirements first apply to GHGs. EPA reasoned that, in accordance with the *Chevron* analytical framework for statutory construction, taking into account the "absurd results" and "administrative necessity" lines of cases, Congress did not intend that the PSD and Title V requirements apply at the 100/250 tpy statutory thresholds to GHG-emitting sources as of January 2, 2011, but rather that those requirements could be limited, at least initially, through a phase-in approach, to higher-emitting sources. Just as the extensive workload of processing permit applications from sources below the Tailoring Rule thresholds justified exempting those sources at least from the initial steps in the Tailoring Rule phase-in program, pending EPA's development of streamlining methods and the permitting authorities' acquisition of additional resources, so too the extensive workload of processing permit applications from biomass facilities justifies exempting those sources for a period of time, pending EPA's development of a consistent and practical methodology for determining net carbon cycle impacts (*see* section II.D). The EPA proposes in the present action that a three-year deferral will be adequate to allow time for the development of the methodology. In effect, EPA proposes in this action to revise the Tailoring Rule's phase-in approach to, in effect, defer the applicability of PSD and Title V to biogenic $CO_2$ emissions, relying in part, on the same rationale as EPA used to justify the Tailoring Rule's phase-in approach.

An alternative way to reduce the permitting burden would be to apply PSD and Title V to all facilities with biogenic $CO_2$ emissions that emit at or above the Tailoring Rule thresholds, but without making any effort to take into account net carbon cycle impacts. However, we believe that it is conceivable that as a result of the scientific examination of biogenic $CO_2$ emissions described in section II.D, we could conclude that the net carbon cycle impact for some biomass feedstocks is negligible. Accordingly, this could result in regulation that yields trivial gain as previously discussed. To avoid this outcome, given our current state of knowledge, we believe a case-by-case net carbon cycle impact analysis would be required in the course of reviewing each permit application. This burden would be in addition to the currently existing burden associated with obtaining a PSD or Title V permit. In light of the permitting burdens assessed in the Tailoring Rule, adding to that burden would frustrate the goals we sought to accomplish in the Tailoring Rule to ensure that the PSD and Title V programs can be administered in each State.

Furthermore, given the potential that the utilization of at least some biomass feedstocks may have a negligible impact on the net carbon cycle, engaging in this type of burdensome analysis may not be an optimal use of the limited resources of PSD and Title V permitting authorities. The additional scientific examination proposed by the EPA (*see* section II.D) could ultimately conclude that such resources could have been more effectively utilized to target $CO_2$ emissions that clearly have a detrimental impact on the net carbon cycle. Establishing a three-year deferral period for biogenic $CO_2$ emissions will enable EPA to consider the results of the detailed examination of the science of these emissions and undertake a rulemaking to determine the best way to account for biogenic $CO_2$ emissions when determining PSD applicability.

5. Subjecting Biogenic $CO_2$ Emissions to Permitting may be Counterproductive Because it Could Discourage Utilization of the Biomass Feedstock as Fuel

In some cases, the use of biological material as a fuel would clearly reduce net atmospheric $CO_2$ levels. In these cases, requiring permitting at this time, before conducting the detailed scientific examination discussed in section II.D that is required to develop an appropriate accounting system for bioenergy and other biogenic sources, might actually discourage projects that would have a net benefit for the atmosphere. For example, requiring permitting for facilities seeking to generate energy from the combustion of dead trees, especially those killed due to a widespread event like the mountain pine beetle epidemic, is likely to discourage the utilization of a readily available resource that would clearly reduce $CO_2$ emissions (*e.g.,* by removing and utilizing biomass material that would otherwise be susceptible to fire or decompose in the forest, leading to $CO_2$ and $CH_4$ emissions from decomposition). Likewise, combustion of $CH_4$-laden biogas (*e.g.*, from landfills or other large sources of methane) for energy production reduces overall $CO_2e$ emissions because of the higher GWP for $CH_4$.

*B. $CO_2$ Emissions That Are Deferred*

As discussed earlier, the deferral applies to biogenic $CO_2$ emissions from biogenic feedstocks, rather than to specific types of facilities. All non-biogenic emissions from a facility continue to be included for purposes of PSD applicability throughout the deferral period. However, the portion of the $CO_2$ emissions from a facility that result from biologically-derived material are deferred and not included for purposes of determining PSD applicability during the deferral period. If fossil-derived fuel is used within a facility to provide energy for a process that also uses biological material, the emissions associated with the fossil fuel must be counted toward PSD applicability regardless of the use of the biological material.

Specifically, the emissions that are deferred from applicability include, but are not limited to:

- $CO_2$ generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- $CO_2$ from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- $CO_2$ from fermentation during ethanol production;
- $CO_2$ from combustion of the biological fraction of municipal solid waste or biosolids;
- $CO_2$ from combustion of the biological fraction of tire-derived fuel; and
- $CO_2$ derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

*C. Non-$CO_2$ GHGs and Non-GHG Pollutants*

As explained in section II.A.4, $CO_2$ is unique among GHGs in that large and relatively rapid fluxes of $CO_2$ between land and atmosphere occur as part of the global biogeochemical system that maintains life on Earth.[20] Because other non-GHG pollutants and non-$CO_2$ GHGs do not participate in natural biogeochemical carbon cycles as $CO_2$ does, this frame of reference—in which sequestration outside the facility is considered as part of the justification for differential treatment in the PSD and Title V programs—is not relevant for those other pollutants. The deferral proposed here does not apply to GHG emissions from bioenergy or biogenic sources other than biogenic $CO_2$ emissions, nor does it apply to emissions of non-GHG pollutants.

*D. Mechanism for Deferral and State Implementation*

1. Adding to Definition of Subject to Regulation Established in Tailoring Rule

To implement the proposed deferral, we are proposing to revise the definition of the term "subject to regulation" that EPA adopted in the PSD and Title V GHG Tailoring Rule. We are proposing to add language to the definition of "subject to regulation" to exclude biogenic $CO_2$ emissions from stationary sources for a three-year period starting on the date the promulgated rule is published in the **Federal Register**.

The EPA's PSD regulations implement the PSD provisions of the CAA, and the language of these statutory provisions is broad enough to cover biogenic $CO_2$ emissions. The 100/250 tpy thresholds previously described originate from section 169 of the CAA, which applies PSD to any "major emitting facility" and defines the term to include any source with a potential to emit "any air pollutant" in an amount equal to or greater than 100 or 250 tpy, depending on the source category. The EPA's long-standing regulations interpret the PSD applicability provision that refers to "any air pollutant" to refer to any "regulated NSR pollutant," which includes any air pollutant "subject to regulation." In the final Tailoring Rule, EPA defined the term "subject to regulation" so that only GHG emissions from sources at or above specified thresholds (depending on the circumstances, 75,000 and/or 100,000 tpy on a $CO_2e$ basis) are pollutants subject to regulation. Thus, sources that emit amounts exceeding the established thresholds, are subject to PSD as long as that amount of GHG also exceeds 100/250 tpy on a mass basis. Similarly, in the Tailoring Rule, EPA defined "subject to regulation" under the Title V program regulations so GHG emissions from sources at or above 100,000 tpy on a $CO_2e$ basis are subject to regulation. We believe this is also the most efficient and effective approach for implementing the deferral of biogenic $CO_2$ emissions proposed in this rule.

Under this approach, some States may not need to undertake a regulatory or legislative action to implement the final rule if they are able to interpret the term "subject to regulation" used in existing State regulations in a manner consistent with the revised definition propose in this rule. A full description of the "subject to regulation" mechanism and the basis for its usage in the Tailoring Rule can be found in preamble text for that rulemaking.[21]

2. State Decisions To Adopt Deferral

Currently, a SIP-approved PSD program that applies to GHG-emitting sources applies to biogenic $CO_2$ emissions to the same extent as the program applies to all other GHGs. The same is true for an approved Title V program that applies to GHG-emitting sources. However, we believe that many States may not be inclined to apply their PSD or Title V programs to biogenic $CO_2$ emission sources for the same fundamental reasons that we are proposing to defer inclusions of these sources under the PSD and Title V permitting programs for a three-year period. As has been stated previously, one of our primary reasons for reconsideration of application of the Tailoring Rule requirements to biogenic $CO_2$ emissions sources[22] was to allow for a detailed examination of the science associated with biogenic $CO_2$ emissions and to consider the technical issues that the agency must resolve in order to account for biogenic $CO_2$ emissions in ways that are scientifically sound and also manageable in practice. We believe that most, if not all, States are facing similar needs for further scientific examination and analysis to properly consider biogenic $CO_2$ emissions under a permitting scenario in a way that will not disrupt the proper functioning and timeliness of permitting activity within the State PSD and Title V programs. We believe States will also benefit from the deferral period in order to have sufficient time to respond to the results of the data collection and examination of the science associated with biogenic emissions and to properly educate and train staff in the unique permitting issues associated with biogenic sources, including fundamental principles such as accurate emission estimation methodologies and full consideration of environmental impacts associated with these sources.

Thus, States that cannot interpret their PSD SIP or Title V requirements to incorporate the three-year deferral are strongly encouraged to submit SIP revisions or Title V program revisions to adopt the three-year deferral. However, EPA recognizes that some States may not have any, or may have only a few, sources that combust biomass, and may have adequate information and resources as to the nature of biogenic emissions from those sources. EPA requests each State to advise EPA by letter, during the comment period for this proposal, as to the number and type of biomass sources in the State and what the State expects to be the number and type of biomass sources over the next three years, and the State's resource constraints, to the extent that information is available. EPA solicits comment on how to treat States in light of this information and any preferences that the States may express.

3. Interim Guidance To Address Biogenic $CO_2$ Sources Under PSD Review

Concurrent with this proposal to defer application of the pre-construction and Title V permitting programs to biogenic $CO_2$ emissions, EPA is issuing interim guidance to help permitting authorities establish a basis for concluding that BACT (which is one of the statutory conditions for receiving a permit) for GHG emissions at such sources is combustion of biomass fuel by itself. As previously noted, under the Tailoring Rule, since January 2, 2011, large stationary sources that become subject to PSD for other pollutants have had to address GHG such as $CO_2$. Since this proposed rulemaking to defer biogenic $CO_2$ emissions from PSD permitting requirements for a three-year period is not planned to be finalized until the July 2011 timeframe, there will be an interim period when such biogenic $CO_2$ emissions will still need to be addressed in making PSD permitting determinations since the deferral will not yet be in effect.[23] For example, if a

[20] U.S. Greenhouse Gas Inventory Fast Facts (April 2010.). *http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-Fast-Facts-2008.pdf.*

[21] 75 FR 31579–81 (June 3, 2010).

[22] Letter from Honorable Lisa Jackson, Administrator, U.S. EPA, to R. Martella, Jr., R. Gray, and J. Coleman, Sidley Austin, LLP. (January 12, 2011.). *http://www.epa.gov/NSR/ghgdocs/McCarthytoMartella.pdf.*

[23] As of January 2, 2011, permitting authorities and sources subject to Title V need to address any

Continued

PSD permit is issued before the planned July 2011 finalization of this rulemaking that would defer biogenic $CO_2$ emissions from PSD applicability, then existing regulations might require that the PSD permit meet the BACT requirement for GHG emissions, including biogenic $CO_2$ emissions, during the interim period of time.

In its November 2010 GHG permitting guidance, EPA explicitly recognized that a permitting authority might determine that certain types of biomass by themselves are BACT for GHG emissions after considering the environmental, energy, and economic benefits of using the fuel. EPA's supplemental guidance provides a basis that permitting authorities may use to support the conclusion, during the interim period until the biomass deferral rulemaking is finalized, that BACT for biogenic $CO_2$ emissions from applicable sources is the combustion of biomass fuel by itself.

*E. Requesting Comment*

Given the detail and rationale above, EPA has concluded this approach to defer application of PSD and Title V permitting requirements to biogenic $CO_2$ emissions is appropriate. However, EPA is requesting comment on this proposal, including the approach, the rationale and other considerations the Agency should take into account.

## IV. Statutory and Executive Order Review

*A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. Instead, this action will reduce costs incurred by any facility with biogenic $CO_2$ emissions, as well as permitting authorities, relative to the costs that would be incurred if EPA did not revise the rule.

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 has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and Title V (*see* 40 CFR parts 70 and 71) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

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

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

After considering the economic impacts of this proposed action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We believe that this proposed rule will relieve the necessary extensive analysis and corresponding extensive workload requirements for most affected facilities, including small businesses. As a result, the program changes provided in this rule are not expected to result in a significant economic impact on a substantial number of small entities. In addition, EPA determined that the proposed rulemaking would not have a significant impact on small governmental jurisdictions. The EPA has therefore concluded that this proposed action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed action on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act (UMRA)*

This proposed 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. Only those few States whose permitting authorities do not implement the Federal PSD and Title V rules by reference in their SIPs will have a small increase in burden. These States will have to amend their corresponding SIPs to incorporate the proposed amendments from today's action, as the deferral that we propose will not otherwise apply to the PSD and Title V programs. Thus, this rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed earlier, this rule is expected to result in an administrative burden reduction for all affected permitting authorities and permittees, including small governments.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132. These proposed amendments would simplify and reduce the burden on implementing the PSD and Title V operating permit programs, by deferral of PSD and Title V application requirements to biogenic $CO_2$ emissions at a facility. Thus, EO 13132 does not apply to this action.

applicable requirements for GHG, such as PSD permit requirements, consistent with the requirements of 40 CFR part 70 and approved State programs. However, GHG emissions will not be used to establish Title V applicability before July 1, 2011.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action 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" (59 FR 22951, 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."

The EPA has concluded that this proposed rule may have Tribal implications. However, it will neither impose substantial direct compliance costs on Tribal government, nor preempt Tribal law. There are no Tribal authorities currently issuing major NSR permits; however, this may change in the future.

The EPA specifically solicits additional comment on this proposed action from Tribal officials.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order 492 has the potential to influence the regulation. This action is not subject to Executive Order 13045 and does not establish an environmental standard intended to mitigate health or safety risks.

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

This proposed rule is not a "significant energy action" as defined in EO 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects because this action would not create any new requirements for sources in the energy supply, distribution, or use sectors.

*I. National Technology Transfer and Advancement Act*

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

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment because any impacts that it will have will be global in nature and will not affect local communities or populations in a manner that adversely affects the level of protection provided to human health or the environment.

*K. CAA Section 307*

Pursuant to section 307(d)(1)(J) and (V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(J) provides that the provisions of section 307(d) apply to the promulgation or revision of regulations under Part C of Title I of the Clean Air Act, which covers the PSD program. Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine." The Administrator determines that section 307(d) applies to the Title V program components of this rule.

Furthermore, this action has a nationwide scope and effect. Thus, under section 307(b)(1) of the Act, judicial review of the final action on this proposal will be available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit.

**List of Subjects**

*40 CFR Part 51*

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

*40 CFR Part 52*

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

*40 CFR Part 70*

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

*40 CFR Part 71*

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

Dated: March 11, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

## PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

## Subpart I—[Amended]

2. Section 51.166 is amended by revising paragraph (b)(48)(ii)(*a*) to read as follows:

**§ 51.166 Prevention of significant deterioration of air quality.**

* * * * *

(b) * * *

(48) * * *

(ii) * * *

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph (b)(48)(ii)(*a*), prior to [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL DEFERRAL RULE], the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

## PART 52—[AMENDED]

3. The authority citation for part 52 continues to read as follows:

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

## Subpart A—[Amended]

4. Section 52.21 is amended by revising paragraph (b)(49)(ii)(*a*) to read as follows:

### § 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(49) * * *

(ii) * * *

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph, prior to [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL DEFERRAL RULE], the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

## PART 70—[AMENDED]

5. The authority citation for part 70 continues to read as follows:

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

6. Section 70.2 is amended by revising paragraph (2) of the definition of "Subject to regulation" to read as follows:

### § 70.2 Definitions.

* * * * *

*Subject to regulation* * * *

(2) The term tpy $CO_2$ equivalent emissions ($CO_2e$) shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy $CO_2e$. For purposes of this paragraph, prior to [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL DEFERRAL RULE], the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

## PART 71—[AMENDED]

7. The authority citation for part 51 continues to read as follows:

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

## Subpart A—[Amended]

8. Section 71.2 is amended by revising paragraph (2) of the definition of "Subject to regulation" to read as follows:

### § 71.2 Definitions.

* * * * *

*Subject to regulation* * * *

(2) The term tpy $CO_2$ equivalent emissions ($CO_2e$) shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy $CO_2e$. For purposes of this paragraph, prior to [DATE 3 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL DEFERRAL RULE], the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

[FR Doc. 2011–6438 Filed 3–18–11; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Parts 60 and 63

**[EPA–HQ–OAR–2002–0058; EPA–HQ–OAR–2006–0790; EPA–HQ–OAR–2003–0119; FRL–9272–7]**

**RIN 2060–AQ25; RIN 2060–AM44; RIN 2060–AO12**

## National Emission Standards for Hazardous Air Pollutants; Notice of Reconsideration

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of reconsideration of final rules.

**SUMMARY:** EPA is initiating a reconsideration process with respect to certain aspects of the national emission standards for hazardous air pollutants (NESHAP) for new and existing sources for Major Source Industrial, Commercial, and Institutional Boilers and Process Heaters; the NESHAP for new and existing sources for Area Source Industrial, Commercial, and Institutional Boilers; and standards of performance for new Commercial and

Industrial Solid Waste Incineration Units and emission guidelines for existing Commercial and Industrial Solid Waste Incineration Units published as final rules elsewhere in this issue of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters: Mr. Brian Shrager, Energy Strategies Group, Sector Policies and Programs Division, (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541–7689; Fax number (919) 541–5450; E-mail address: *shrager.brian@epa.gov.*

National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers: Mr. Jim Eddinger, Energy Strategies Group, Sector Policies and Programs Division, (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5426; Fax number (919) 541–5450; e-mail address: *eddinger.jim@epa.gov.*

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units: Ms. Toni Jones, Natural Resource and Commerce Group, Sector Policies and Programs Division (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0316; fax number: (919) 541–3470; e-mail address: *jones.toni@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Reconsideration of the Emissions Standards for Major Boilers and Process Heaters, Area Source Boilers, and Commercial and Industrial Solid Waste Incinerators*

In separate final rules documents published elsewhere in today's **Federal Register**, EPA is issuing emissions standards for new and existing sources in the following source categories: Major source boilers and process heaters, area source boilers, and commercial and industrial solid waste incinerators. In this notice, we are convening a proceeding for reconsideration of certain portions of these emissions standards. The Agency is in the process of developing a proposed reconsideration notice that identifies the specific elements of the rules for which we believe further public comment is appropriate and any provisions that we propose to modify after more fully evaluating the data and comments already received. At that time, we may also seek public comment on other aspects of the portions of the rules we decide to reconsider in addition to other provisions in these rules. We will also evaluate any petitions submitted to the Agency by members of the public requesting that the Agency reconsider any aspects of these rules. We intend to consider for inclusion in any forthcoming proposed reconsideration notice all additional issues for which we determine that reconsideration is appropriate.

We recognize that certain issues of central relevance to these rules arose after the period for public comment or may have been impracticable to comment upon. Therefore, we believe that reconsideration is appropriate under section 307(d)(7)(B) of the Clean Air Act. While we have taken final action on the rules identified above, and believe that the final rules reflect reasonable approaches consistent with the requirements of the Clean Air Act, some of the issues identified in the comments raise difficult technical issues that we believe may benefit from additional public involvement.

Therefore, we are initiating reconsideration of a number of issues in the major and area sources boilers rules, and the commercial and industrial solid waste incineration rule. The following issues concern provisions in the final rules that are appropriate and consistent with the requirements of the Act, but for which we believe reconsideration and additional opportunity for public review and comment should be obtained:

- Revisions to the proposed subcategories in the major source boilers rule.
- Establishment of a fuel specification in the major source boilers rule through which gas-fired boilers that use a fuel other than natural gas may be considered Gas 1 units.
- Establishing work practice standards for limited use major source boilers.
- Establishment of standards for biomass and oil-fired area source boilers based on generally available control technology.
- Revision of the proposed subcategory for energy recovery units for CISWI units.
- Establishment of limitations on fuel switching provisions for CISWI units.
- Revision to the proposed definition of CISWI to exclude cyclonic burn barrels.
- Providing an affirmative defense for malfunction events for major and area source boilers and for CISWI units.

The following additional issues concern actions taken in the final rules for which we believe reconsideration under section 307(d) and, potentially, further revisions may be warranted because they involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment upon:

- Revisions to the proposed monitoring requirements for carbon monoxide for major source boilers and for CISWI units.
- Revisions to the proposed dioxin emission limit and testing requirement for major source boilers.
- Establishing a full-load stack test requirement for carbon monoxide coupled with continuous oxygen monitoring for major source boilers and CISWI units.
- Establishing a definition of "homogenous waste" in the CISWI rule.
- Setting PM standards under generally available control technology for oil-fired area source boilers.
- Certain findings regarding the applicability of Title V permitting requirements for area source boilers.

Additional information concerning issues and concerns presented by commenters can be found in the dockets accompanying each of the rules under reconsideration in today's notice.

## List of Subjects

*40 CFR Part 60*

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

*40 CFR Part 63*

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

Dated: February 21, 2011.

**Lisa P. Jackson,**

*Administrator.*

[FR Doc. 2011–4490 Filed 3–18–11; 8:45 am]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 CFR Part 81**

**[Docket Number NIOSH–209]**

**RIN 0920–AA39**

# Guidelines for Determining Probability of Causation Under the Energy Employees Occupational Illness Compensation Program Act of 2000; Revision of Guidelines on Non-Radiogenic Cancers

**AGENCY:** National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, DHHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Health and Human Services (HHS) is proposing to treat chronic lymphocytic leukemia (CLL) as a radiogenic cancer under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). Under current guidelines HHS promulgated as regulations in 2002, all types of cancers except for CLL are treated as being potentially caused by radiation and hence as potentially compensable under EEOICPA. HHS proposes to reverse its decision to exclude CLL from such treatment.

**DATES:** The Department invites written comments on this Notice of Proposed Rulemaking from interested parties. Comments must be received by June 20, 2011.

**ADDRESSES:** You may submit comments, identified by "RIN 0920–AA39," by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* NIOSH Docket Officer, *nioshdocket@cdc.gov.* Include "RIN 0920–AA39" and "42 CFR 81.30" in the subject line of the message.
- *Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments will be posted without change to *http://www.regulations.gov* and *http://www.cdc.gov/niosh/docket/archive/docket209.html,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or *http://www.cdc.gov/niosh/docket/archive/docket209.html.*

**FOR FURTHER INFORMATION CONTACT:** Stuart Hinnefeld, Director, Division of Compensation Analysis and Support,[1] National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS–C46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *dcas@cdc.gov.*

**SUPPLEMENTARY INFORMATION:**

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  I. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)
  J. Plain Writing Act of 2010

## I. Public Participation

Interested persons or organizations are invited to participate in this rulemaking by submitting written views, arguments, recommendations, and data. Comments are invited on any topic related to this proposal. In addition, HHS invites comments specifically on the following questions related to this rulemaking:

(1) Does epidemiological and other scientific research support finding that CLL is caused by radiation, and what are the major limitations of the determination (whether affirmative or negative)?

(2) If CLL were to be covered under EEOICPA, does the risk model proposed by the National Institute for Occupational Safety and Health (NIOSH) use the best available science and methodological approaches to express the dose-response relationship between radiation exposure and CLL? Does the approach NIOSH is taking in this package appropriately account for the uncertainty associated with the limited evidence of radiogenicity? In this context, did NIOSH make use of appropriate biological and epidemiological information in the development of its proposed model? If not, please cite specific research studies that NIOSH should have considered as well as alternative modeling approaches that could also be considered.

Comments submitted by e-mail or mail should be addressed to the NIOSH Docket Officer, titled "NIOSH Docket #209," and should identify the author(s), return address, and a phone number, in case clarification is needed. Comments can be submitted by e-mail to: *nioshdocket@cdc.gov.* E-mail comments may be provided as e-mail text or as a file attachment. Printed comments can be sent to the NIOSH Docket Office at the address above. All communications received on or before the closing date for comments will be fully considered by HHS.

All comments submitted will be available for examination in the rule docket (a publicly available repository of the documents associated with the rulemaking) both before and after the closing date for comments. A complete electronic docket containing all comments submitted will be available at *http://www.cdc.gov/niosh/docket/archive/docket209.html* and *http://www.regulations.gov,* or comments will be available in hard-copy by request. NIOSH includes all comments received without change in the docket, including any personal information provided.

## II. Background

### *A. Introduction*

The Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384–7385, established a compensation program to provide a lump-sum payment of $150,000 and prospective medical benefits as compensation to covered employees suffering from designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the Department of Energy (DOE) and certain of its vendors, contractors, and subcontractors. This legislation also provided for lump-sum payments for certain survivors of these covered employees.

[1] The name of the NIOSH Office of Compensation Analysis and Support (OCAS) was changed to the Division of Compensation Analysis and Support (DCAS) in March 2010.

Under Executive Order 13179 ("Providing Compensation to America's Nuclear Weapons Workers"), the Department of Labor (DOL) has primary responsibility for administering the compensation program. HHS performs several technical and policymaking roles in support of the DOL program. One of these is to develop guidelines, by regulation, to be used by DOL to assess the likelihood that an employee with cancer developed that cancer as a result of exposure to radiation in performing his or her duty at a DOE facility or an atomic weapons employer facility. HHS published a final rule establishing these "probability of causation" guidelines on May 2, 2002 (67 FR 22296) under 42 CFR part 81.

The HHS probability of causation guidelines comprise a set of policies and procedures by which DOL determines whether it is "at least as likely as not" that the cancer of a nuclear weapons employee was caused by radiation doses the employee incurred while employed at a facility both involved in the production of nuclear weapons and covered under EEOICPA. These procedures direct DOL to use one or more appropriate quantitative risk assessment models to calculate the probability that a cancer was caused by the relevant radiation doses. The risk models, originally developed by the National Cancer Institute (NCI) and again revised by an expert work group, chaired by NCI, in 2002 for use under EEOICPA, are contained within a computer program called the NIOSH Interactive RadioEpidemiological Program (NIOSH–IREP).[2] NIOSH–IREP contains a risk model for every type of cancer covered by an EEOICPA claim, except for CLL. The guidelines designate CLL as non-radiogenic, and hence require DOL to assign a probability of causation value of "zero."

There were two related scientific reasons for designating CLL as non-radiogenic at the time the HHS guidelines were promulgated in 2002. The first was that the epidemiological studies did not demonstrate radiation as the cause of CLL, a conclusion reached by a number of expert scientific committees, as well as by NIOSH.[3] This evidence included studies of a variety of designs on populations with a variety of high radiation exposures, including British ankylosing spondylitis patients treated with x-rays;[4] U.S., Canadian, and European women exposed to radiation during treatment for uterine cancer;[5] nuclear workers in the United Kingdom and internationally;[6] and Japanese atomic bomb survivors from World War II.[7] No major epidemiological study as of that date had found a statistically significant increase in the risk of CLL associated with radiation exposure, let alone a dose-response relationship.[8]

The second reason was that, even if NIOSH had determined that CLL should be treated as radiogenic, NIOSH scientists judged it would not have been feasible to develop a quantitative risk model, specifying a dose-response relationship between radiation and CLL, given the existing scientific evidence at that time. Hence, it was not feasible to include CLL as a radiogenic cancer under the guidelines.

*B. NIOSH Reconsideration of CLL*

Basis for Reconsideration

In the original technical documentation for NIOSH–IREP, the discussion of the rationale for excluding CLL from consideration under EEOICPA stated that this decision would be revisited as new scientific information became available. Although HHS received little comment on the designation of CLL as non-radiogenic during the rulemaking that established the probability of causation guidelines under EEOICPA, NIOSH has steadily since heard concerns about this policy decision from EEOICPA claimants, their representatives, and others.

In response to stakeholder input, the Congressional appropriations language for fiscal year 2004 directed NIOSH to conduct epidemiological research and other activities to "establish the scientific link between radiation exposure and the occurrence of chronic lymphocytic leukemia."[9] To this end, a focus on the radiogenicity of CLL was added to existing research conducted under the NIOSH Occupational Energy Research Program (OERP). On July 21, 2004, OERP convened a public meeting, during which a panel of six experts in epidemiologic and molecular CLL research, unaffiliated with NIOSH, met to: (1) Discuss available research strategies for investigating the potential relationship between the incidence of CLL and worker exposures to ionizing radiation; and (2) identify gaps in current research.[10] The consensus among the panelists was that the current scientific evidence was inconclusive with respect to CLL's association with ionizing radiation and additional research was required to definitively answer this question.

Subsequent to the July meeting, five additional subject matter experts unaffiliated with NIOSH were asked by NIOSH's Division of Compensation Analysis and Support to provide their individual judgments as to whether

> the evidence of an association, or lack thereof, between radiation exposure and the risk of developing CLL [is] sufficient to continue to regard CLL as a non-radiogenic cancer and to continue to exclude it, *a priori,* from eligibility for compensation under EEOICPA.[11]

This second round of review was undertaken because the purpose of the July 2004 expert panel convened by OERP was focused on how to definitively address the question of radiogenicity, rather than on the narrower context of the continued exclusion of CLL from consideration under the unique conditions prescribed under EEOICPA. That is, EEOICPA requires that consideration be given to the uncertainty associated with risk models and, in fact, requires that probability of causation (and hence, the compensation decision) be evaluated at the upper 99th percentile of the credibility level of the distribution of

[2] An interactive version of NIOSH–IREP is available on the Internet at: *https://www.niosh-irep.com/irep_niosh/.*

[3] 67 FR 22296, 22302 (May 2, 2002) (codified at 42 CFR part 81).

[4] Darby SC, Doll R, Gill SK, *et al.* Long-term mortality after a single treatment course with X-rays in patients treated for ankylosing spondylitis. *Br. J. Cancer.* 1987;55:179–190.

[5] Curtis RE, Boice JD, Stovall M, *et al.* Relationship of leukemia risk to radiation dose following cancer of the uterine corpus. *J. Natl. Cancer Inst.* 1994;86:1315–1324.

[6] Muirhead CR, Goodill AA, Haylock RGE, *et al.* Occupational radiation exposure and mortality: second analysis of the National Registry for Radiation Workers. *J. Radiol. Prot.* 1999;19:3–26.

Cardis E, Gilbert ES, Carpenter L, *et al.* Effects of low doses and low dose rates of external ionizing radiation: cancer mortality among nuclear industry workers in three countries. *Radiat. Res.* 1995;142:117–132.

[7] Preston DL, Kusumi S, Tomonaga M, *et al.* Cancer incidence in atomic bomb survivors. Part III: Leukemia, lymphoma and multiple myeloma, 1950–1987. *Radiat. Res.* 1994;137:S68–S97.

[8] A dose-response relationship between radiation and CLL would be a finding that the incidence of CLL among populations increases with increases in the amount of radiation dose. With such a relationship, populations with a moderate amount of radiation dose would be found to have a moderate frequency of CLL, populations with a high amount of radiation dose would be found to have a high frequency of CLL, and populations with a very high amount of radiation dose would be found to have a very high frequency of CLL.

[9] NIOSH publication 2006–100. *Report of the public meeting to seek input on gaps in chronic lymphocytic leukemia (CLL) radiogenicity research, held July 21, 2004.*

[10] A summary of the proceedings of this meeting can be found in: NIOSH Publication 2006–100. *Report of the public meeting to seek input on gaps in chronic lymphocytic leukemia (CLL) radiogenicity research, held July 21, 2004.*

[11] NIOSH, Office of Compensation Analysis and Support (OCAS). *Chronic lymphocytic leukemia (CLL): reconsideration of exclusion from eligibility for compensation under EEOICPA.* 2005. This document is included in the docket for this rulemaking.

possible outcomes. Because of this, the IREP program was designed to include cancers whose central estimate of the risk coefficient, while not statistically significant, may be significantly greater than 1 at the upper uncertainty limit and thus produce a probability of causation greater than or equal to 50 percent (*i.e.,* be compensable).

The experts chosen for this review were selected by NIOSH based on their past experience in the area of radiation epidemiology, with the goal of obtaining a diverse range of perspectives on the matter. Each of the five experts consulted posited a scientific opinion about the weight of the evidence. The full text of these opinions is available in the docket for this rulemaking.

One reviewer concluded that "the available evidence is insufficient to rule out an association between ionizing radiation and CLL." [12]

A second reviewer found no evidence on epidemiologic grounds to support the contention that CLL is induced by radiation, stating that:

> From the scientific point of view, this evidence could be interpreted as the absence of a convincing association between radiation exposure and subsequent CLL. If risks are present, but, are not identified in epidemiological studies, then they are certainly much smaller than the risks estimated for other types of leukemia.[13]

The reviewer did comment, however, that CLL remains one of the most controversial issues in radiation epidemiology:

> Though in the past it was thought to be definitely non-radiogenic, recent discoveries, particularly from genetic and molecular studies, provide evidence that lymphatic cancers may differ to a great degree from other types of leukemia. If risks are present, they are probably so small as to render them virtually undetectable in individual studies under currently available scientific epidemiological methods.[14]

This reviewer refrained from offering an opinion on whether CLL should be included in the list of cancers that are potentially compensable under EEOICPA and concluded "from an epidemiological point of view it is not possible to prove that there is no risk of CLL due to occupational radiation exposure. It is only possible to say that currently we do not have solid scientific evidence to say that CLL is radiogenic." [15]

A third reviewer concluded that

> In fact, the scientific evidence pertaining to the molecular mechanisms of CLL induction weighs heavily towards the conclusion that CLL is similar to other hematological malignancies whose etiology involves structural changes on the chromosomal level that cause mutational changes on the molecular level, altering important cellular functions, and, ultimately, leading to malignant transformation of a cell. The weight of this scientific evidence is in support of the conclusion that the somatic mutations that contribute to the genesis of CLL can be produced by ionizing radiation exposure.[16]

He concluded by stating:

> Available scientific evidence suggests that CLL incidence will be increased by exposure to ionizing radiation. Scientific evidence does not provide a sufficient basis for regarding CLL as non-radiogenic.[17]

A fourth reviewer concluded his review by stating "my expert opinion supports including CLL as a radiogenic cancer and against the continuing, and it seems to me, arbitrary practice of exclusion." [18]

A fifth reviewer found that "[t]he body of scientific evidence indicates that chronic lymphocytic leukemia (CLL) is not caused by exposure to ionizing radiation at any level of dose." [19] He concluded that,

> based on epidemiologic studies of radiation finding no evidence for an association with CLL, coupled with the etiologic and clinical differences between CLL and the other forms of leukemia that are caused by radiation, CLL should not be considered a radiation-inducible cancer.[20]

This reviewer also provided a counterargument to Reviewer #3's position that the type of genetic damage that may be involved in the carcinogenesis of CLL, namely deletions of chromosomal material, can be caused by radiation, which is a known clastogen (an agent that breaks chromosomes). According to Reviewer #5, other carcinogenic clastogens besides radiation (*e.g.,* benzene and tobacco smoke) found by epidemiological studies to cause myeloid leukemia, have also been found not to cause CLL, and hence proposes that another, unspecified carcinogenic mechanism must operate for CLL.[21]

In sum, of the five reviewers, three offered their support for the consideration of CLL as radiogenic for the purposes of potential compensation. Three reviewers, Reviewer #1, Reviewer #2, and Reviewer #3, offered the opinion that, while the evidence presented by the epidemiology studies reviewed in 2002 might not have provided conclusive proof that CLL is caused by ionizing radiation, genetic studies offer a perspective much different from that demonstrated by epidemiology studies and should be considered. The only stated opposition to including CLL came from Reviewer #5, who recognized that the conclusions reached by NIOSH with regard to other cancers deemed potentially compensable were based on NIOSH's stated policy to "err on the side of the claimant when the state of scientific knowledge is lacking." [22]

Finally, NIOSH asked four subject matter experts to review a 2009 draft report of the CLL risk model. Of those reviewers, two also provided reviews in 2004 (Reviewers #2 and #3). The 2009 reviewers were not charged specifically with reviewing the evidence of radiogenicity and were asked to evaluate the proposed risk model (discussed below) based on the premise that CLL has a probability of causation greater than zero. According to the NIOSH summary of the 2009 reviews,

> [t]he reviewers did not disagree with our basic conclusion, namely that CLL could be radiogenic, and that, from an epidemiological perspective, we can only conclude that we currently do not have solid scientific evidence of a well-defined dose-response from the LSS [Life Span Study of Japanese atomic bomb survivors] data, but not that there is no risk of CLL due to occupational radiation exposure.[23]

Of these reviewers, only one premised his opinion about CLL radiogenicity on the compensation program's inclusion of other cancers with similarly weak

[12] Crowther, MA. *Letter to Centers for Disease Control and Prevention.* Report submitted to NIOSH, November 17, 2004. A copy of this report is available in the docket for this rulemaking.

[13] Zablotska, L. *Comments on the arguments for covering chronic lymphocytic leukemia under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA) advanced by its stakeholders in "Chronic Lymphocytic Leukemia: Reconsideration of Exclusion from Eligibility for Compensation under EEOICPA.*" Report submitted to NIOSH, December 16, 2004. A copy of this report is available in the docket for this rulemaking.

[14] *Id.*

[15] *Id.*

[16] Richardson DB. *Chronic lymphocytic leukemia: Reconsideration of exclusion from eligibility for compensation under EEOICPA.* Report submitted to NIOSH, November 2004. A copy of this report is available in the docket for this rulemaking.

[17] *Id.*

[18] Ozonoff, D. *Letter to Russell Henshaw, NIOSH, regarding Reconsideration of CLL.* Report submitted to NIOSH, December 1, 2004. A copy of this report is available in the docket for this rulemaking.

[19] Boice, JD. *Reconsideration of chronic lymphocytic leukemia for purposes of compensation.* Report submitted to NIOSH, January 7, 2005. A copy of this report is available in the docket for this rulemaking.

[20] *Id.*

[21] *Id.*

[22] NIOSH. *Charge to reviewers: Chronic lymphocytic leukemia: reconsideration of exclusion from eligibility for compensation under EEOICPA.* Undated. This document is available in the docket for this rulemaking.

[23] NIOSH, Office of Compensation Analysis and Support (OCAS). *Response to review comments on draft report: development of a CLL risk model for NIOSH–IREP.* December 1, 2009. This document is available in the docket for this rulemaking.

evidence of radiogenicity; the other 2009 reviewers addressed only the science. One of those individuals, Reviewer #2 in the 2004 review, reversed her prior opinion that epidemiological evidence in support of CLL's radiogenicity is lacking and stated that

> new evidence that came into light in the year since the report has been issued, provides evidence for the hypothesis advocated by [the report's authors] that CLL may be radiogenic and that its risk profile may be similar to that previously observed for other types of leukemia and/or [non-Hodgkin's lymphoma]. These studies are of particular importance because they provide evidence from the low-dose studies, a dose range of primary interest for occupationally exposed workers in the U.S.[24]

These reviews [25] have led NIOSH to better appreciate some of the possible limitations of the epidemiological evidence, and particularly the substantial reliance on mortality studies for a disease that may not always be recorded as the primary cause of death, being principally a slowly developing cancer of old age. An examination of the long latency period between initial radiation exposure and CLL diagnosis has led some researchers to conclude that many epidemiology studies fail to "appropriately account for a protracted induction latency, and morbidity period between radiation exposure and CLL mortality." [26] Another limitation stems from the low incidence of CLL, resulting in studies limited by low statistical power.[27] NIOSH's review of both epidemiological and biological research has demonstrated that evidence for the radiogenicity of CLL is growing, and that "[i]rradiation may have been given a clean bill of health with respect to CLL with less than adequate evidence." [28]

Under EEOICPA, NIOSH is required to develop guidelines using the 1985 radioepidemiological tables (or its successor) in computing probability of causation. The Act further requires that the probability of causation decision be made at the upper 99 percent credibility level.[29] When the original 1985 radioepidemiological tables were revised in 2002, the expert working group (chaired by NCI) included additional cancers that did not have statistically significant excess relative risk coefficients. The logic for doing so is based on the fact that, if one accounts for uncertainty, it is possible for the upper limit for the risk coefficient to be greater than 1, even if the central estimate of risk is not statistically significant. The technical basis behind the revised radioepidemiological tables,[30] including the provision for including cancers with non-statistically significant central estimates of risk, was documented in a report reviewed by the National Academy of Sciences (NAS). NAS supported the inclusion of cancers without demonstrated radiogenicity, but proposed an approach for calculating the Assigned Share for those cancers that differed from the approach used for cancers with demonstrated radiogenicity in the 1990 draft report of the working group to revise the radioepidemiological tables. NIOSH–IREP includes models and calculates probability of causation for all cancers except CLL. It does so by considering the uncertainty associated with the excess relative risk (ERR) values and using the 99th percentile of that probability distribution in the probability of causation calculation. Given that the law requires the use of the upper 99 percent credibility level in making compensation decisions, [31] the inclusion of CLL despite the limited evidence of radiogenicity, is considered appropriate by NIOSH. In short, the NIOSH–IREP risk models for those cancers lacking statistically significant central estimates of risk account for the uncertainty inherent in epidemiological studies of the association between ionizing radiation exposure and cancer.

NIOSH also considered the classification of CLL in relation to other lymphomas (although CLL is designated a leukemia, clinically and etiologically it appears to be a lymphoma [32]) of primary importance to this effort. CLL is now classified as a form of non-Hodgkin's lymphoma (NHL) by both NCI and the World Health Organization.[33] Under contemporary classification schemes, NHL comprises CLL and small lymphocytic lymphoma (SLL); SLL and NHL are both compensable under EEOICPA.

Finally, in the Agency's judgment, including CLL as a potentially compensable cancer would be in keeping with already-established Federal policy. The U.S. Department of Veterans Affairs (VA) recognizes CLL as a form of non-Hodgkin's lymphoma, and thus a radiogenic cancer, for the purpose of compensation under the Nuclear Test Personnel Review Program.[34]

With respect to the radiogenicity of CLL, the Agency finds the evidence of radiogenicity offered by epidemiology studies to be non-determinative, but no longer believes that it is possible to state that the probability of causation equals zero. NIOSH has weighed the non-determinative epidemiology evidence, the mechanistic argument for CLL causation, similarities between CLL and other compensated cancers, the classification of CLL, and the treatment of CLL as a potentially-compensable radiogenic cancer by the VA, and finds sufficient evidence to include CLL as a compensable cancer under EEOICPA, and thus allow claimants with CLL to be eligible for dose reconstruction. The remaining issue NIOSH had to address to pursue such a policy was the practical matter of developing a model with a quantitative dose-response relationship for CLL.

## Risk Model

The NIOSH efforts to develop a quantitative radiation risk model for CLL began with a review of key papers on the epidemiological, molecular, and clinical bases of CLL, including but not limited to those cited by Richardson *et*

[24] Zablotska LB. *Evaluation of a prototype CLL risk model for potential inclusion in the computer program NIOS–IREP.* Report submitted to NIOSH, September 2009. A copy of this report is available in the docket for this rulemaking.

[25] A timeline of the various reviews initiated by NIOSH is available in Appendix A.

[26] Richardson DB, Wing S, Schroeder J, *et al.* Ionizing radiation and chronic lymphocytic leukemia. *Environ. Health Persp.* 113:1–5. 2005.

[27] *Id.*

[28] Hamblin TJ. Have we been wrong about ionizing radiation and chronic lymphocytic leukemia? *Leuk. Res.* 2008;32:523–525.

[29] 42 U.S.C. 7348n(c)(3)(A).

[30] National Academy of Sciences. *A Review of the Draft Report of the NCI–CDC Working Group to Revise the 1985 Radioepidemiological Tables.* National Academies Press. 2000.

[31] 42 U.S.C. 7348n(c)(3)(A).

[32] Harris NL, Jaffe ES, Diebold J, Flandrin G, Muller-Hermelink HK, Vardiman J, Lister TA, and Bloomfield CD. World Health Organization classification of neoplastic diseases of the hematopoietic and lymphoid tissues: Report of the clinical advisory committee meeting—Airlie House, Virginia, November 1997. *J. Clin. Oncol.* 17:3835–3849.

Boice JD. *Reconsideration of chronic lymphocytic leukemia for purposes of compensation.* January 7, 2005.

National Cancer Institute. *Adult non-Hodgkin lymphoma treatment (PDQ®): health professional version.* Modified July 8, 2010. *http://www.cancer.gov/cancertopics/pdq/treatment/adult-non-hodgkins/healthprofessional/allpages.* Accessed July 15, 2010.

[33] National Cancer Institute. *Adult non-Hodgkin lymphoma treatment (PDQ®): health professional version.* Modified July 8, 2010. *http://www.cancer.gov/cancertopics/pdq/treatment/adult-non-hodgkins/healthprofessional/allpages.* Accessed July 15, 2010.

Harris NL, Jaffe ES, Diebold J, *et al.* World Health Organization classification of neoplastic diseases of the hematopoietic and lymphoid tissues: Report of the clinical advisory committee meeting—Airlie House, Virginia, November 1997. *J. Clin. Oncol.* 1999;17:3835–3849.

[34] Kocher DC and Apostoaei JA. *Screening doses for induction of cancers calculated with the Interactive RadioEpidemiologic Program (IREP).* Fort Belvoir, VA: U.S. Department of Defense, Defense Threat Reduction Agency, March 2007. Technical Report DTRA–TR–07–4.

*al.*[35] and by Boice; [36] the NIOSH Annotated Bibliography for CLL; [37] the CLL special issue of the *British Journal of Haematology;* [38] and the Biological Effects of Ionizing Radiation (BEIR) VII committee.[39] NIOSH also compiled information pertinent to developing the new model: Sex and age-specific background incidence rates for CLL from the NCI's Surveillance, Epidemiology, and End Results (SEER) registry for the U.S. population [40] and from the International Agency for Research on Cancer (IARC) databases for the Japanese population.[41]

NIOSH also evaluated epidemiology study data potentially bearing on the issue of latency of CLL,[42] and created a risk model for CLL by modifying the existing NIOSH–IREP risk model for lymphoma and multiple myeloma [43] to include an extended latency period. Use of the lymphoma and multiple myeloma risk models as a starting point was considered appropriate, given the classification of CLL as a form of non-Hodgkin's lymphoma.

The extended latency period for CLL was examined in some detail. After reviewing a number of studies, the midpoint of the latency period for CLL within the draft risk model was set at 15 years, with an uncertainty band of ±5 years. As with other cancers in the NIOSH–IREP model, the risk of developing CLL is considered to be very low for short times after exposure with the magnitude of the risk increasing by an adjustment factor that confers the maximum risk value at 20 years post-exposure.

A draft report entitled "Development of a Risk Model for Chronic Lymphocytic Leukemia," which includes NIOSH's analysis of the literature along with the justification for the proposed model, was provided to four subject matter experts for review in 2009.[44] Two of the four individuals previously were asked to provide their judgment regarding the evidence of radiogenicity of CLL in 2004. NIOSH received comments on many substantive issues with regard to CLL, including the potential radiogenicity of CLL; implications of reclassification as an NHL; the appropriateness of using the NIOSH–IREP lymphoma and multiple myeloma model for CLL; the appropriateness of extended latency for CLL; and a number of additional issues pertinent to this rulemaking. NIOSH addressed these comments in a report available in the regulatory docket for this rulemaking. The comments resulted in one major modification to the proposed risk model: The shortening of the midpoint of the latency period for CLL from 15 to 10 years, while maintaining the uncertainty in the midpoint at ±5 years.[45]

The CLL risk model was quantitatively tested by calculating probability of causation results for males between 20 and 40 years of age hypothetically exposed to 1 Sievert (Sv) of high-energy gamma radiation. Although the evaluations were restricted to exposures to males, the results for women are very similar, because the same risk coefficient is used and the age-specific incidence patterns in Japanese women and U.S. women are similar. The results of these evaluations indicate that the probability of causation exceeds 50 percent only at the 99th percentile, and then only for times since exposure greater than 15 years for men initially exposed at age 20. Doses higher than 1 Sv will be required to produce 99th percentile values of probability of causation that equal or exceed a value of 50 percent for older ages at time of exposure or at time of diagnosis.

CLL is considered a disease that originates from a population of antigen-selected, mature B lymphocytes. As such, these cells could potentially undergo transformation to CLL clones anywhere within the hematopoietic or lymphatic system, thus complicating the reconstruction of the radiation dose to the target organ. This is particularly problematic for reconstructing doses due to internally deposited radionuclides, because the radiation dose in this case is most often not homogeneously distributed within the body. To resolve this issue, NIOSH proposes to use a probabilistic approach to dose reconstruction where the radiation dose to the B lymphocytes is a weighted average, based on the dose to a given site and the probability that a B cell precursor for CLL will occupy that site. A document that provides the scientific basis for this approach to reconstruction of dose has been prepared by NIOSH and is included in the NIOSH Docket for this rulemaking.

### *C. Purpose of the Rule*

The purpose of this rule is to provide for coverage of CLL under part B of EEOICPA. Presently, the probability of causation guidelines at 42 CFR part 81 designate CLL as non-radiogenic and require DOL to assign a probability of causation to CLL of zero, when presented in a claim for compensation under part B of EEOICPA. This proposed revision would remove the designation of CLL under § 81.30 of the guidelines. In concert with this change, NIOSH would add a CLL risk model to NIOSH–IREP and DOL would refer CLL claims under part B of EEOICPA to NIOSH for dose reconstructions, to be followed by determinations of probability of causation by DOL under these revised guidelines.

### *D. Technical Review by the Advisory Board on Radiation and Worker Health*

EEOICPA required that HHS obtain a technical review by the Advisory Board on Radiation and Worker Health (the Board) prior to establishing the probability of causation guidelines to be amended through this rulemaking.[46] HHS interprets this requirement also to apply to any revisions HHS would make to these guidelines. Hence, HHS will obtain a technical review by the Board and consider the findings of this review in promulgating the final regulation.

## III. Summary of Proposed Rule

The proposed rule would remove § 81.30 of 42 CFR part 81 thus rescind the designation of CLL as a non-radiogenic cancer under this part. The effect of this rescission would be that a qualified claim for CLL under part B of EEOICPA would be referred by DOL to

[35] Richardson DB, Wing S, Schroeder, J, *et al.* Ionizing radiation and chronic lymphocytic leukemia. *Environ. Health Persp.* 2005;113:1–5.

[36] Boice, JD. *Reconsideration of chronic lymphocytic leukemia for purposes of compensation.* Report submitted to NIOSH, January 7, 2005.

[37] Silver SR, Hiratzka SL, Schubauer-Berigan MK, Daniels RD. Chronic lymphocytic leukemia: A systematic review. *Cancer Causes Control.* 2007;18:1077–1093.

[38] CLL special issue of *British Journal of Haematology.* December 2007;135:629–848.

[39] National Research Council, Board on Radiation Effects Research. *Health risks from exposure to low levels of ionizing radiation: BEIR VII Phase 2.* The National Academies Press, Washington, DC, 2006.

[40] National Cancer Institute. *Surveillance Epidemiology and End Results (SEER) Program. http://seer.cancer.gov.* Accessed July 15, 2010.

[41] Parkin DM, Whelan SL, Ferlay J, Raymond L, Young J (eds.). Cancer incidence in five continents, Volume VII. Lyon, France: World Health Organization, International Agency for Research on Cancer, 1997. IARC Scientific Publication No. 143.

[42] *See* Appendix C, Assessment of potential latency for incidence of CLL, lymphomas, and multiple myeloma, in *Development of a risk model for chronic lymphocytic leukemia for NIOSH–IREP.* January 5, 2010. A copy of this report is available in the docket for this rulemaking.

[43] Land CE, Gilbert ES, Smith JM, *et al. Report of the NCI–CDC Working Group to revise the 1985 NIH radioepidemiological tables.* Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, 2003. NIH Publication No. 03–5387.

[44] The names of experts whose opinions were solicited, the request, and the responses from these experts are included in the NIOSH Docket for this rulemaking.

[45] NIOSH, Office of Compensation Analysis and Support (OCAS). *Response to review comments on draft report: Development of a CLL risk model for NIOSH–IREP.* December 1, 2009.

[46] 42 U.S.C. 7384n(c).

NIOSH for radiation dose reconstruction and, upon completion of the dose reconstruction, DOL would determine the probability of causation and complete the adjudication of the claim on that basis. Presently, such claims are not referred to NIOSH for dose reconstruction, since under the current language of § 81.30(a), DOL is required to assign a probability of zero to CLL.

Upon promulgation of the final regulation, DOL would identify open and closed cases (NIOSH estimates the number of closed cases to be about 363) under part B of EEOICPA involving CLL claims and attempt to notify the claimants of the new provision. In addition, NIOSH would assist DOL in identifying active and closed cases involving multiple primary cancers including CLL, to identify those whose outcome might be affected by the new provision. For all cases involving CLL, NIOSH would revise the dose reconstruction to take into account radiation doses relevant to CLL, and DOL would recalculate the probability of causation accordingly.

## IV. Regulatory Assessment Requirements

### *A. Executive Order 12866 and Executive Order 13563*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The rule is consistent with the requirements of 42 U.S.C. 7384n(c). The rule does not interfere with State, local, or Tribal governments in the exercise of their governmental functions.

The rule is not considered economically significant, as defined in § 3(f)(1) of E.O. 12866. CLL is a rare cancer, with a lifetime risk of 0.48 percent; according to data provided by NCI, an estimated 1.1 percent of all cancers will be CLL.[47] This low risk among the U.S. population, coupled with the weak evidence for CLL's radiogenicity, indicates DOL is unlikely to receive a substantial volume of claims for CLL, thus limiting the administrative expenses associated with such claims and the potential compensation costs. Since 2001, NIOSH has received approximately 33,000 cases[48] that included all cancers currently covered under EEOICPA; given that an estimated 1.1 percent of all cancers occurring among adults are CLL, NIOSH estimates that approximately 363 of those cases would have sought compensation for CLL. NIOSH also receives an average of 200 new cases per month from DOL, and therefore estimates an expected total of 12,000 cases over the next 5 years; based on the 1.1 percent incidence rate, NIOSH estimates that approximately 132 of those cases will seek compensation for CLL. The Agency expects to review the 363 reopened cases plus 132 new CLL cases in the first 5 years after promulgation of this rule—a total of approximately 99 CLL cases per year for the first 5 years. The estimated cost to NIOSH of conducting dose reconstructions is $12,000 per reconstructed case ($1,188,000 per year); DOL estimates its direct cost per adjudicated case to be about $8,000 ($792,000 per year); and DOE estimates its cost per case to be $198 per each DOL request for employment verification, and $372 for responding to each NIOSH request for exposure data ($56,430 per year). In sum, NIOSH estimates the administrative costs to the three Federal agencies associated with CLL cases to be $2,036,430 per year.

Based on our knowledge of the exposure potential for the claimant population and the probability of causation guidelines discussed above, NIOSH expects that approximately 30 percent of CLL cases—30 cases per year—will result in compensation. Compensated claimants receive $150,000 plus medical expenses, which are estimated to cost about $20,000 per year (costs tend to be higher in the first year of treatment, but benefits are payable only from the date of filing a claim, and most claimants have already begun treatment by that time). The financial award granted to successful claimants comes directly from the U.S. Treasury's Energy Employees Occupational Illness Compensation Fund (42 U.S.C. 7384f); NIOSH estimates that annual compensation will amount to $5,100,000. In total, this rule is estimated to cost the Federal government (the three Federal agencies plus the U.S. Treasury) $7,136,430 per year, or just over 7 percent of the established $100 million annual threshold for economic significance.[49]

There are no feasible alternatives to this regulatory action. OMB has reviewed this probability of causation rule for consistency with the President's priorities and the principles set forth in E.O. 12866 and E.O. 13563.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires each agency to consider the potential impact of its regulations on small entities including small businesses, small governmental units, and small not-for-profit organizations. We certify that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The rule affects only DOL, DOE, HHS, and certain individuals covered by EEOICPA. Therefore, a regulatory flexibility analysis as provided for under RFA is not required.

### *C. Paperwork Reduction Act*

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* requires an agency to invite public comment on and to obtain OMB approval of any regulation that requires 10 or more people to report information to the agency or to keep certain records. This rule does not contain any information collection requirements. It provides guidelines only to DOL for adjudicating compensation claims and thus requires no reporting or record keeping. Information required by DOL to apply these guidelines is being provided by HHS and by individual claimants to DOL under DOL regulations at 20 CFR part 30. Thus, HHS has determined that the PRA does not apply to this rule.

[47] National Cancer Institute. SEER Cancer Statistics Review 1975–2007; Table 1.14. *Lifetime risk (percent) of being diagnosed with cancer by site and race/ethnicity: both sexes, 17 SEER areas, 2005–2007.*

[48] This figure represents the number of individual cases requiring dose reconstruction that have been forwarded to NIOSH by DOL.

[49] NIOSH further estimates the upper bounds of potential costs associated with CLL compensation. To address any potential uncertainty in the incidence estimate, multiplying by a factor of 2 will increase the CLL incidence rate from 1.1 percent to 2.2 percent. Doing so will result in a total of 990 cases, or 198 CLL cases per year for the first 5 years. Reconstructing 198 cases per year will likely cost NIOSH $2,376,000 per year, DOL $1,584,000 per year, and DOE $112,860 per year for an estimated total cost to the 3 Federal agencies of $4,072,860. With an incidence rate of 2.2 percent, NIOSH predicts that 30 percent, or 60 cases, will be compensated. Given an award of $150,000 per case plus medical expenses, NIOSH estimates that the rule will result in compensation of $10,200,000. In total, NIOSH estimates that this rulemaking will cost the Federal government no more than $14,272,860 annually.

*D. Small Business Regulatory Enforcement Fairness Act*

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the Department will report the promulgation of this rule to Congress prior to its effective date. The report will state that the Department has concluded that this rule is not a "major rule" because it is not likely to result in an annual effect on the economy of $100 million or more.

*E. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector "other than to the extent that such regulations incorporate requirements specifically set forth in law." For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or Tribal governments in the aggregate, or by the private sector, adjusted annually for inflation. For 2010, the inflation adjusted threshold is $135 million.

*F. Executive Order 12988 (Civil Justice)*

This rule has been drafted and reviewed in accordance with Executive Order 12988, "Civil Justice Reform," and will not unduly burden the Federal court system. Probability of causation may be an element in reviews of DOL adverse decisions in the United States District Courts pursuant to the Administrative Procedure Act. However, DOL has attempted to minimize that burden by providing claimants an opportunity to seek administrative review of adverse decisions, including those involving probability of causation. HHS has provided a clear legal standard for DOL to apply regarding probability of causation. This rule has been reviewed carefully to eliminate drafting errors and ambiguities.

*G. Executive Order 13132 (Federalism)*

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have "federalism implications." The rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

*H. Executive Order 13045 (Protection of Children From Environmental, Health Risks and Safety Risks)*

In accordance with Executive Order 13045, HHS has evaluated the environmental health and safety effects of this rule on children. HHS has determined that the rule would have no effect on children.

*I. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)*

In accordance with Executive Order 13211, HHS has evaluated the effects of this rule on energy supply, distribution or use, and has determined that the rule will not have a significant adverse effect.

*J. Plain Writing Act of 2010*

Under Public Law 111–274 (October 13, 2010), executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal Government administers or enforces. HHS has attempted to use plain language in promulgating the proposed rule consistent with the Federal Plain Writing Act guidelines.

**List of Subjects in 42 CFR Part 81**

Cancer, Government employees, Occupational safety and health, Nuclear materials, Radiation protection, Radioactive materials, Workers' compensation.

For the reasons discussed in the preamble, the Department of Health and Human Services proposes to amend 42 CFR part 81 as follows:

## PART 81—GUIDELINES FOR DETERMINING THE PROBABILITY OF CAUSATION UNDER THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT OF 2000

### Subpart E—Guidelines To Estimate Probability of Causation

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

**Authority:** 42 U.S.C. 7384n; E.O. 13179, 65 FR 77487, 3 CFR, 2000 Comp., p. 321.

**§ 81.30 [Removed]**

2. Remove § 81.30.

Dated: December 9, 2010.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

## Appendix A

CHRONOLOGY OF CLL-RELATED ACTIVITIES INITIATED BY NIOSH

| Date | Description |
|---|---|
| May 2002 | NIOSH publishes Probability of Causation Rule (42 CFR part 81), excluding CLL for eligibility under EEOICPA. CLL is the only type of cancer granted an *a priori* probability of causation of 0%. |
| July 2004 | Based on direction from the U.S. Congress, the NIOSH Occupational Energy Research Program convenes a public meeting in Washington, DC to: (1) discuss available research strategies for investigating the potential relationship between the incidence of CLL and worker exposures to ionizing radiation and (2) identify gaps in the current research. |
| September–October 2004 | The NIOSH Office of Compensation Analysis and Support (now the Division of Compensation Analysis and Support (DCAS)) recruits five outside experts, not affiliated with NIOSH, to evaluate if: the evidence of an association, or lack thereof, between radiation exposure and the risk of developing CLL [is] sufficient to continue to regard CLL as a non-radiogenic cancer and to continue to exclude it, *a priori,* from eligibility for compensation under EEOICPA. |
| November 2004–January 2005 | NIOSH receives opinions on the radiogenicity of CLL from outside experts regarding and prepares summaries. |
| July 2005 | Because the opinion of a majority of subject experts is that CLL should not continue to be excluded from eligibility of compensation under EEOICPA, NIOSH begins the development of a model capable of quantifying the risk of developing CLL as a consequence of exposure to ionizing radiation. |

CHRONOLOGY OF CLL-RELATED ACTIVITIES INITIATED BY NIOSH—Continued

| Date | Description |
|---|---|
| August 2005–June 2009 | NIOSH conducts research into an appropriate risk model for CLL, including selection of the appropriate target organ and methodology for reconstructing dose. |
| July 2009 | NIOSH completes draft report that describes the CLL risk model (and the scientific rationale behind it) and recruits four subject matter experts to review the draft model. |
| September–August 2009 | NIOSH receives subject matter expert comments on the draft CLL risk model. |
| January 2010 | NIOSH addresses subject matter expert comments on the CLL risk model and finalizes the risk model. |

[FR Doc. 2011–6329 Filed 3–18–11; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 622

**[Docket No. 110218148–1169–01]**

**RIN 0648–BA83**

## Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Golden Crab Fishery Off the Southern Atlantic States; Control Date

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

**ACTION:** Advanced notice of proposed rulemaking; consideration of a control date.

**SUMMARY:** NMFS announces that it is establishing a control date of December 7, 2010, to control future access to the golden crab fishery operating in the exclusive economic zone (EEZ) of the South Atlantic. If changes to the management regime are developed and implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), a control date could be used to limit the number of participants in the fishery. This announcement is intended, in part, to promote awareness of the potential eligibility criteria for future access so as to discourage speculative entry into the fishery while the South Atlantic Fishery Management Council (Council) and NMFS consider whether and how access to the golden crab fishery should be controlled.

**DATES:** Written comments must be received on or before 5 p.m., local time, April 20, 2011.

**ADDRESSES:** You may submit comments, identified by 0648–BA83, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* Attn: Karla Gore 727–824–5305.
- *Mail:* Karla Gore, NMFS Southeast Regional Office, Sustainable Fisheries Division, 263 13th Avenue South, St. Petersburg, FL 33701.

*Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-rulemaking portal *http://www.regulations.gov,* enter "NOAA–NMFS–2011–0044" in the keyword search, then check the box labeled "Select to find documents accepting comments or submissions", then select "Send a comment or submission". NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council; toll free 1–866–SAFMC–10 or 843–571–4366; *kim.iverson@safmc.net.*

**SUPPLEMENTARY INFORMATION:** At their December 2010 meeting, the Council recommended a control date of December 7, 2010, for the golden crab fishery. The Council manages golden crab under the Fishery Management Plan for the Golden Crab Fishery of the South Atlantic Region. The control date would apply to persons who are contemplating entering the golden crab fishery in the EEZ of the South Atlantic region. If adopted, a control date would be established for the golden crab fishery. The Council requested that this control date be published in the **Federal Register** to notify fishermen that if they enter such a fishery after December 7, 2010, they may not be assured of future access if the Council and/or NMFS decide to limit entry or impose other measures to manage these fisheries.

Establishment of the control date would allow the Council to evaluate the level of participation in the subject fishery and address any level of overcapacity. Control dates are intended to discourage speculative entry into a fishery, as new entrants entering the fishery after the control date are forewarned that they are not guaranteed future participation in the fishery.

Establishment of this control date does not commit the Council or NMFS to any particular management regime or criteria for entry into the golden crab fishery. Fishermen are not guaranteed future participation in the fishery regardless of their level of participation before or after the control date. The Council may recommend a different control date or it may recommend a management regime that does not involve a control date. Other criteria, such as documentation of landings or fishing effort, may be used to determine eligibility for participation in a limited access fishery. The Council and/or NMFS also may choose to take no further action to control entry or access to the fisheries, in which case the control date may be rescinded. Any action by the Council will be taken pursuant to the requirements for fishery management plan and amendment development established under the Magnuson-Stevens Act.

This notification also gives the public notice that interested participants should locate and preserve records that substantiate and verify their participation in the golden crab fishery in the South Atlantic EEZ.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: March 16, 2011.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

[FR Doc. 2011–6583 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–22–P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

**[Docket No. 110210132–1133–01]**

**RIN 0648–BA65**

## Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Quotas and Atlantic Tuna Fisheries Management Measures; Correction

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

**ACTION:** Proposed rule.

**SUMMARY:** On March 14, 2011, NMFS published a proposed rule to modify Atlantic bluefin tuna (BFT) base quotas for all domestic fishing categories; establish BFT quota specifications for the 2011 fishing year; reinstate pelagic longline target catch requirements for retaining BFT in the Northeast Distant Gear Restricted Area (NED); amend the Atlantic tunas possession at sea and landing regulations to allow removal of Atlantic tunas tail lobes; and clarify the transfer at sea regulations for Atlantic tunas. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). In the proposed rule, NMFS announced the end of the comment period as April 14, 2011, which would allow an approximately 30-day comment period. In order to provide additional opportunities for the public and other interested parties to comment on the proposed rule, NMFS is extending the comment period for this action until April 28, 2011, allowing a 45-day comment period. Comments received by NMFS on the proposed rule will help NMFS determine whether and how to implement final management measures for the BFT and Atlantic tuna fisheries as described in the proposed action. In addition, NMFS has rescheduled the public hearing that was originally scheduled for March 21, 2011, 3 to 5 p.m., in Gloucester, MA. NMFS has rescheduled the public hearing to be held on April 1, 2011, 1 to 3 p.m. at the same location.

**DATES:** The deadline for comments on the proposed rule regarding BFT quotas and Atlantic tuna fishery management measures has been extended from April 14, 2011, as published on March 14, 2011 (76 FR 13583), to April 28, 2011. The public hearing that was originally scheduled for March 21, 2011, in Gloucester, MA, has been rescheduled for April 1, 2011. See **SUPPLEMENTARY INFORMATION** for further details.

**ADDRESSES:** As published on March 14, 2011 (76 FR 13583), you may submit comments, identified by "0648–BA65", by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- *Fax:* 978–281–9340, Attn: Sarah McLaughlin
- *Mail:* Sarah McLaughlin, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, 55 Great Republic Drive, Gloucester, MA 01930
- *Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. To be considered, electronic comments must be submitted via the Federal eRulemaking Portal *http://www.regulations.gov.* Do not submit electronic comments to individual NMFS staff.

Supporting documents, including the draft Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis, are available by sending your request to Sarah McLaughlin at the mailing address specified above. These documents and others, such as the Fishery Management Plans described below, also may be downloaded from the HMS Web site at *http://www.nmfs.noaa.gov/sfa/hms/.*

The location of the rescheduled public hearing in Gloucester, MA, remains as follows: NMFS, 55 Great Republic Drive, Gloucester, MA. See **SUPPLEMENTARY INFORMATION** for further details.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin or Brad McHale, 978–281–9260.

**SUPPLEMENTARY INFORMATION:** Atlantic bluefin tuna, bigeye tuna, albacore tuna, yellowfin tuna, and skipjack tuna (hereafter referred to as "Atlantic tunas") are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

In the proposed rule, NMFS announced the end of the comment period as April, 14, 2011. NMFS has received several comments requesting a 15-day extension of the comment period. NMFS has determined that it is reasonable to extend the comment period to allow additional opportunities for public comment, and is extending the comment period until April 28, 2011. These comments will assist NMFS in determining final management measures to conserve and manage the Atlantic tunas fisheries, consistent with the 2006 Consolidated HMS FMP, the Magnuson-Stevens Act, ATCA, and other applicable law.

### Need for Correction

This Gloucester, MA, public hearing, originally scheduled for March 21, 2011, has been rescheduled to April 1, 2011, to provide additional advance notice of the hearing and allow attendees additional time to prepare their comments prior to the hearing. In the proposed rule that published March 14, 2011 (76 FR 13583):

1. On page 13583, in the second column, the date and time of the first public hearing listed under the heading **DATES** should be corrected to read as follows:

"1. April 1, 2011, 1 to 3 p.m., Gloucester, MA."

2. On page 13588, in the first column, the first paragraph under the heading "Request for Comments" should be corrected to read as follows:

"NMFS solicits comments on this proposed rule through April 28, 2011. See instructions in **ADDRESSES** section above. NMFS intends to add additional hearings to allow for additional opportunities for public comment. NMFS will announce the dates and locations of those hearings in a future notice."

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: March 16, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2011–6563 Filed 3–16–11; 4:15 pm]

**BILLING CODE 3510–22–P**

# Notices

Federal Register

Vol. 76, No. 54

Monday, March 21, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2010–0121]**

### Notice of Request for Extension of Approval of an Information Collection; Importation of Hass Avocados From Michoacan, Mexico

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of Hass avocados from Michoacan, Mexico.

**DATES:** We will consider all comments that we receive on or before May 20, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0121* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2010–0121, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0121.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** For information on regulations for the importation of Hass avocados from Michoacan, Mexico, contact Mr. David Lamb, Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–4312. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Importation of Hass Avocados from Michoacan, Mexico.

*OMB Number:* 0579–0129.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests, including avocado stem weevils, seed weevils, and seed moths, into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from certain parts of the world are contained in "Subpart–Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–50).

Under these regulations, avocados from Michoacan, Mexico, are subject to certain conditions before entering the United States. These requirements include, among other things, trust fund agreements, work plans, phytosanitary certificates, stickers, truck and container seals, and box marking.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.0015068 hours per response.

*Respondents:* Importers, shippers, Mexican officials.

*Estimated annual number of respondents:* 20,178.

*Estimated annual number of responses per respondent:* 4,078.

*Estimated annual number of responses:* 82,283,974.

*Estimated total annual burden on respondents:* 123,985 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 15th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–6481 Filed 3–18–11; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0015]**

### Importation of Garlic From the European Union and Other Countries Into the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that we have prepared a commodity import evaluation document (CIED) that evaluates the phytosanitary measures under which garlic may be imported into the continental United States from the European Union and several other countries. Currently, garlic may be imported from these countries into the United States only if it is treated for certain pests. Based on the CIED, we believe that the application of one or more designated phytosanitary measures other than treatment will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of garlic from these countries into the continental United States. We are making the CIED available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before May 20, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2011-0015* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2011–0015, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2011–0015.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Tony Román, Import Specialist, Plant Protection and Quarantine, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 734–5820.

**SUPPLEMENTARY INFORMATION:**

#### Background

Under the regulations in "Subpart—Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–50, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

There are two pests of concern associated with the importation of garlic (*Allium sativum* L.) from most countries in the world: Weevils in the genus *Brachycerus* spp. and the moth larvae *Dyspessa ulula.* Both of these pests have stages that may feed internally in the garlic cloves.

Currently, several countries are authorized to export garlic (dry bulbs, no green leaves) to the United States only if the commodity undergoes vacuum fumigation with methyl bromide for *Brachycerus* spp. and *D. ulula.* These countries are Algeria, Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Egypt, Estonia, Georgia, Germany, Greece, Hungary, Israel, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, the Republic of Macedonia, Moldova, Montenegro, Morocco, Palestine Authority, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Switzerland, Syria, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan. In this document, we refer to them as the European Union (EU) and other countries.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. These measures are:

- The fruits or vegetables are subject to inspection upon arrival in the United States and comply with all applicable provisions of § 319.56–3;
- The fruits or vegetables are imported from a pest-free area in the country of origin that meets the requirements of § 319.56–5 for freedom from that pest and are accompanied by a phytosanitary certificate stating that the fruits or vegetables originated in a pest-free area in the country of origin;
- The fruits or vegetables are treated in accordance with 7 CFR part 305;
- The fruits or vegetables are inspected in the country of origin by an inspector or an official of the national plant protection organization of the exporting country, and have been found free of one or more specific quarantine pests identified by the risk analysis as likely to follow the import pathway; and/or
- The fruits or vegetables are a commercial consignment.

APHIS received a request from the Government of Egypt to allow the importation of garlic bulbs from Egypt into the continental United States without vacuum chamber fumigation. We have prepared a commodity import evaluation document (CIED) to evaluate whether vacuum fumigation is necessary to mitigate the risk from *Brachycerus* spp. and *D. ulula.* We have concluded that garlic can be safely imported into the continental United States from the EU and other countries without vacuum fumigation by using one or more of the five designated phytosanitary measures listed in § 319.56–4(b).

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our CIED for public review and comment. The CIED may be viewed on the Regulations.gov Web site or in our reading room (*see* **ADDRESSES** above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the CIED by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the subject of the CIED when requesting copies.

After reviewing the comments we receive, we will announce our decision regarding the import status of garlic from the European Union and other countries in a subsequent notice. If the overall conclusions of the CIED and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will begin issuing permits for importation of garlic from the EU and other countries into the continental United States subject to the requirements specified in the CIED.

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 16th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–6536 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0018]**

### Notice of Availability of a Pest Risk Analysis for the Importation of Fresh Persimmon From the Republic of South Africa

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with the importation into the continental United States of fresh persimmon fruit (*Diospyros kaki*) from the Republic of South Africa. Based on this analysis, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh persimmon fruit from the Republic of South Africa. We are making the pest risk analysis available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before May 20, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2011-0018* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2011–0018, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2011–0018.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Phillip B. Grove, Regulatory Coordinator, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737–1236; (301) 734–6280.

**SUPPLEMENTARY INFORMATION:**

#### Background

Under the regulations in "Subpart—Fruits and Vegetables" (7 CFR 319.56–1 through 319.56–50, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest-risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. These measures are:

- The fruits or vegetables are subject to inspection upon arrival in the United States and comply with all applicable provisions of § 319.56–3;
- The fruits or vegetables are imported from a pest-free area in the country of origin that meets the requirements of § 319.56–5 for freedom from that pest and are accompanied by a phytosanitary certificate stating that the fruits or vegetables originated in a pest-free area in the country of origin;
- The fruits or vegetables are treated in accordance with 7 CFR part 305;
- The fruits or vegetables are inspected in the country of origin by an inspector or an official of the national plant protection organization of the exporting country, and have been found free of one or more specific quarantine pests identified by the risk assessment as likely to follow the import pathway; and/or
- The fruits or vegetables are a commercial consignment.

APHIS received a request from the Government of the Republic of South Africa to allow the importation of fresh persimmon fruit (*Diospyros kaki*) from the Republic of South Africa into the continental United States. We have completed a pest risk assessment for this commodity to identify pests of quarantine significance that could follow the pathway of importation into the United States and, based on this list, have prepared a risk management document to identify phytosanitary measures that could be applied to fresh persimmon fruit from the Republic of South Africa to mitigate the pest risk. We have concluded that fresh persimmon fruit can be safely imported into the continental United States from the Republic of South Africa using one or more of the five designated phytosanitary measures listed in § 319.56–4(b). Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our pest risk analysis for public review and comment. The pest risk analysis may be viewed on the Regulations.gov Web site or in our reading room (*see* **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the pest risk analysis by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the subject of the pest risk analysis you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh persimmon fruit from the Republic of South Africa in a subsequent notice. If the overall conclusions of the analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will begin issuing permits for the importation of fresh persimmon fruit from the Republic of South Africa into the continental United States subject to the requirements specified in the risk management document.

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC this 15th day of March 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–6479 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Evaluation of the Quantity and Quality of Nutritional Information Available to School Food Authorities About Food Service Products and Commodities

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a new collection for evaluation of the quantity and quality of nutritional information available to school food authorities about food service products and commodities.

**DATES:** Written comments must be received on or before May 20, 2011.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Alexandra Lewin, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 500, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Alexandra Lewin at 703–305–1410 or via e-mail to *Alexandra.lewin@fns.usda.gov*. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 500, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Alexandra Lewin at 703–305–2705.

**SUPPLEMENTARY INFORMATION:**

*Title:* Evaluation of the Quantity and Quality of Nutritional Information Available to School Food Authorities about Food Service Products and Commodities.

*OMB Number:* [0584–NEW].

*Expiration Date:* [Not Yet Determined.]

*Type of Request:* [New Collection].

*Abstract:* The purpose of this evaluation is to fulfill the requirements of Section 242 of the Health, Hunger-Free Kids Act of 2010 (the Act). The Act amended Section 9(a)(4) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1758(a)(4), and requires the Secretary to, not later than 1 year after the date of enactment of the Act, carry out a study to analyze the quantity and quality of nutritional information available to school food authorities about food service products and commodities. In addition, the Secretary must also submit to Congress a report on the results of the study that contains such legislative recommendations as the Secretary considers necessary to ensure that school food authorities have access to the nutritional information needed for menu planning and compliance assessments within 1 year after enactment of the Act.

To conduct this study, FNS will work with our external partners, such as State agencies and the School Nutrition Association, to disseminate the survey to school foodservice professionals. The study will assess the quality and quantity of nutrition information available to school food authorities (SFAs) during both the ordering and delivery periods. The questions posed in the study will help FNS better understand purchasing decisions and will ultimately allow FNS to make recommendations to ensure SFAs can effectively and efficiently obtain accurate nutrition information needed for purchasing the widest variety of healthful foods, menu planning and undertaking compliance assessments.

*Affected Public:* State, Local and Tribal Government. Respondent groups identified include current school foodservice professionals sampled from across the United States.

*Estimated Number of Respondents:* Approximately 500 school foodservice professionals will participate in the benchmark survey as part of the study. This is based on an estimated completion rate with a previous FNS survey conducted through the School Nutrition Association's membership list.

*Estimated Number of Responses per Respondent:* The school foodservice professionals will be asked to respond to a survey once.

*Estimated Total Annual Responses:* 500 (500 respondents × 1 response).

*Estimated Time per Response:* .25 (the estimated time is approximately 15 minutes).

*Estimated Total Annual Burden on Respondents:* 5,000 minutes (125 hours). See the table below for estimated total annual burden for each type of respondent.

| Respondent | Estimated number respondent | Responses annually per respondent | Total annual responses (col. b × c) | Estimated avg. number of hours per response | Estimated total hours (col. d × e) |
|---|---|---|---|---|---|
| **Reporting Burden** | | | | | |
| School foodservice professionals | 500 | 1.00 | 500.00 | 0.25 | 125 |
| Total Reporting Burden | 500 | | 500.00 | | 125 |

Dated: March 14, 2011.

**Julia Paradis,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2011–6494 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2010–0029]**

### New Performance Standards for Salmonella and Campylobacter in Young Chicken and Turkey Slaughter Establishments: Response to Comments and Announcement of Implementation Schedule

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) published a **Federal Register** Notice on May 14, 2010 (75 FR 27288) in which it announced the forthcoming implementation of new performance standards for the pathogenic micro-organisms *Salmonella* and *Campylobacter* for chilled carcasses in young chicken (broiler) and turkey slaughter establishments. The new performance standards were developed in response to a charge from the President's Food Safety Working Group and based on recent FSIS Nationwide Microbiological Baseline Data Collection Programs. The standards will be applied to sample sets collected and analyzed by the Agency to evaluate establishment performance with respect to requirements of the Hazard Analysis and Critical Control Points (HACCP) Rule. The Agency received detailed comments submitted in response to the notice. This notice responds to those comments submitted and explains the changes adopted by the Agency after carefully evaluating comments. These changes include:

1. Updated *Salmonella* and new *Campylobacter* performance standards for young chickens and turkeys will take effect with Agency verification sample sets scheduled for July 2011
2. All young chicken and turkey establishments will move to the highest scheduling priority due to the initiation of *Campylobacter* testing for these product classes
3. All sample sets scheduled for young chicken and turkey establishments will be analyzed for both *Campylobacter* and *Salmonella,* and follow-up sample sets responding to sample set failure for either organism will be analyzed for both organisms
4. Effective with sample sets begun in July 2011, the new *Salmonella* standards will accept five positive samples in a 51-sample set for young chickens and four positive samples in a 56-sample set for turkeys
5. Effective July 2011 *Salmonella* performance Categories 1 and 2 for young chicken and turkey establishments, based on the new performance standards, will be applied exclusively for Agency internal analysis and quarterly aggregate reporting
6. Web-posting of young chicken and turkey establishments that fail the new *Salmonella* standards ("Category 3") for their last set will begin as sample sets scheduled for July 2011 are completed
7. *Campylobacter* performance standards and sample set criteria for tracking and reporting to establishments will be applied to results from the smaller of the two laboratory *Campylobacter* sample portions (1 mL), which detects higher levels of contamination, making the performance standards 10.4 percent for young chickens and 0.79 percent for turkeys
8. *Campylobacter* sample set criteria for tracking and reporting 1 mL results are eight positive samples acceptable per 51-sample set for young chickens and three positive samples acceptable per 56-sample set for turkeys
9. *Campylobacter* results from the larger of the two laboratory *Campylobacter* sample portions (30 mL for chickens, 24 mL for turkeys), which detects lower levels of contamination, will be used for Agency internal analysis
10. Agency responses to *Campylobacter* sample set results will follow current *Salmonella* procedures for immediate follow-up testing for both organisms and for Food Safety Assessments when necessary
11. Category 1/2/3 results will be posted in quarterly aggregate reports for all establishments producing raw products subject to FSIS *Salmonella* testing, including young chickens and turkeys under the new standards

*Docket:* For access to background documents, go to the FSIS Docket Room at Room 2–2127, George Washington Carver Center, 5601 Sunnyside Avenue, Mailstop 5474, Beltsville, MD 20705–5474 between 8:30 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Daniel Engeljohn, PhD, Assistant Administrator for Office of Policy and Program Development, FSIS, USDA, Room 349–E, Jamie Whitten Building, 14th and Independence, SW., Washington, DC 20250–3700; telephone (202) 205–0495, fax (202) 720–2025; *daniel.engeljohn@fsis.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

FSIS is the public health regulatory agency in USDA that is responsible for ensuring that the nation's commercial supply of meat, poultry, and processed egg products is safe, wholesome, and appropriately labeled and packaged. FSIS is a participant in the President's Food Safety Working Group (FSWG), which was created by President Obama in March 2009 to recommend improvements to the U.S. food safety system. The FSWG is chaired by Secretary of Agriculture Tom Vilsack and Health and Human Services Secretary Kathleen Sebelius. In July 2009, the FSWG published Key Findings recommending a new, public health-focused approach to food safety based on three core principles: Prioritizing prevention, strengthening surveillance and enforcement, and improving response and recovery.

The FSWG specifically charged FSIS with "cutting *Salmonella* risk in Poultry Products" by "develop[ing] new standards to reduce the prevalence of *Salmonella* in turkey and poultry" and by "establish[ing] a *Salmonella* verification program with the goal of having 90 percent of poultry establishments meeting the new standards by the end of [calendar year] 2010." (FSWG) These new *Salmonella* standards are to be applied to sample sets from establishments included in the Agency's *Salmonella* Verification Program in the place of the performance standards for young chickens (as broilers) codified at 9 CFR 381.94 and the standards for turkeys announced in a **Federal Register** Notice of February 17, 2005. The Agency intends to issue a proposed rule that would formally rescind the codified standards that are no longer in effect. In consultations with the FSWG, the Agency committed to a number of other food safety initiatives to prevent illness, among them developing a new performance standard for *Campylobacter* for young chickens and turkeys.

The Agency accordingly published a **Federal Register** Notice on May 14, 2010 (75 FR 27288) in which it announced the July 2010 implementation of new performance standards for the pathogenic micro-organisms *Salmonella* and *Campylobacter* for chilled carcasses in young chicken and turkey slaughter establishments. The May 14, 2010 notice announced that FSIS had developed such performance standards and predicted the public health impact that might result if, after two years of implementation, these standards are met by half of the establishments that would not meet them at first. The new performance standards for young chickens and turkeys were informed by, among other data sources, data collected during the Agency's recent Nationwide Microbiological Baseline Data Collection Programs: The Young Chicken Baseline Survey (YCBS), and the Young Turkey Baseline Survey

(YTBS) (*Baselines*). The May 14, 2010 notice detailed the baseline surveys and their use in developing the new performance standards.

Although FSIS had planned to implement the new standards in July 2010, the Agency decided to delay implementation until the many comments filed in response to the May 14, 2010 notice had been evaluated. This current notice responds to those comments and explains the policy changes made by the Agency based on its careful evaluation of the comments. These policy changes are listed in the notice Summary above and are further detailed in the responses to comments below.

The Agency cannot yet determine if it has met the FSWG goal of having 90 percent of poultry establishments meeting the new *Salmonella* standards by the end of Calendar Year (CY) 2010 as *Salmonella* verification set scheduling and sampling is an ongoing process and a number of establishments that started sets in CY 2010 were not completed by December 31, 2010. Partial sets are incommensurate, moreover, with the completed-set-based performance measures used by the Agency and the FSWG. Therefore, in preparing its CY 2010 accounting for this FSWG goal, FSIS plans to complete sample sets started in 2010 or earlier during the first quarter of 2011 and count those completed sets toward its final 2010 report. The Agency will cut off its 2010 sample set total on April 1, 2011 and issue its final 2010 accounting at that point. Any 2010-started sample sets not completed by April 1 will be applied toward CY 2011 totals once completed. The final CY total will thus comprise sets started no later than December 31, 2010 and completed no later than March 31, 2011. As of March 2011, 86.2 percent of young chicken slaughter establishments would have met the new standard for 2010. Also as of March 2011, 87.8 percent of young turkey slaughter establishments would have met the new standard for 2010.

The Agency believes that the policy changes announced in this notice, which will be implemented in July 2011, will encourage the poultry industry to reduce *Salmonella* in poultry and thereby further reduce the risk of human illnesses.

*Foreign Government Programs*

Foreign countries that are eligible to export poultry products to the United States must apply inspection, sanitary, and other standards that are equivalent to those that FSIS applies to poultry products. Thus, in evaluating a foreign country's poultry inspection system to determine the country's eligibility to export products to the United States, FSIS will consider whether *Salmonella* or *Campylobacter* methods and procedures that the country applies are equivalent to those that FSIS uses.

Response to Comments on the **Federal Register** Notice of May 14, 2010

**Administrative Procedure Questions**

Some comments claimed that the Agency is violating the Administrative Procedure Act (APA) by effectively promulgating a "regulation" without following due notice-and-comment procedure.

*FSIS Response:* The Agency does not agree that FSIS policies explained herein are regulations subject to notice-and-comment requirements under the APA or are otherwise in violation of the APA. The policies and performance standards, including the testing process the Agency will undertake, do not impose requirements on establishments. We would note, however, that the Agency has sought to engage industry and all interested parties in the subject matter of this notice, has provided extensive opportunity for public comment, delayed implementation to carefully consider issues that were raised in comments, and made various substantive changes to policies based on those comments. We would also note that this is not a novel approach and that notice establishing standards against which to measure establishment performance has been accomplished before through **Federal Register** notices in 2005 (70 FR 8058) and 2006 (71 FR 9772) (referenced in the May 14, 2010 notice). In 2008, FSIS further articulated how the Agency intended to evaluate whether industry was adequately controlling for *Salmonella* in carcasses (73 FR 4767).

***Salmonella* Posting Rationale**

Several comments expressed opposition to the Agency's decision to apply the new standards requiring fewer positives for Category 1 status than has been the case and that posting Category 2 establishments unrealistically differentiates such establishments from those in Category 1.

*FSIS Response:* The Agency believes that its policy of posting establishments that are not in the highest performance rank has stimulated improvement in industry performance, as was shown in the Agency's experience after announcing performance categories in 2006 when 55–60 percent of non-compliant establishments moved to become compliant within two years. FSIS, however, recognizes that some establishments that have been excluded from posting may now be included based on the same level of performance. While the Agency will implement updated *Salmonella* and new *Campylobacter* performance standards for young chickens and turkeys with Agency verification sample sets scheduled for July 2011, establishments that complete sample sets begun in or after July 2011 will be Web-posted only if they have failed the new standards. Web-posting of Category 2 and 3 establishments that began sets under current standards will continue until these establishments have completed sets under the new standards.

Effective with samples sets starting in or after July 2011, *Salmonella* performance Categories 1 and 2, based on the new performance standards, will be applied exclusively for Agency internal analysis and not for posting purposes. The Agency will post quarterly aggregate reports showing the Category 1/2/3 distribution for each relevant product class subject to FSIS *Salmonella* testing but will not identify individual establishments. In order to accomplish this, the Agency will determine Category 1 and 2 performance criteria for young turkey establishments.

The Agency believes that this policy change is reasonable given the general progress of the poultry industry in reducing positive rates from the 1996 HACCP baselines to current rates. Though the "pass-fail" approach is to be taken with young chickens now as well as turkeys, as stated in the May 14, 2010 notice, the smaller prevalence on young turkey carcasses permits a less stringent compliance criterion that is consistent with the Agency's stated objectives of substantially reducing pathogen presence. Thus, the young chicken standard allows an establishment operating at the baseline prevalence approximately an 80 percent chance of passing. The turkey standard, however, is based on a much lower prevalence and so the turkey standard's higher chance of passing of 99+ percent is appropriate.

**Connection Between *Salmonella* Contamination of Chicken Carcasses and Human Illness**

Several comments doubted that there is a connection between *Salmonella* contamination of chicken carcasses and the occurrence of cases of human salmonellosis.

*FSIS Response:* The Agency believes that there is a connection between *Salmonella* contamination and human illness, and that poultry contamination continues to contribute significantly to salmonellosis. Evidence of the

connection of salmonellosis and contaminated chicken products can be found in the outbreaks that have been associated with chicken (CDC food borne outbreaks) and a 2004 case control study conducted by the Centers for Disease Control and Prevention (CDC) that has linked salmonellosis with chicken products (A.C. Kimura et al.; Kimura et al. study). Furthermore, in a Memorandum to the Record dated January 18, 2011, CDC re-affirmed that "Poultry products are an important vehicle for human *Salmonella* and *Campylobacter* infections in the United States" (posted with this notice at *http://www.fsis.usda.gov/Regulations_&_Policies/2011_Notices_Index/index.asp*). Since raw chicken products (ground and carcasses) continue to show greater *Salmonella* prevalence than is found with other product classes (Salmonella Testing Tables), it is likely that the source of the contamination was chicken carcasses rather than other non-chicken ingredients such as spices that may be used with such products. The Agency has concluded, using the available data and the best science available, that reducing *Salmonella* on chicken carcasses would reduce risk of illness and thus potentially reduce the occurrence of illnesses.

The Agency further notes, however, that the commenter's evidence to support the assertion of no connection was based on the human illness FoodNet database (*see* discussion below). Salmonellosis cases due to poultry are only a subset of all salmonellosis cases reported through the CDC FoodNet program. The total number of salmonellosis cases stem from all sources including cattle, swine, eggs, fish, fruits and vegetables. Thus an observed correlation (negative or positive) between *Salmonella* occurrence in poultry carcasses at post chill and salmonellosis from FoodNet data cannot be used to assert a causal relationship between poultry contamination and salmonellosis. Further, the available salmonellosis data cannot be stratified by food vehicle (*e.g.,* poultry), given the lack of food attribution data within the FoodNet database. Given this data gap, it is entirely conceivable that a reduction of salmonellosis due to one food product such as poultry could be negated by an increase in salmonellosis due to another product or unrelated vehicle. In any case, the Agency believes that the available evidence leads to the conclusion that *Salmonella* occurrence in poultry has the potential to cause salmonellosis in humans.

**Efficacy of Performance Standards**

Several comments from industry argued that tightening *Salmonella* performance standards since 2006 has not resulted in fewer cases of human salmonellosis and thus that further tightening the standards would be pointless and punitive. They argue that available evidence (from CDC FoodNet data sets) did not support the Agency's predictions that there would be benefits derived from decreases in *Salmonella* found on carcasses at post chill.

*FSIS Response:* There are important reasons why it is not appropriate to examine CDC salmonellosis rates and compare these data directly to trends of *Salmonella* incidence for inferring the impact of reduction of *Salmonella* incidence for any particular commodity and salmonellosis rates. Specifically, it is important to distinguish the two surveillance datasets available from the CDC used to analyze outbreak trends and foodborne illness. First, the CDC National Outbreak Reporting System (NORS) (*http://wwwn.cdc.gov/foodborneoutbreaks/*), referred here as outbreak data, provides information on reported outbreaks (defined as two or more illnesses associated with a single vehicle (product) that caused the illness). The source of the contamination is investigated (the pathogen and food product responsible for the outbreak); however, about 50 percent of confirmed *Salmonella* outbreaks do not have a known food vehicle. Second, the Foodborne Diseases Active Surveillance Network (FoodNet) (*http://cdc.gov/foodnet/*) produces annual case rates for several major foodborne pathogens, including *Salmonella.* FoodNet data tracks salmonellosis cases presently in 10 states, presently covering about 1/7 of the U.S. population (46 million). The majority of reported FoodNet cases reflect sporadic cases of *Salmonella* (for example, only six percent of 2007 reported FoodNet cases were outbreak-related (2007 annual report). There is no information regarding the food product that was (or might have been) associated with the illness. Therefore, FoodNet data are only available as aggregated information from cases due to all sources thought to be foodborne, including all food products such as those categories of foods defined by the CDC—including fish, crustaceans, mollusks, dairy, eggs, beef, game, pork, poultry, grains-beans, oils-sugars, fruits-nuts, fungi, leafy vegetables, root vegetables, sprout, vine-stalk vegetables (Painter *et al.,* 2009; Painter et al.). Thus an observed correlation (negative or positive) between *Salmonella* occurrence in chicken carcasses at post chill and FoodNet salmonellosis cannot be used, by itself, to assert a causal relationship between chicken contamination and salmonellosis. Unfortunately, as mentioned above, the FoodNet database reflecting trends of salmonellosis rates cannot be stratified by food vehicle (*e.g.,* chicken), given the lack of food attribution data. However, for all food sources, the incidence of *Salmonella*-caused human illness declined approximately eight percent from the beginning of surveillance in 1996 to the most recently released annual report case rate in 2007 (as opposed to the most recently released preliminary report in 2009), with most of the reductions in the earlier years. This trend (or lack of trend) though cannot be assumed true for product-specific trends: It is possible that reduction of salmonellosis due to one food product such as chicken could be negated by the increase in salmonellosis due to another product or unrelated vehicle, such as produce, thus causing the stable case rate in recent years. Consequently, even if there is not a positive correlation of salmonellosis rates and the incidence of contamination rates on young chicken carcasses over time, it would not be possible to dismiss the likelihood that *Salmonella* occurrence in chicken and salmonellosis are causally connected.

The data presented above are part of a weight of evidence approach to refute the assertion that there is no connection between the presence of *Salmonella* on broilers and human illnesses. Additional evidence can be gleaned by performing trend analyses comparing either CDC outbreak data or the serotype data contained within FoodNet to FSIS verification results (FSIS Serotype Data).

***Campylobacter* Performance Standards**

Some comments questioned the validity of applying *Campylobacter* performance standards, given the fragility of the organism and the relatively low risk associated with all but highly-contaminated servings or samples.

*FSIS Response:* After evaluating comments pointing out the complexities of *Campylobacter* and considering the Agency's lack of experience with verification sampling for this organism, FSIS has decided that it will track and report *Campylobacter* results to establishments and will not post the names of establishments that fail to meet the new *Campylobacter* standards. The *Campylobacter* performance standards and sample set criteria for tracking and reporting to establishments

will be applied to results from the smaller of the two laboratory *Campylobacter* sample portions (1 mL) described in the May 14, 2010 Notice, which detects higher levels of contamination. The *Campylobacter* sample set criteria for tracking and reporting 1 mL results are eight positive samples acceptable per 51-sample set for young chickens and three positive samples acceptable per 56-sample set for turkeys. *Campylobacter* results from the larger of the two laboratory *Campylobacter* sample portions (30 mL for chickens, sponge plus 24 mL sponge diluent for turkeys), which detects lower levels of contamination, will be used for Agency internal analysis. Agency responses to *Campylobacter* sample set results will follow current *Salmonella* procedures for immediate follow-up testing for both organisms and for Food Safety Assessments (FSAs) when deemed necessary.

The Agency notes that the implementation of *Campylobacter* standards and sampling in July 2011 will mean that all poultry establishments will move to the highest priority in the Agency scheduling algorithm as "new" establishments. Each set scheduled under the new standards will be tested for both *Campylobacter* and *Salmonella.* Furthermore, any establishment that fails a set for either organism will be moved to the second-highest priority for scheduling to conduct an immediate follow-up set, and the samples taken in the follow-up set will be analyzed for both organisms. FSIS believes that this more intensive sampling approach will provide a significant incentive for establishments to increase process control for both pathogens.

Category 1/2/3 results will be posted in quarterly aggregate reports for all establishments producing raw products subject to FSIS *Salmonella* testing, including young chickens and turkeys under the new standards including *Campylobacter*. FSIS will evaluate industry performance trends with regard to both *Salmonella* and *Campylobacter*. In response to adverse trends, the Agency may consider actions that could include, among other things, posting young chicken and turkey Category 2 establishments, posting all establishments that fail any applicable performance standards, or posting non-categorized individual sample set results from all establishments producing raw products subject to such testing. Any such actions would be announced in a **Federal Register** notice.

**Public Health Predictions**

Some comments criticized the Agency's predictions of illness reduction, including (1) the assumptions used, and (2) that such reductions were not possible because the standard would primarily affect small volume establishments (Potential Public Health Impact).

*FSIS Response:* FSIS notes here that the public health predictions made in the May 14, 2010 **Federal Register** notice were derived from the latest available illness-attribution data published by the CDC in 1999. Updated data have been published recently by the CDC (CDC updated data). The Agency has adjusted its public health predictions accordingly. These public health predictions depend on establishments that currently do not pass the new performance standards changing their processes to pass. Although FSIS has some historic evidence regarding industry behavior in response to previous measures (*i.e., Salmonella* HACCP verification program data and categorization of establishments in that program [FSIS 2006]), the true behavior of the industry in response to the new performance standards is unknowable in advance. If the status quo remains and no establishments change their processes to meet the new performance standards, zero illnesses will be avoided. Alternatively, approximately 40,000 illnesses could be avoided if all initially noncompliant establishments were to become compliant. Based on the past performance of the industry to the previous guidance where approximately 50 percent of noncompliant establishments became compliant (FSIS, 2006), FSIS now predicts that two years after implementing the *Salmonella* standards, human illnesses due to *Salmonella* could decrease by approximately 20,000 per year.

The case of *Campylobacter* is somewhat different, in that the Agency will be tracking industry performance and will expect to see improvement rather than stasis or regression. If the Agency, as stated above, sees adverse trends with *Campylobacter,* it may take various mitigation actions. These public health predictions depend on establishments that currently do not pass the new performance standards changing their processes to pass. Although FSIS has some historic evidence regarding industry behavior in response to previous measures (*i.e., Salmonella* HACCP verification program data and categorization of establishments in that program [FSIS 2006]), the true behavior of the industry in response to the new performance standards is unknowable in advance. If the status quo remains and no establishments change their processes to meet the new performance standards, zero illnesses will be avoided. If all initially noncompliant establishments were to become compliant, approximately 11,000 illnesses due to *Campylobacter* could be avoided. Based on the past response of the industry to the previous guidance where approximately 50 percent of noncompliant establishments became compliant (FSIS, 2006), the Agency predicts that, two years after implementation, as many as 5,000 fewer cases of human illness due to *Campylobacter* might occur each year. The Agency's detailed response to comments on its approach to making public health predictions is contained in Appendix I.

**Turkey *Salmonella* Issues**

Comments noted that the Agency's Young Turkey Baseline Survey (YTBS) found 0.35 percent of post-chill samples positive for *Salmonella* and asked the Agency to explain the discrepancy between the YTBS and FSIS HACCP verification sampling results. In light of the lowered performance standards and these other concerns, comments requested a "grace period" for turkey establishments failing under the new standards, using an average over two sets before posting establishments.

*FSIS Response:* As an initial matter, FSIS notes and regrets the error in the report "The Nationwide Microbiological Baseline Data Collection Program: Young Turkey Survey August 2008—July 2009" where the report erroneously stated that 0.35 percent of the analyzed post chill samples were found with *Salmonella;* in the report FSIS also correctly stated that "The estimated prevalence for *Salmonella* was 1.73 percent * * *" (pages 9 and 11). Reference was made to a technical report: "Technical Paper for Performance Guidance for Broilers and Young Turkey at Post-chill," that explains the estimation procedure used (Technical Paper). In that technical report, FSIS addressed this issue of the difference of percentages of positive results between the two sampling programs. The comparison between the percentages of positive *Salmonella* results showed a higher percentage with the HACCP verification sampling, though the difference was not statistically significant. A more detailed response to these comments is attached in Appendix II.

### ***Campylobacter*** **Methodology Questions**

*Use of Large-Portion Campylobacter Procedure for Performance Standards*

Comments on the proposed *Campylobacter* performance standards for chickens and turkeys suggest removing the larger sample test portion of the compliance criteria (30 mL for chickens and sponge plus 24 mL sponge diluent for turkeys). Remaining would be the test to detect relatively high levels based on analyses of 1 mL portions for chickens and turkeys.

*FSIS response:* The Agency believes that a performance standard based on the 1 mL is most efficient in that it targets samples with higher levels of *Campylobacter,* which have a greater probability of inducing human illness by cross-contamination and surviving cooking compared to lower levels. The performance criteria (number of positive samples acceptable per sample set) for tracking and reporting to establishments will be eight positive samples acceptable per 51-sample set for young chickens and three positive samples acceptable per 56-sample set for turkeys. Data collected for the 30 and sponge plus 24 mL sponge diluent enrichment will be used primarily for Agency internal analysis but will also be aggregated and posted quarterly by performance category to show the progress of the chicken and turkey industries. If there is no improvement in these data over time, FSIS may consider implementing the performance standard using the larger-portion sample results as well.

*Dose-Response Level for Campylobacter*

Comments cited studies claiming that the threshold of concern for *Campylobacter* in broilers is much higher than the new *Campylobacter* performance standard and questioned the standard's relevance to public health.

*FSIS Response:* The threshold dose-response concept implies that there is a very low probability of illness below a certain dose. The 500 Colony Forming Units/gram (CFU/g) threshold suggested would translate into roughly 50,000 CFU as a minimum dose to cause illness assuming a serving of about 100 grams. This assertion is in contrast to the available data. *Campylobacter* human feeding trials show human illness can result in healthy adult males fed 500 CFU and 800 CFU (Robinson, 1985; Black et al., 1988). If such low levels can result in human illness among healthy adult males, it is reasonable to assume that lower doses might result in human illness in traditionally sensitive populations, such as the young, the old, and the immuno-compromised. Given these concerns, the Agency believes that establishing a performance standard from baseline data is warranted.

*Campylobacter Fragility*

A comment stated that the *Campylobacter* organism is very fragile and is unlikely to survive regular processing and handling and thus questioned the need or usefulness of creating a performance standard for it.

*FSIS Response:* The FSIS Young Chicken Baseline Survey, 2007–2008, found about 46 percent of sampled chicken carcasses at post-chill had *Campylobacter.* FSIS does not have data to confirm or deny the presence of *Campylobacter* on finished product or at retail. However, two *Consumer Reports* of retail sampling programs for leading national brands of young chickens, published in January of 2007 and 2010 respectively, found about 81 and 62 percent of retail young chickens contaminated with *Campylobacter* (Consumer Reports). Given the limited sampling, these results cannot be generalized to the retail market as a whole. In addition, however, the National Antibiotic Resistance Monitoring System (NARMS) annual retail meat survey reported that between 2002 and 2008 the incidence of *Campylobacter* on chicken breasts was between approximately 40 and 60 percent (NARMS).

As *Campylobacter* does not grow at normal distribution temperatures, it is likely that *Campylobacter* organisms are able to survive the commercial processes and current interventions employed by the industry. In view of these facts, the Agency believes that it is appropriate to apply *Campylobacter* standards for tracking and reporting to establishments and for Agency internal analysis, follow-up testing, and Food Safety Assessments when deemed necessary.

### ***Campylobacter*** **Methodology**

Several comments asked for clarification on appropriate methods for use by establishments to verify compliance with the new *Campylobacter* standards.

*FSIS Response:* The Agency testing program to verify establishment performance against the new standards will collect young chicken rinsates and turkey carcass sponges to be tested for *Campylobacter* using a method described in the Microbiology Laboratory Guidebook (MLG), which is available on the FSIS Web site at *http://www.fsis.usda.gov/PDF/MLG_41_00.pdf.* Contrary to a misleading note in the May 14, 2010 notice implying that the method was being significantly revised, no substantive changes to this method are anticipated at this time.

The MLG 41 method for poultry rinsates and carcass sponges is designed to be selective for the *Campylobacter* species of interest. FSIS will perform testing for detection and enumeration of *Campylobacter jejuni, C. coli,* and *C. lari.* According to CDC data, *C. jejuni* and *C. coli* cause the majority of *Campylobacter* illnesses in the U.S. The National Advisory Committee for Microbiological Criteria of Foods (NACMCF) recommended the use of methodology to specifically target these *Campylobacter* species so FSIS encourages industry testing to include these species.

The MLG method includes two procedures. In the first procedure (MLG 41 Section 41.5), an aliquot of the rinsate or sponge/buffered peptone water (BPW) combination is plated directly to the Campy-Cefex plating medium and then incubated under microaerophilic conditions for 48 hours at 42 °C.

In the second procedure (MLG 41 Section 41.6.1 or 41.6.2), an aliquot of rinsate or sponge/BPW combination is cultured in blood free Bolton enrichment broth plus Bolton broth selective supplements under microaerophilic conditions for 48 hours at 42 °C and then a small amount of enriched culture is streaked to Campy-Cefex plating medium and incubated under microaerophilic conditions for 48 hours at 42 °C.

The theoretical limit of detection is considerably higher for the direct plating sample compared with the enriched sample. For both procedures, multiple colonies that are typical of the appearance of *Campylobacter* are picked from the Campy-Cefex plating medium and confirmed as *Campylobacter jejuni, coli,* or *lari (Campylobacter j/c/l*) using microscopy to assess cell morphology and motility, and a latex agglutination serological testing procedure that identifies *Campylobacter* specifically belonging to these three species. To determine establishment performance relative to the performance standards, samples by the direct plating procedure with one or more colonies confirmed as *Campylobacter j/c/l* would be considered positive. Samples positive by either or both procedures will be recorded by FSIS and used for internal Agency analysis and quarterly aggregate reports.

Establishments that wish to perform *Campylobacter* testing to verify their process control procedures can use the FSIS MLG method. Alternatively,

establishments may rely on methods that have been validated to provide equivalent or superior sensitivity. For example, verification testing programs based solely on enriching samples could provide equivalent sensitivity compared with the FSIS method. To be comparable with the FSIS method, confirmatory methods should be demonstrated to be capable of detecting *C. coli, C. jejuni,* and *C. lari.* However, FSIS realizes that *C. lari* is rarely encountered in poultry samples. The culture and identification procedures in MLG 41 are not optimized for detection of non-*Campylobacter j/c/l* species.

Questions related to specific *Campylobacter* methods used by establishments should be directed to the AskFSIS sampling queue at *http://www.fsis.usda.gov/Businesses/index.asp.*

One comment queried why available Polymerase Chain Reaction (PCR) methodology is not used by the Agency.

*FSIS Response:* For its baseline testing, FSIS applied standard culture methodology recommended by the NACMCF for detecting and quantifying levels of *Campylobacter* on poultry samples. Non-proprietary traditional culture methodology offers advantages for reliability of results, the potential for confirming and subtyping isolates, and implementation of testing in a broad range of laboratories that may not have access to equipment for PCR or similar testing technologies. FSIS plans to apply the same NACMCF-recommended methodology used in the baseline study for future Agency verification testing. However, FSIS is encouraging development and validation of alternative testing methodologies for detecting and quantifying *Campylobacter.*

**Sample Collection Methods—Turkey Sponge vs. Chicken Rinse**

One comment questioned the Agency use of different sampling methodologies for young chickens and turkeys, asserting that the turkey methodology is biased against finding *Salmonella* and *Campylobacter.*

*FSIS Response:* FSIS agrees that sampling methodology has an impact on pathogen detection and enumeration. Because different sampling methodologies are used for chicken and turkey carcasses, FSIS has not proposed to compare data for these commodities. FSIS agrees that rinsate sampling, even without complete recovery of attached pathogens, provides a representative sample for internal and external carcass surfaces. For the first turkey carcass baseline in the mid-1990s, FSIS had attempted to use 600 mL rinsate sampling for turkey carcasses. However, because the typical turkey carcass was quite large and heavy, the manual rinse procedure posed problems for effective sampling and workplace safety. Following that initial study, FSIS adopted an industry recommendation to use a sponge to sample a 100 $cm^2$ area of the turkey carcass. To compare the effectiveness of rinse vs. sponge sampling, FSIS conducted two baseline studies, Young Turkey Rinse Baseline (1996–1997) and the Young Turkey Sponge Baseline (1997–1998). The two baseline studies demonstrated a comparable *Salmonella* prevalence of 18.6 percent and 19.6 percent, respectively. For the most recent turkey carcass baseline study in 2009, FSIS considered sampling skin from the neck flap or other areas of the carcass, but these sampling procedures also present technical and logistical challenges. FSIS agrees that sponge sampling likely under-represents the prevalence and levels of *Salmonella* and *Campylobacter* on turkey carcasses, but this approach, applied consistently over time to sampling continues to provide an effective means to identify establishments where process control may be less robust.

General questions were raised about Agency policies regarding *Campylobacter* following implementation of the new performance standards.

*FSIS Response:* The Agency will respond to a sample set failure for either organism by immediately scheduling a follow-up set, the samples of which will be analyzed for both organisms. An FSA will automatically be triggered under the current criteria for failing the *Salmonella* standard. The Agency will follow the *Salmonella* methodology for *Campylobacter* until FSIS develops specific methodology for a *Campylobacter* FSA. The Agency will not set an automatic *Campylobacter* FSA trigger until two full sample sets have been completed under the new standard for 90 percent of the eligible establishments in the product class, at which time the Agency will evaluate the results to determine the best food safety and public health policy. The Agency may, however, conduct an FSA for any establishment failing the *Campylobacter* performance standard for two sets straight or in the case of egregious failure of a single set. The concept for an egregious failure is based on a comparison of the establishment's performance for the set versus establishments' performances on other sets during some specified period of time. Thus, the actual criterion for determining an egregious failure could, and is expected to, change over time. The criterion is based on first determining an 80th percentile of the distribution of establishment-specific prevalences of positive results over some specified period, and then determining a cutoff threshold for the number of positive results in a set such that if exceeded for a set would be considered an egregious occurrence. Using the Young Chicken Baseline Survey and a statistical model using empirical Bayes estimation procedures for developing a tentative criterion, the Agency estimated the 80th percentile of the establishments' specific estimated prevalence to be 18 percent. The compliance criterion would therefore be 14 positive samples out of a 51 sample set. Fifteen or more positive results would be considered egregious given there would be more than 95 percent confidence that the true underlying establishment-specific prevalence during the period of sampling exceeded 18 percent, based on an assumption that positive results are distributed randomly following the binomial distribution. However, as mentioned above, FSIS expects this threshold value to change over time as data from the HACCP verification samples are analyzed.

**Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food

safety news and information. This service is available at *http://www.fsis.usda.gov/news_&_events/e-mail_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on March 16, 2011.

**Alfred V. Almanza,**

*Administrator.*

## Appendix I

Comments questioned the design and development of the Agency's public health predictions. In developing its public health predictions, FSIS used a "prevalence-based" approach to estimate the impact of the proposed performance standards. The approach used in this model assumes that contamination levels on broiler carcasses are independent of the frequency of contaminated carcasses. If the prevalence of *Salmonella*-contaminated carcasses and the levels of *Salmonella* on contaminated carcasses are positively correlated, then this assumption would likely be conservative in models that estimate the reduction in illnesses associated with a reduction in prevalence. Nevertheless, the available evidence does not reject this assumption. For samples that were test-positive, the average concentration of *Salmonella* per mL of sample rinsate was 0.16 and 0.14 CFU in the 1995 and 2008 baseline surveys, respectively (FSIS 1996, FSIS 2009). Yet, the prevalence of positive carcasses was demonstrably different in those surveys, 20 percent and 7.5 percent, respectively.

Estimates of the reduction of *Salmonella* incidence (presence/absence) as a result of compliance with the proposed performance standards were used for estimating the averted number of illnesses as a consequence of implementing these performance standards. A detailed description of the underlying model follows.

The true annual number of poultry-related illnesses is determined by only three components. The first is the number of servings, denoted as $N_{servings}$, consumed in the U.S. It is reasonable to assume that this number does not fluctuate wildly from year to year. The second component describes the frequency of exposure to contaminated servings, denoted by *P(exp).* It is reasonable to assume that *P(exp)* is proportional the percent of positives carcasses (i.e., it only differs by a simple scaling factor). The final component is the probability that an individual serving derived from a contaminated carcass causes illness. Let this be denoted by *P(ill/(exp).* This component contains all the factors that FSIS does not control, such as storage, handling, cooking practices, and pathogenicity of different strains that are circulating in any given year.

Taking all three factors into account, the number of illnesses is

$$N_{ill} = N_{servings} P(ill/exp) P(exp).$$

This formula summarizes all the components that go into any food-safety risk assessment. Thus, there are actually very few assumptions involved with the estimation. The source of uncertainty that was evaluated in the document was the uncertainty about the proportion of non-compliant establishments that would modify their production practices in order to meet the new standard. The analysis of this parameter does indeed demonstrate that the true effect of the performance standard varies directly with this parameter. Nevertheless, FSIS has provided historic evidence that suggests that this parameter will not be zero and may approach 50 percent or more.

The comment implied that FSIS estimates are not correct because only small establishments would be affected and it would not be possible that such impact could lead to FSIS' estimates of averted illnesses. FSIS disagrees with this assertion and believes that some larger volume establishments would be affected and thus the estimates of averted illnesses reflect this belief. The technical paper attached to the May 14, 2010 **Federal Register** Notice (Technical Paper) that explained in detail the derivation of the performance standard, explains also how the proposed standards would affect the prevalence. In that document, Equation 3 provides the formula that was used to compute the expected prevalence, which as described above FSIS assumed is proportional to P(exp), for product that would be associated with passing the compliance rule. Similarly, a formula was computed for the expected prevalence for product that would be associated with establishments that fail the compliance criterion. These formulas explicitly treat establishments as "different" depending upon their results from the baseline.

Because the formula of Equation 3 explicitly treats establishments as "different" depending upon their results from the baseline, it was not assumed that all large or medium volume establishments would pass the compliance criterion. The compliance criterion is designed such that if an establishment were meeting the standard exactly—that is, the establishment's prevalence was in fact the standard of 7.5 percent—then the establishment would fail the compliance criterion 20 percent of the time. Thus, in modeling the impact, such an establishment would contribute to the estimate of the expected number of illnesses prevented because it would be expected that 20 percent of such establishments would make improvement.

Though FSIS believes these assumptions are reasonable, only time can validate their appropriateness. Though it is possible that establishments, even if they fail, might not make any changes, such a possibility would not invalidate the model. In sum, FSIS believes that the model reflects a reasonable expectation.

### Appendix II

Comments noted differences in FSIS baseline and PR/HACCP verification data. To explore the question in more depth, FSIS examined its HACCP verification and Baseline data since the baseline survey (August 2008–July 2010) for comparison purposes. As the Agency has discussed in other communications, percentages of positive results from HACCP verification data should not be interpreted as an estimate of prevalence because the sample and establishment selections are not designed for statistical purposes but rather for verification activities. Thus, the HACCP verification sampling program takes disproportional numbers of samples in some establishments over time. In the period being discussed, 2362 samples were taken from 35 establishments—82 were positive, for a percent positive rate of 3.47. Five establishments, with 8–12 positive results, accounted for 49 positive results. No other establishments had more than five positive results. Thus there appears a distinction between the performances of these five establishments and all other establishments. If results from these five establishments were deleted, the percentage of positive results from the remainder (1872 samples) is 1.76. This percentage is congruent with the Baseline estimate of prevalence. However, the establishment-effect was not seen in the Baseline in part because the numbers of samples per establishment were not large, particularly during the period from April to July when most of the HACCP samples were analyzed. The following table classifies data by sampling program, period of time, and whether or not the sample was taken from one of the 5 establishments referred to above. The column heading "Estab Relative Positive Rates" distinguishes the results from the 5 establishments (High) from the others (Low).

| April percent to July | Estab relative positive rates | Samples HACCP (#) | Positive HACCP (#) | Positive HACCP (percent) | Samples base (#) | Positive base (#) | Positive base (percent) |
|---|---|---|---|---|---|---|---|
| No | Low | 387 | 2 | 0.52 | 842 | 7 | 0.83 |
| Yes | Low | 1485 | 31 | 2.09 | 416 | 11 | 2.64 |
| No | High | 70 | 6 | 8.57 | 118 | 3 | 2.54 |
| Yes | High | 420 | 43 | 10.24 | 66 | 3 | 4.55 |

From this table an explanation of why the percentage of positive samples for the HACCP verification sample program is greater than the estimated prevalence derived from the Baseline survey data. On a relative scale, by examining the table one can see where the large differences between cell-specific percentages occur and where small differences occur and identify the factors and their values that are associated with large differences. For example, consider the cells with data from establishments that are classified with "Low" relative positive rates (second column of table) thus excluding data from the 5 establishment identified above with exceptionally high percentages of positive results. And within those cells, consider the differences of the two percentages within each of the periods identified in the April—July column (no, yes). These cells are in bold in the above table. Differences of percentages can be computed in two directions: (1) Differences of the percentages in the same rows, and (2) differences of percentages in the same columns. The first direction (in the same rows): For the first row, data not collected between April to July, the difference is computed as: 0.83 percent (for the Baseline) minus 0.52 percent (for the HACCP data), which is equal to 0.31 percent; for the second row, data collected between April–July, the difference is computed as: 2.64 percent − 2.09 percent = 0.55 percent. So the two row-specific differences are 0.31 percent and 0.55 percent. Now compute the differences for results in the same columns: For the baseline cells, the difference is computed as: 2.64 percent (for data collected between April–July) minus 0.83 percent (for data collected not between April–July) which is equal to 1.81 percent; for the HACCP cells, the corresponding difference is computed as: 2.09 percent − 0.52 percent = 1.57 percent. So the two column-specific differences are 1.81 percent and 1.57 percent. These two percentages average to 1.69 percent. These two column-specific differences are quite a bit larger than the two row-specific differences of 0.31 percent and 0.55 percent, which average to 0.43 percent. In other words, the average of the differences of percentage when comparing the percentages in *different periods* is about 4 times the average of the differences of percentages when comparing the percentages in different sampling programs. Thus on a relative scale, this relationship suggests that an important variable or factor that "explains" the variation of percentages is the *period* in which the data were collected.

The third and fourth rows of the table contain percentages of positive results for the 5 establishments that performed poorly on the HACCP samples. It can be seen that for the Baseline samples, for these establishments, the percentages of them that were positive were larger than the corresponding percentages for the other establishments (in the first two rows). For example, for the samples not collected during April–July, the percentage of positive samples for these 5 establishments was 2.54 percent versus 0.83 percent for the samples collected from the other establishments; and for the samples collected during April–July the two percentages are 4.55 percent and 2.64 percent, respectively. The relationship of the percentages for the different periods of sampling is also in the same direction as seen for the percentages given in the first two rows of the table; that is, the percentages of positive samples for samples taken during April–July are larger than the corresponding percentages for the samples not taken during April–July. Thus these results, associated with the 3rd and 4th rows of the above table, support the assessment that "period of sample selection" is an important explanatory variable, as well as supporting that the "group of establishments" is an important explanatory variable.

The difference of percentage positive results between the HACCP verification and Baseline sampling programs is, it appears, a result of the differences of proportions of samples between the two programs, associated with the above two explanatory variables. Specifically, there are large differences of the proportions of samples for the two designated groupings of establishments and from the two designated periods: (1) Close to 21 percent of the HACCP samples were from the 5 poorer performing establishments, whereas about 13 percent of the Baseline samples were from these establishments; and (2) about 80 percent of the HACCP samples were from the period April-July, whereas about 33 percent of the Baseline samples were from the same period.

The above is an explanation of the differences between the two sampling programs' percentages of positive results. FSIS had been aware of the possibility of both temporal and establishment effects in developing its performance standard approach. FSIS addressed possible temporal effects by using year long baseline surveys (with the exception of some ground products). The purpose of the performance standard is to eliminate establishment effects that would lead to higher than expected risk to the public. Thus performance standards are designed to bring a degree of consistency of performance by noting poor performance, relative to the rest of the industry, over time. For these data, the concern of a lack of consistency is clearly justified—there are many establishments with low percentages of positive results and there are (only) a few others that had what would be considered, relatively, a high percentage of positive results, suggesting that the establishments' processes were not in control, as least as well as others in the industry.

This observation informs the Agency's response to the comment suggesting that FSIS provide a "grace period" when results on a sample set does not meet the compliance criterion of no more than four positive results in a sample set for turkey carcasses. The comment noted that because the number of positive results permitted is low, results from every set would not meet the criterion, thus implying that establishments would be failing incorrectly—that the failing establishment's process was actually in control. In statistical quality control parlance, this misclassification is referred to as a type 1 error. However, it should be noted that FSIS addressed this issue by relaxing the criterion for failing a set from the approximate 80 percent confidence requirement for asserting a failure that had been, and still is, being used by FSIS for other products, to requiring at least having 99 percent confidence before asserting a failure. In other words, because of the low expected incidence of *Salmonella* findings, FSIS reduced the type 1 error rate from about 20 percent to less than 1 percent. If FSIS had followed its previous procedure and required only about 80 percent confidence before asserting a failure, then the compliance criterion would have been "no more than 1 positive result in 56 samples (providing a 75 percent probability of passing when the performance standard (of 1.73 percent) was being met). Originally the 80 percent confidence rule was used because FSIS wanted establishments to take action to reduce the incidence of pathogens in their products to below the performance standard percentage; that is, if an establishment were actually producing at the performance standard, there would be a 20 percent chance that it would not pass the set—a risk of failing which the Agency believed would be too high. Thus, FSIS believed that establishments in such a situation would improve their processing in order to reduce the risk of failing. By selecting an at least 99 percent confidence requirement FSIS acknowledged that the industry has improved and that at the present time FSIS could not expect more improvement. FSIS believes the "at least 99 percent confidence" rule helps ensure that processing will not get worse, and at the same time minimizes the type 1 error rate, thereby addressing the commenter's concern.

The comment's implication of using an average of two 56-sample sets, together with the at least 99 percent criterion, would mean that in 112 samples there should be no more than six positive results. Using an average could place an establishment in a more difficult situation. For example, if there were five or six positive results in the first set then only at most one or no positive results would be permitted for the second set in order to pass. An establishment in such a situation would fail if there were more than one or zero positive results—a difficult standard even if the establishment had the best control. Upon a failure (*e.g.,* two or three positive results within the set), a third set would be needed, in the meantime, the establishment would have failed to meet the standard, when in fact the establishment's process might actually be in control. Thus, following the comment's suggestion actually would be increasing the type 1 error rate by resulting in listing of establishments at a time in which their process is most likely to be in control, and increasing the so-called type 2 errors of not posting an establishment when its process was not performing well. Rather the FSIS approach is timelier: When sufficient evidence exists (in this case, with 99.7 percent confidence, or a type 1 error rate of 0.3 percent) that the standard was not being met, then the establishment would be listed, and if on a second set, the establishment passes with no more than four positive results, the establishment's name would be removed.

FSIS believes that HACCP verification data examined above support the Agency's

position. For the two-year period for which data were analyzed, five establishments had seven, seven, nine, nine, and 10 positive results (the same five establishments with the largest number of positive results identified above). Of these, three establishments had a second full set of 56 samples, with a total number of six positive results (one, two, and three), for a rate of 3.6 percent, still above average. These three establishments though would have met the standard and thus would have been taken off the list. If the proposed grace period option were operating, then it would have been invoked if there had been six positive results instead of seven for one of the sets; in such a case, any of results from the second sets given above would have resulted in the establishment not meeting the standard, and the establishment's name would have been listed. Under FSIS' system, in this case the establishments would have been listed after the first set when there was sufficient evidence for adducing that the establishments' processes were not as good as could be relative to the rest of the industry, and then removed after the second set success, when the latest evidence would not be sufficient for such an adduction.

In conclusion, FSIS believes that its system prevents type 1 errors from occurring often and is timelier regarding when poor performing establishments would be listed. FSIS believes that its policy is appropriate for maintaining the status quo, and inducing poorer performing establishments to improve their processes to a level consistent with the industry's overall performance. By relaxing the required degree of confidence to 99 percent from 80 percent confidence, FSIS believes that it has provided a reasonable policy with regard to small deviations from the standard for which the establishment could and should address without being listed. For the compliance guideline for the turkey performance standard, the actual degree of confidence is 99.7 percent. As a consequence, FSIS does not believe a "grace period" is necessary; that if an establishment fails to meet the standard compliance criterion it would indicate that the establishment's process can be improved. In addition, (1) The discrepancy between the baseline and HACCP percentages of positive results can be "explained" for the most part by the disproportional distribution of samples over time and over establishments; (2) HACCP verification data show that over 90 percent of the sets in the time period analyzed had no more than three positive results, and thus for the most part it seems that establishments have been performing recently at or better than the specified performance standard.

[FR Doc. 2011–6585 Filed 3–18–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Sanders County Resource Advisory Committee Meeting

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Sanders County Resource Advisory Committee Meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lolo and Kootenai National Forests' Sanders County Resource Advisory Committee will meet on April 21, 2011 at 7 p.m. in Thompson Falls, Montana for a business meeting. The meeting is open to the public.

**DATES:** April 21, 2011.

**ADDRESSES:** The meeting will be held at the Thompson Falls Courthouse, 1111 Main Street, Thompson Falls, MT 59873.

**FOR FURTHER INFORMATION CONTACT:** Randy Hojem, Designated Federal Official (DFO), District Ranger, Plains Ranger District, Lolo National Forest at (406) 826–3821.

**SUPPLEMENTARY INFORMATION:** Agenda topics include solicitation for new RAC project proposals, reviewing progress on current projects, and receiving public comment. If the meeting location is changed, notice will be posted in the local newspapers, including the Clark Fork Valley Press, and Sanders County Ledger.

Dated: March 14, 2011.

**Randy R. Hojem,**

*District Ranger.*

[FR Doc. 2011–6503 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

**[0209IDP30910]**

### Upper Rio Grande Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Upper Rio Grande Resource Advisory Committee will meet in Monte Vista, Colorado. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to review and recommend project proposals to be funded with Title II money.

**DATES:** The meeting will be held on April 11, 2011 and will begin at 10 a.m.

**ADDRESSES:** The meeting will be held at the South Fork Community Building, 0254 Highway 149, South Fork, Colorado. Written comments should be sent to Mike Blakeman, San Luis Valley Public Lands Center, 1803 West U.S. Highway 160, Monte Vista, CO 81144. Comments may also be sent via e-mail to *mblakeman@fs.fed.us,* or via facsimile to 719–852–6250.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the San Luis Valley Public Lands Center, 1803 West U.S. Highway 160, Monte Vista, CO 81144.

**FOR FURTHER INFORMATION CONTACT:** Mike Blakeman, RAC coordinator, USDA, San Luis Valley Public Lands Center, 1803 West U.S. Highway 160, Monte Vista, CO 81144; 719–852–6212; E-mail *mblakeman@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel; (2) Review status of approved projects; (3) Review, evaluate and recommend project proposals to be funded with Title II money; (4) Create a timeline to receive and review new project proposals and schedule the next meeting; and (5) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: March 15, 2011.

**Dan S. Dallas,**

*Forest Supervisor.*

[FR Doc. 2011–6531 Filed 3–18–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 20–2011]**

### Foreign-Trade Zone 106—Oklahoma City, OK Application for Reorganization/Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Port Authority of Greater Oklahoma City, grantee of FTZ 106, requesting authority to reorganize and expand the zone under the alternative site framework (ASF)

adopted by the Board (74 FR 1170, 1/12/09 (correction 74 FR 3987, 1/22/09); 75 FR 71069–71070, 11/22/10). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on March 15, 2011.

FTZ 106 was established by the Board on September 13, 1984 (Board Order 271, 49 FR 36133, 9/21/84), and expanded on December 7, 1989 (Board Order 455, 54 FR 51441, 12/15/89), on February 10, 2000 (Board Order 1078, 65 FR 8337–8338, 2/18/00), on September 28, 2007 (Board Order 1529, 72 FR 56722–56723, 10/4/07), and on June 26, 2009 (Board Order 1628, 74 FR 32892, 7/9/09).

The current zone project consists of six sites (totaling 1,450 acres) in the Oklahoma City area: *Site 1* (1,061 acres)—within the 6,700-acre Will Rogers World Airport complex; *Site 2* (6 acres)—Biagi Bros. Warehouse, 5002 SW 36th, Oklahoma City; *Site 8* (30 acres)—Will Rogers World Airport NE, immediately northeast of Will Rogers World Airport, Oklahoma City; *Site 12* (26 acres, sunset 10/31/2012)—ICON Center Industrial Park, 300 Arlington, Ada; *Site 13* (308 acres)—within the 401-acre Guthrie/Edmond Regional Airport, 520 Airport Road, Guthrie; and, *Site 14* (19 acres, expires 6/30/2014)—Industrial Gasket, Inc. dba International Group, facility, 720 South Sara Road, Mustang. (**Note:** Sites 3, 4, 5, 6, 7, 9, 10 and 11 have expired or were deleted through a previous Board action.)

The grantee's proposed service area under the ASF would be Blaine, Caddo, Canadian, Cleveland, Comanche, Custer, Garfield, Garvin, Grady, Kay, Kingfisher, Lincoln, Logan, McClain, Noble, Oklahoma, Payne, Pontotoc, Pottawatomie, Seminole and Stephens Counties, Oklahoma. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Oklahoma City Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include existing Sites 12, 13 and 14 as "magnet sites", existing Site 2 as a "usage-driven" site, and combine existing Site 1 and Site 8 to become Site 1 (new site total—1,091 acres) as a magnet site. The ASF allows for the possible exemption of one magnet site from the sunset time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. The applicant is also requesting approval of two additional "magnet" sites: *Proposed Site 15* (67.688 acres)—Enid Woodring Regional Airport/Cimarron Industrial Park, 1026 S. 66th, Enid (Garfield County); and, *Proposed Site 16* (63.434 acres)—Shawnee Regional Airport, 2202 Airport Road, Shawnee (Pottawatomie County). Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 106's authorized subzones.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is May 20, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to June 6, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: March 15, 2011.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2011–6562 Filed 3–18–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–816]**

### Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Final Results of the Sixteenth Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 14, 2010, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review for certain corrosion-resistant carbon steel flat products (CORE) from the Republic of Korea (Korea). *See Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Preliminary Results of the Sixteenth Antidumping Duty Administrative Review,* 75 FR 55769 (September 14, 2010) (*Preliminary Results*). This review covers eight manufacturers and/or exporters (collectively, the respondents) of the subject merchandise: LG Chem., Ltd. (LG Chem); Haewon MSC Co. Ltd. (Haewon); Dongbu Steel Co., Ltd. (Dongbu); Hyundai HYSCO (HYSCO); Pohang Iron & Steel Co., Ltd. (POSCO) and Pohang Coated Steel Co., Ltd. (POCOS) (collectively, POSCO); Dongkuk Industries Co., Ltd. (Dongkuk); LG Hausys, Ltd. (Hausys); and Union Steel Manufacturing Co., Ltd. (Union).[1] The period of review (POR) is August 1, 2008, through July 31, 2009.

As a result of our analysis of the comments received, these final results differ from the *Preliminary Results.* For our final results, we find that Union and Dongbu made sales of subject merchandise at less than normal value (NV), and that POSCO and HYSCO have not. In addition, based on the final results for the respondents selected for individual review, we have determined a weighted-average margin for those companies that were not selected for individual review.

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dennis McClure (Union), Jolanta Lawska (HYSCO), Christopher Hargett

[1] As noted in the *Preliminary Results,* the Department selected HYSCO, POSCO, Dongbu and Union as mandatory respondents in this review. *See* Memorandum from Dennis McClure, International Trade Compliance Analyst, through James Terpstra, Program Manager, to Melissa Skinner, Director, Office 3, entitled "2008–2009 Antidumping Duty Administrative Review of Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Selection of Respondents for Individual Review," dated December 7, 2009.

(Dongbu) and Victoria Cho (the POSCO Group, and non-selected companies), Office 3, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5973, (202) 482–8362, (202) 482–4161, and (202) 482–5075, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On September 14, 2010, the Department published the *Preliminary Results.* In the *Preliminary Results,* the Department determined that Union and Dongbu made sales of subject merchandise at less than NV during the POR, and that HYSCO and POSCO did not. In addition, based on the preliminary results for the respondents selected for individual review, the Department calculated a weighted-average margin for those companies that were not selected for individual review.

We conducted sales verifications at the POSCO Group from October 18 through 22, 2010, at HYSCO from October 25 through 29, 2010, and at Union from November 1 through 5, 2010. We conducted cost verifications at HYSCO from October 4 through 8, 2010, at the POSCO Group from October 11 through 15, 2010, and at Union from November 8 through 12, 2010. On December 7, 15, and 21, 2010, respectively, the Department released sales verification reports for Union, HYSCO, and the POSCO Group. On November 29, December 6, and December 17, 2010, respectively, the Department released cost verification reports for the POSCO Group, HYSCO, and Union.

On December 13, 2010, the Department extended the time limits for the final results of this review until no later than March 14, 2011. *See Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review,* 75 FR 77615 (December 13, 2010).

## Comments From Interested Parties

We invited parties to comment on our *Preliminary Results.* On January 14, 2011, United States Steel Corporation (U.S. Steel) filed case briefs concerning all four mandatory respondents. On January 14, 2011, HYSCO, POSCO, Union, and Dongbu each filed case briefs. On January 14, 2011, Hausys submitted its case brief, stating that it supports the arguments submitted by Union and Dongbu in their case briefs because Hausys's dumping margin would be based on the respondents subject to individual examination. On January 21, 2011, U.S. Steel and Nucor Corporation (Nucor) (collectively, petitioners) each filed rebuttal briefs. On January 21, 2011, HYSCO, POSCO, Union, and Dongbu each filed rebuttal briefs.

## Scope of the Order

This order covers cold-rolled (cold-reduced) carbon steel flat-rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0090, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090. Included in this order are corrosion-resistant flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been "worked after rolling")—for example, products which have been beveled or rounded at the edges. Excluded from this order are flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (terne plate), or both chromium and chromium oxides (tin-free steel), whether or not painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating. Also excluded from this order are clad products in straight lengths of 0.1875 inch or more in composite thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness. Also excluded from this order are certain clad stainless flat-rolled products, which are three-layered corrosion-resistant carbon steel flat-rolled products less than 4.75 millimeters in composite thickness that consist of a carbon steel flat-rolled product clad on both sides with stainless steel in a 20%–60%–20% ratio.

These HTSUS item numbers are provided for convenience and customs purposes. The written descriptions remain dispositive.

## Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the accompanying Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues which parties have raised, and to which we have responded in the Issues and Decision Memorandum, is attached to this notice as an Appendix. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

## Changes From the Preliminary Results

As a result of the Department's analysis of comments received, we have made certain changes to the calculations of company-specific weight-average margins.

For Union, we revised our treatment of laminated CORE products as noted at Comment 2 of our Issues and Decision Memorandum. *See also* "Calculation Memorandum for Union Steel," from Dennis McClure to the File, dated March 14, 2011. We have also revised Union's reported cost of manufacturing figures to reflect a recalculation of Union's scrap offset, GNA-expense rate calculation, cost of goods sold denominator to reflect the FY scrap revenue, and financial expense ratio as noted at Comments 16, 17, 18, and 19. *See also* "Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Union Steel Co. Ltd.," from Kristin Case to Neal Halper, dated March 14, 2010.

For the POSCO Group, we revised our treatment of laminated CORE products, U.S. warranty expenses, home market indirect selling expenses, and U.S. indirect selling expenses incurred in the country of manufacture, as noted at Comments 2, 6, and 9 of our Issues and

Decision Memorandum. *See also* "Calculation Memorandum for Pohang Iron & Steel Company, Ltd. (POSCO), and Pohang Coated Steel Co., Ltd. (POCOS) (collectively, the POSCO Group)," from Victoria Cho to the File, dated March 14, 2011. We have also revised the POSCO Group's reported cost of manufacturing figures to reflect a recalculation of POSCO's total cost of manufacturing, as noted at Comment 12. *See also* "Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Pohang Iron & Steel Company, Ltd., and Pohang Coated Steel Co., Ltd.," from Sheikh M. Hannan to Neal M. Halper, dated March 14, 2011.

For HYSCO, we calculated the temper rolling cost adjustment factors for both temper rolled and non-temper rolled products and applied them to HYSCO's reported cost file as noted at Comment 5 of our Issues and Decision Memorandum. *See also* "Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Hyundai HYSCO," from Ji Young Oh to Neal M. Halper, dated March 14, 2011 (*HYSCO's Final Cost Calculation Memorandum*). Moreover, we reversed our adjustment made in the *Preliminary Results* as facts available, regarding the use of weighted-average value of SOTHMAT, DIRLAB, and FOH from the cost file for CONNUMS with negative values and disregarded the cost file field COMADJ3 as noted at Comment 4 of our Issues and Decision Memorandum. *See Preliminary Results,* 75 FR at 55774; *see also HYSCO's Final Cost Calculation Memorandum.*

We have made no changes to Dongbu's margin calculations since the *Preliminary Results. See* "Final Results in the 16th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea: Calculation Memorandum for Dongbu Steel," from Christopher Hargett to the File, dated March 14, 2011.

*Final Results of Review*

We determine that the following weighted-average margins exist:

| Manufacturer/exporter | Percent margin |
|---|---|
| HYSCO | [a] 0.20 |
| The POSCO Group | [a] 9.05 |
| Union | 2.27 |
| Dongbu | 3.89 |
| Review-Specific Average Rate Applicable to the Following Companies[2]: LG Chem, Haewon, Hausys and Dongkuk | 3.0% |

[a] (*de minimis*).

**Assessment**

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to 19 CFR 351.212(b). The Department calculated importer-specific duty assessment rates on the basis of the ratio of the total antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. Where the assessment rate is above *de minimis,* we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of review.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification applies to POR entries of subject merchandise produced by companies examined in this review (*i.e.,* companies for which a dumping margin was calculated) where the companies did not know that their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

**Cash Deposit Requirements**

The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of CORE from Korea entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a) of the Tariff Act of 1930, as amended (the Act): (1) For companies covered by this review, the cash deposit rate will be the rate listed above; (2) for previously reviewed or investigated companies other than those covered by this review, the cash deposit rate will be the company-specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the producer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) if neither the exporter nor the producer is a firm covered in this review, a prior review, or the investigation, the cash deposit rate will be 17.70 percent, the all-others rate established in the less-than-fair-value investigation. These deposit requirements shall remain in effect until further notice.

[2] This rate is a weight-average percentage margin (based on the two reviewed companies with an affirmative dumping margin) for the period August 1, 2008, through July 31, 2009, and does not include zero and *de minimis* rates or any rates based solely upon facts available.

**Reimbursement of Duties**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

**Administrative Protective Order**

This notice also is the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 14, 2011.

**Kim Glas,**

*Acting Deputy Assistant Secretary for Import Administration.*

**APPENDIX I**

List of Comments in the Accompanying Issues and Decision Memorandum:

**A. General Issues**

Comment 1: *Treatment of "Negative Dumping Margins" (Zeroing)*
Comment 2: *Treatment of Laminated Products in Model Match*

**B. Company-Specific Issues**

*Hyundai HYSCO*

Comment 3: *Liquidation Instructions*
Comment 4: *Cost Adjustments Made by HYSCO*
Comment 5: *Whether the Department Should Treat All Products that Passed Through the*

*Continuous Galvanizing Line as Temper-Rolled*

*The POSCO Group*

Comment 6: *POSCO's Average Warranty Expense for U.S. Price*
Comment 7: *The Department's Treatment of Service Fees in its Home Market Indirect Selling Expenses*
Comment 8: *The POSCO Group's Home Market Warranty Expenses for Non-Prime Merchandise with Certain Gross Unit Prices*
Comment 9: *The Allocation of POSCO's Home Market Warranty Expense Over All Home Market Sales*
Comment 10: *The Treatment of POSAM's Other Expenses in its U.S. Indirect Selling Expenses*
Comment 11: *The Treatment of the POSCO Group's Actual Interest Expense in INDIRSU*
Comment 12: *Beginning Inventory Variances for Semi-finished Goods*
Comment 13: *Reported Costs*
Comment 14: *General and Administrative Expense Ratio Calculation*

*Union*

Comment 15: *Cost-Recovery Test when Using a Quarterly-Cost Methodology*
Comment 16: *Scrap Offset*
Comment 17: *General and Administrative Expenses*
Comment 18: *Cost of Goods Sold (COGS) Denominator*
Comment 19: *Financial Expenses*

*Dongbu*

Comment 20: *Calculation of Home Market-Short Term Interest Rate*
Comment 21: *Reported U.S. Customs Duty*

[FR Doc. 2011–6566 Filed 3–18–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[Application No. 10–00005]**

### Export Trade Certificate of Review

**ACTION:** Notice of issuance of an Export Trade Certificate of Review to ARC Industries Ltd. ("ARC") (Application #10–00005).

**SUMMARY:** On March 7, 2011, the U.S. Department of Commerce issued an Export Trade Certificate of Review to ARC Industries Ltd. ("ARC"). This notice summarizes the conduct for which certification has been granted.

**FOR FURTHER INFORMATION CONTACT:** Joseph E. Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or e-mail at *etca@trade.gov.*

**SUPPLEMENTARY INFORMATION:** Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR part 325 (2010). The U.S. Department of Commerce, International Trade Administration, Office of Competition and Economic Analysis ("OCEA") is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of the issuance in the **Federal Register**. Under Section 305(a) of the Export Trading Company Act (15 U.S.C. 4012(b)(1)) and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

**Description of Certified Conduct**

ARC is certified to engage in the Export Trade Activities and Methods of Operation described below in the following Export Trade and Export Markets.

**I. Export Trade**

1. *Products:* All products.
2. *Services:* All services.
3. *Technology Rights:* Technology rights that relate to Products and Services including, but not limited to, patents, trademarks, copyrights, and trade secrets.
4. *Export Trade Facilitation Services (as They Relate to the Export of Products, Services, and Technology Rights):* Export Trade Facilitation Services include professional services in the areas of government relations and assistance with State and Federal programs; foreign trade and business protocol; consulting; market research and analysis; collection of information on trade opportunities; marketing; negotiations; joint ventures; shipping; export management; export licensing; advertising; documentation and services related to compliance with customs requirements; insurance and financing; trade show exhibitions; organizational development; management and labor strategies; licensing of technology; transportation; and facilitating the formation of products and services associations.

**II. Export Markets**

The Export markets include all parts of the world except the United States: (the fifty States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

**III. Export Trade Activities and Methods of Operation**

1. With respect to the export of Products and Services, licensing of Technology Rights and provision of Export Trade Facilitation Services, ARC may, subject to the terms and conditions listed below:

a. Provide and/or arrange for the provision of Export Trade Facilitation Services;

b. Engage in promotional and marketing activities and collect information on trade opportunities in the Export Markets and distribute such information to clients;

c. Enter into exclusive and/or non-exclusive licensing and/or sales agreements with Suppliers for the export of products and services, and/or technology rights to Export Markets;

d. Enter into exclusive and/or non-exclusive agreements with distributors and/or sales representatives in Export Markets;

e. Allocate export sales or divide Export Markets among Suppliers for the sale and/or licensing of products and services and/or technology rights;

f. Allocate export orders among Suppliers;

g. Establish the price of products and services and/or technology rights for sales and/or licensing in Export Markets; and

h. Negotiate, enter into, and/or manage licensing agreements for the export of technology rights.

2. ARC may exchange information with individual Suppliers on a one-to-one basis regarding that Supplier's inventories and near-term production schedules in order that the availability of Products for export can be determined and effectively coordinated by ARC with its distributors in Export Markets.

**IV. Terms and Conditions**

1. In engaging in Export Trade Activities and Methods of Operation, ARC will not intentionally disclose, directly or indirectly, to any Supplier any information about any other Supplier's costs, production, capacity, inventories, domestic prices, domestic sales, or U.S. business plans, strategies, or methods that is not already generally available to the trade or public.

2. ARC will comply with requests made by the Secretary of Commerce on behalf of the Secretary or the Attorney General for information or documents relevant to conduct under the Certificate. The Secretary of Commerce will request such information or

documents when either the Attorney General or the Secretary of Commerce believes that the information or documents are required to determine that the Export Trade, Export Trade Activities and Methods of Operation of a person protected by this Certificate of Review continue to comply with the standards of section 303(a) of the Act.

**Definition**

"Supplier" means a person who produces, provides, or sells Products, Services, and/or Technology Rights.

Dated: March 11, 2011.

**Joseph E. Flynn,**

*Director, Office of Competition and Economic Analysis.*

[FR Doc. 2011–6177 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–DR–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–888]**

### Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 14, 2010, the U.S. Department of Commerce (the Department) published the preliminary results of the 2007–2008 administrative review of the antidumping duty order covering Since Hardware (Gunagzhou) Co., Ltd (Since Hardware) on floor-standing, metal-top ironing tables from the People's Republic of China (PRC). *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55759 (September 14, 2010) (*AR4 Preliminary Results*). This review covers one exporter. The period of review (POR) is August 1, 2007, through July 31, 2008. We invited interested parties to comment on the *Preliminary Results.*

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the Final Results differ from the *Preliminary Results.* The weighted average dumping margins are listed below in the section entitled "Final Results of Review".

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4475 or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 14, 2010, the Department published the preliminary results of this administrative review. *See AR4 Preliminary Results.* The merchandise covered by the order is floor-standing, metal-top ironing tables and certain parts thereof from the PRC, as described in the "Scope of the Order" section of this notice. The period of review (POR) is August 1, 2007, through July 31, 2008. This administrative review covers Since Hardware.

In the *Preliminary Results,* we invited parties to comment. Additionally, on October 22, 2010 we issued to Interested Parties a Memorandum detailing the Industry Specific Wage Rates that the Department has used in these Final Results. *See* October 22, 2010, Memorandum from Michael J. Heaney to the File: "08/01/2007–07/31/2008 Review of the Antidumping Duty Order on Floor Standing Metal Top Ironing Tables from the People's Republic of China: Industry Specific Wage Rate Selection." We invited interested parties to comment on the Department's calculation of industry specific wage rates that are outlined in our October 22, 2010, Industry Specific Wage Rate Memorandum. On November 3, 2010, we extended the due date for filing case briefs until November 15, 2010. In response, on November 15, 2010, the Department received a case brief from Home Products International (the Petitioner in this case).[1] Petitioner, and Since Hardware submitted rebuttal briefs on November 22, 2010. On December 27, 2010, the Department extended the time frame for the final results of review by an additional 60 days. *See Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Extension of Time Limit for the Final Results of Administrative Review,* 75 FR 81212 (December 27, 2010).

[1] On November 16, 2010, Since Hardware attempted to submit a case brief. On November 22, 2010, the Department issued a letter to Since Hardware which rejected Since Hardware's November 16, 2010, case brief as untimely filed. *See* November 22, 2010, letter from Robert M. James to Since Hardware. Accordingly, the Department has not considered Since Hardware's November 16, 2010, submission in these Final Results.

**Scope of the Order**

For purposes of the order, the product covered consists of floor-standing, metal-top ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. The subject tables are designed and used principally for the hand ironing or pressing of garments or other articles of fabric. The subject tables have full-height leg assemblies that support the ironing surface at an appropriate (often adjustable) height above the floor. The subject tables are produced in a variety of leg finishes, such as painted, plated, or matte, and they are available with various features, including iron rests, linen racks, and others. The subject ironing tables may be sold with or without a pad and/or cover. All types and configurations of floor-standing, metal-top ironing tables are covered by this review.

Furthermore, the order specifically covers imports of ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. For purposes of the order, the term "unassembled" ironing table means a product requiring the attachment of the leg assembly to the top or the attachment of an included feature such as an iron rest or linen rack. The term "complete" ironing table means product sold as a ready-to-use ensemble consisting of the metal-top table and a pad and cover, with or without additional features, *e.g.,* iron rest or linen rack. The term "incomplete" ironing table means product shipped or sold as a "bare board"—*i.e.,* a metal-top table only, without the pad and cover—with or without additional features, *e.g.* iron rest or linen rack. The major parts or components of ironing tables that are intended to be covered by the order under the term "certain parts thereof" consist of the metal top component (with or without assembled supports and slides) and/or the leg components, whether or not attached together as a leg assembly. The order covers separately shipped metal top components and leg components, without regard to whether the respective quantities would yield an exact quantity of assembled ironing tables.

Ironing tables without legs (such as models that mount on walls or over doors) are not floor-standing and are specifically excluded. Additionally, tabletop or countertop models with short legs that do not exceed 12 inches in length (and which may or may not collapse or retract) are specifically excluded.

The subject ironing tables were previously classified under Harmonized

Tariff Schedule of the United States (HTSUS) subheading 9403.20.0010. Effective July 1, 2003, the subject ironing tables are classified under new HTSUS subheading 9403.20.0011. The subject metal top and leg components are classified under HTSUS subheading 9403.90.8040. Although the HTSUS subheadings are provided for convenience and for Customs and Border Protection (CBP) purposes, the Department's written description of the scope remains dispositive.

**Separate Rates**

Since Hardware requested a separate, company-specific antidumping duty rate. In the *AR4 Preliminary Results,* we found that Since Hardware had met the criteria for the application of a separate antidumping duty rate. *See Preliminary Results,* 75 FR at 55761.

We verified the separate rate information submitted by Since Hardware. *See* August 23, 2010 Verification of the Sales and Factors Response of Since Hardware (Guangzhou) Co., Ltd. in the Antidumping Review of Floor Standing Metal Top Ironing Tables (Ironing Tables) and Certain Parts Thereof from the People's Republic of China (PRC) (Since Hardware Verification Report) at 6.

Moreover, we have not received any information since the *Preliminary Results* with respect to Since Hardware that would warrant reconsideration of our separate-rates determination. Therefore, we have assigned an individual dumping margin to Since Hardware for this review period.

**Analysis of Comments Received**

All issues raised in the case briefs by the parties and to which we have responded are addressed in the Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled "Issues and Decision Memorandum for the Final Results in the Administrative Review of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China", (March 14, 2011) (Issues and Decision Memorandum), which is hereby adopted by this notice. A list of the issues raised, all of which are in the Issues and Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit (CRU), room 7046 of the Department of Commerce. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at *http://trade.gov/ia.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

**Changes Since the Preliminary Results**

Based on the comments received from interested parties, we have made the following changes from that presented in our *Preliminary Results:*

We have based our calculations of labor inputs on industry specific wage rates.

We have applied brokerage and handling charges according to the weight of the merchandise and the container size of the shipment.

We have corrected an error in our calculation of the surrogate value of water.

**Final Results of Review**

We determine that the following antidumping duty margins exist in these final results:

| Exporter | Margin (percent) |
|---|---|
| Since Hardware ..... | 67.37 |

For details on the calculation of the antidumping duty weighted-average margin for Since Hardware, see Memorandum to the File from Michael J. Heaney, Senior International Trade Compliance Analyst; "Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: dated March 14, 2011. The public version of this memorandum is on file in the CRU.

**Assessment Rates**

Pursuant to section 751(a)(2)(A) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. For assessment purposes, where possible, we calculated importer-specific assessment rates for subject ironing tables from the PRC via *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

**Notification to Interested Parties**

This notice also serves as the final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and in the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and this notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 14, 2011.

**Kim Glas,**

*Acting Deputy Assistant Secretary for Import Administration.*

## Appendix I

*Issues in Decision Memorandum*

Comment 1: Appropriate Wage Rate Calculation
Comment 2: Brokerage and Handling
Comment 3: Whether Certain Expenses are Appropriately Classified as Packaging or Material Costs
Comment 4: Surrogate Value of Cotton
Comment 5: Surrogate Value of Water
Comment 6: Whether Discrepancies in Since Hardware's Calculation of Yield Losses Necessitate Use of Adverse Facts Available
Comment 7: Whether Since Hardware Purchases of Cartons Should Be Treated as Market Economy Transactions

[FR Doc. 2011–6560 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–888]**

### Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 14, 2010, the U.S. Department of Commerce (the Department) published the preliminary results of the 2008—2009 administrative review of the antidumping duty order on floor-standing, metal-top ironing tables from the People's Republic of China (PRC). *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 55754 (September 14, 2010) (*AR5 Preliminary Results*). This review covers two exporters, Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. (Foshan Shunde) and Since Hardware (Guangzhou) Co., Ltd. (Since Hardware). The period of review (POR) is August 1, 2008, through July 31, 2009. We invited interested parties to comment on the *Preliminary Results.*

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the Final Results differ from the *Preliminary Results.* The weighted average dumping margins are listed below in the section entitled "Final Results of Review".

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4475 or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On September 14, 2010, the Department published the preliminary results of this administrative review. *See AR5 Preliminary Results.* The merchandise covered by the order is floor-standing, metal-top ironing tables and certain parts thereof from the PRC, as described in the "Scope of the Order" section of the this notice. The period of review (POR) is August 1, 2008, through July 31, 2009. This administrative review covers Foshan Shunde and Since Hardware.

In the *Preliminary Results,* we invited parties to comment. Additionally, on October 22, 2010 we issued to interested parties a memorandum detailing the industry-specific wage rates that the Department intended to use in these Final Results. *See* October 22, 2010, Memorandum from Michael J. Heaney to the File: "08/01/2008/07/31/2009 Review of the Antidumping Duty Order on Floor Standing Metal Top Ironing Tables from the People's Republic of China: Industry Specific Wage Rate Selection." We invited interested parties to comment on the Department's calculation of industry specific wage rates that are outlined in our October 22, 2010, Industry Specific Wage Rate Memorandum. On November 3, 2010, we extended the due date for filing case briefs until November 15, 2010. In response, on November 15, 2010, the Department received respective case briefs from Foshan Shunde and from Home Products International (the Petitioner in this case).[1] Petitioner, Foshan Shunde, and Since Hardware submitted rebuttal briefs on November 22, 2010. On December 27, 2010, the Department extended the time frame for the final results of review by an additional 60 days. *See Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Extension of Time Limit for the Final Results of Administrative Review,* 75 FR 81212 (December 27, 2010).

## Scope of the Order

For purposes of the order, the product covered consists of floor-standing, metal-top ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. The subject tables are designed and used principally for the hand ironing or pressing of garments or other articles of fabric. The subject tables have full-height leg assemblies that support the ironing surface at an appropriate (often adjustable) height above the floor. The subject tables are produced in a variety of leg finishes, such as painted, plated, or matte, and they are available with various features, including iron rests, linen racks, and others. The subject ironing tables may be sold with or without a pad and/or cover. All types and configurations of floor-standing, metal-top ironing tables are covered by this review.

Furthermore, the order specifically covers imports of ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. For purposes of the order, the term "unassembled" ironing table means a product requiring the attachment of the leg assembly to the top or the attachment of an included feature such as an iron rest or linen rack. The term "complete" ironing table means product sold as a ready-to-use ensemble consisting of the metal-top table and a pad and cover, with or without additional features, *e.g.,* iron rest or linen rack. The term "incomplete" ironing table means product shipped or sold as a "bare board"—*i.e.,* a metal-top table only, without the pad and cover—with or without additional features, *e.g.* iron rest or linen rack. The major parts or components of ironing tables that are intended to be covered by the order under the term "certain parts thereof" consist of the metal top component (with or without assembled supports and slides) and/or the leg components, whether or not attached together as a leg assembly. The order covers separately shipped metal top components and leg components, without regard to whether the respective quantities would yield an exact quantity of assembled ironing tables.

Ironing tables without legs (such as models that mount on walls or over doors) are not floor-standing and are specifically excluded. Additionally, tabletop or countertop models with short legs that do not exceed 12 inches in length (and which may or may not collapse or retract) are specifically excluded.

The subject ironing tables were previously classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 9403.20.0010. Effective July 1, 2003, the subject ironing tables are classified under new HTSUS subheading 9403.20.0011. The subject metal top and leg components are classified under HTSUS subheading 9403.90.8040. Although the HTSUS subheadings are provided for convenience and for Customs and Border Protection (CBP) purposes, the Department's written description of the scope remains dispositive.

## Separate Rates

Foshan Shunde and Since Hardware requested a separate, company-specific antidumping duty rate. In the *AR5 Preliminary Results,* we found that both

[1] On November 16, 2010, Since Hardware attempted to submit a case brief. On November 22, 2010, the Department issued a letter to Since Hardware which rejected Since Hardware's November 16, 2010, case brief as untimely filed. *See* November 22, 2010, letter from Robert M. James to Since Hardware. Accordingly, the Department has not considered Since Hardware's November 16, 2010, submission in these Final Results.

Foshan Shunde and Since Hardware had met the criteria for the application of a separate antidumping duty rate. *See Preliminary Results,* 75 FR at 55755–55756. We verified Foshan Sunde's and Since Hardware's separate rate responses and found no discrepancies.

Further, we have not received any information since the *Preliminary Results* with respect to Foshan Shunde or Since Hardware that would warrant reconsideration of our separate-rates determination. Therefore, we have assigned an individual dumping margin to Foshan Shunde and Since Hardware for this review period.

**Analysis of Comments Received**

All issues raised in the case briefs by the parties and to which we have responded are addressed in the Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled "Issues and Decision Memorandum for the Final Results in the Administrative Review of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China," (March 14, 2011) (Issues and Decision Memorandum), which is hereby adopted by this notice. A list of the issues raised, all of which are in the Issues and Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit (CRU), room 7046 of the Department of Commerce. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at *http://trade.gov/ia.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

**Changes Since the Preliminary Results**

Based on the comments received from interested parties, we have made the following changes from that presented in our *Preliminary Results:*

For both Foshan Shunde and Since Hardware, we have based our calculations of labor inputs on industry-specific wage rates using the methodology set forth in our Industry Specific Wage Rate Memorandum.

For both Foshan Shunde and Since Hardware, we have revised our calculation of brokerage and handling and applied these charges according to the weight of the merchandise and the container size of the shipment.

For both Foshan Shunde and Since Hardware, we have corrected an error in our calculation of the surrogate value of water.

For Foshan Shunde we have revised the cotton conversion factor used in our calculations.

For Foshan Shunde, we have included the cost of cartons in our calculation of packing charges.

**Final Results of Review**

We determine that the following antidumping duty margins exist in these final results:

| Exporter | Margin (percent) |
|---|---|
| Foshan Shunde | 18.76 |
| Since Hardware | 70.05 |

For details on the calculation of the antidumping duty weighted-average margin for Foshan Shunde and Since Hardware, *see* Memorandum to the File from Michael J. Heaney, Senior International Trade Compliance Analyst; "Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Foshan Shunde Yongjian Housewares & Hardware Co., (Foshan Shunde) Analysis Memorandum for the Final Results," dated March 14 2011; *see also* Memorandum to the File from Michael J. Heaney, Senior International Trade Compliance Analyst; "Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Since Hardware (Guangzhou) Co., Ltd. (Since Hardware) Analysis Memorandum for the Final Results." The public versions of both memoranda are on file in the CRU.

**Assessment Rates**

Pursuant to section 751(a)(2)(A) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. For assessment purposes, where possible, we calculated importer-specific assessment rates for subject ironing tables from the PRC via *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of these final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For Foshan Shunde the cash deposit rate will be 18.76 percent; (2) for Since Hardware, the cash deposit rate will be 70. 05 percent; (3) for previously-investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (4) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 157.68 percent; and (5) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Interested Parties**

This notice also serves as the final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and in the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and this notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 14, 2011.

**Kim Glas,**

*Acting Deputy Assistant Secretary for Import Administration.*

## Appendix I

**Issues in Decision Memorandum**

*Comment 1:* Financial Statements Used To Determine General Expenses and Profit Ratios.
*Comment 2:* Appropriate Wage Rate Calculation.
*Comment 3:* Brokerage and Handling.
*Comment 4:* Zeroing.
*Comment 5:* Whether Certain Expenses are Appropriately Classified as Packaging or Material Costs.
*Comment 6:* Surrogate Value of Cotton.
*Comment 7:* Surrogate Value of Water.
*Comment 8:* Whether Foshan Shunde's Yield Losses Are Reasonable and Necessitate Use of Facts Available; Whether Discrepancies in Since Hardware's Calculation of Yield Losses Necessitate Use of Adverse Facts Available.
*Comment 9:* Foshan Shunde Packing Calculation.

[FR Doc. 2011–6558 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–DS–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–533–821]**

### Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Rescission of Countervailing Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Room 4014, Washington, DC 20230, telephone: (202) 482–4793.

**SUPPLEMENTARY INFORMATION:**

### Background

On December 1, 2010, the Department of Commerce (the Department) published a notice of opportunity to request an administrative review of the countervailing duty (CVD) order on certain hot-rolled carbon steel flat products from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 74682 (December 1, 2010). On January 3, 2011, we received from United States Steel Corporation, a domestic producer of subject merchandise, a request that the Department conduct an administrative review of Ispat Industries Limited (Ispat), for the review period January 1, 2010, through December 31, 2010.

On January 28, 2011, the Department published the notice of initiation of the administrative review of the CVD order covering Ispat for the period January 1, 2010, through December 31, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 76 FR 5137 (January 28, 2011). On February 4, 2011, Ispat notified the Department that it had no shipments of subject merchandise to the United States during the period of review (POR).[1]

### Scope of the Order

The products covered under this order are certain hot-rolled flat-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this order.

Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.,* ASTM specifications A543, A387, A514, A517, A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTUS.
- Tool steels, as defined in the HTUS.
- Silico-manganese (as defined in the HTUS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTUS.

The merchandise subject to this order are classified in the HTUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00,

[1] This public document is available on the public file in the Department's Central Record Unit (CRU) located in room 7046 of the main Commerce building.

7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon-quality steel covered by this order, including: vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTUS subheadings are provided for convenience and U.S. Customs purposes, the Department's written description of the merchandise subject to this proceeding is dispositive.

**Intent To Rescind the 2010 Administrative Review**

Ispat submitted a letter to the Department on February 4, 2011, certifying that it had no shipments of subject merchandise to the United States during the POR. The petitioner did not comment on Ispat's claim of no shipments.

On February 7, 2011, we conducted an internal customs data query.[2] We also issued a "no shipments inquiry" message to U.S. Customs and Border Protection (CBP), which posted the message on February 16, 2011.[3] The customs data query indicates that Ispat had no entries of subject merchandise to the United States during the POR. We did not receive any information from CBP contrary to Ispat's claim of no shipments of subject merchandise to the United States during the POR.

Based on our analysis of the shipment data, we preliminarily determine that Ispat did not ship subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice,[4] we preliminarily determine to rescind the review for Ispat. Since Ispat was the only producer/exporter for which a review was requested and initiated, we also preliminarily determine to rescind the administrative review of the CVD order covering the period January 1, 2010, through December 31, 2010.

**Public Comment**

The Department is setting aside a period for interested parties to raise issues regarding the preliminary determination to rescind the administrative review for Ispat. The Department encourages all interested parties to submit such comments within 20 calendar days of the publication of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The period for public comment is intended to provide the Department with ample opportunity to consider all issues prior to the issuance of the notice to rescind the administrative review.

We are issuing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4) of the Department's regulations.

Dated: March 15, 2011.

**Christian Marsh,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2011–6554 Filed 3–18–11; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See* Memorandum to the File from Kristen Johnson, Case Analyst, IA Operations, Office 3, regarding "Customs Data Query Results," (February 8, 2011). A public version of this memorandum is available on the public file in the CRU.

[3] *See* Message number 1047301, available at *http://addcvd.cbp.gov.*

[4] *See, e.g., Welded Carbon Steel Standard Pipe and Tube from Turkey: Notice of Rescission of Countervailing Duty Administrative Review, In Part,* 74 FR 47921 (September 18, 2009).

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA306**

### Endangered Species; File Nos. 16266 and 16291

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that the Virginia Living Museum, 524 J. Clyde Morris Boulevard, Newport News, VA, 23602 [Chris Crippen, Responsible Party], and the Maritime Aquarium at Norwalk, 10 North Water Street, South Norwalk, CT, 06854 [Ellen Riker, Responsible Party], have applied in due form for permits to hold and transport shortnose sturgeon (*Acipenser brevirostrum*) for the purposes of enhancement.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before April 20, 2011.

**ADDRESSES:** The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 16291 or 16266 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by e-mail to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. 16291 and/or 16266 in the subject line of the e-mail comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Colette Cairns or Jennifer Skidmore, (301) 713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The Virginia Living Museum [File No. 16266] is requesting a permit to continue enhancement activities previously authorized under Permit No. 1473. Activities would include the continued maintenance and educational display of eight captive-bred, non-releaseable adult shortnose sturgeon, as well as the transport of four shortnose sturgeon to the Maritime Aquarium at Norfolk. The Maritime Aquarium at Norwalk [File No. 16291] is requesting a permit to continue enhancement activities previously authorized under Permit No. 1472. Activities would include the acquisition of four captive-

bred, non-releaseable adult shortnose sturgeon from the Virginia Living Museum for the maintenance and educational display of those specimens. Both displays would be used to increase public awareness of the shortnose sturgeon and its status by educating the public on shortnose sturgeon life history and the reasons for the species decline. The proposed projects to display endangered cultured shortnose sturgeon responds directly to a recommendation from the NMFS recovery plan outline for this species. The permits would not authorize any takes from the wild, nor would it authorize any release of captive sturgeon into the wild. The permits are requested for a duration of 5 years.

Dated: March 15, 2011.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–6582 Filed 3–18–11; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA307**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Pacific Council and its advisory entities will hold public meetings.

**DATES:** The Pacific Council and its advisory entities will meet April 8–13, 2011. The Pacific Council meeting will begin on Saturday, April 9, 2011 at 8 a.m., reconvening each day through Wednesday, April 13, 2011. All meetings are open to the public, except a closed session will be held from 8 a.m. until 9 a.m. on Saturday, April 9 to address litigation and personnel matters. The Pacific Council will meet as late as necessary each day to complete its scheduled business.

**ADDRESSES:** Meetings of the Pacific Council and its advisory entities will be held at the Marriott San Mateo, 1770 South Amphlett Boulevard, San Mateo, CA 94402; telephone: (650) 635–6000.

*Council address:* Pacific Fishery Management Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220.

**FOR FURTHER INFORMATION CONTACT:** Dr. Donald O. McIsaac, Executive Director; telephone: (503) 820–2280 or (866) 806–7204 toll free; or access the Pacific Council Web site, *http://www.pcouncil.org* for the current meeting location, proposed agenda, and meeting briefing materials.

**SUPPLEMENTARY INFORMATION:** The following items are on the Pacific Council agenda, but not necessarily in this order:

**A. Call to Order**

1. Opening Remarks
2. Roll Call
3. Executive Director's Report
4. Approve Agenda

**B. Open Comment Period**

Comments on Non-Agenda Items

**C. Coastal Pelagic Species (CPS) Management**

1. National Marine Fisheries Service Report
2. Exempted Fishing Permit for 2011 Aerial Survey
3. CPS Survey Methodology

**D. Habitat**

Current Habitat Issues

**E. Administrative Matters**

1. Marine Spatial Planning Update
2. Legislative Matters
3. Approve Council Meeting Minutes
4. Membership Appointments and Council Operating Procedures
5. Future Council Meeting Agenda and Workload Planning

**F. Pacific Halibut Management**

Incidental Catch Regulations for the 2011 Salmon Troll Fishery

**G. Salmon Management**

1. National Marine Fisheries Service Report
2. Tentative Adoption of 2011 Management Measures for Analysis
3. 2011 Methodology Review
4. Further Council Direction for 2011 Management Measures for Analysis
5. Essential Fish Habitat Review
6. Adoption of 2011 Management Measures

**H. Highly Migratory Species Management**

1. National Marine Fisheries Service Report
2. North Pacific Albacore Tuna Conservation and Management

**I. Groundfish Management**

1. National Marine Fisheries Service Report
2. 2013–14 Biennial Management Process and Schedule for Public Review
3. Periodic Essential Fish Habitat Review Process
4. Formation of Risk Pools under the Trawl Rationalization Program, Informational Briefing only
5. Consider Inseason Adjustments—Part I
6. Develop Trailing Management Actions under Trawl Rationalization
7. Council Input to the NMFS Program Improvements and Enhancement Rule
8. Consider Inseason Adjustments—Part 2, if needed

**Schedule of Ancillary Meetings**

*Day 1—Thursday, April 7, 2011*

Habitat Committee—1 p.m.

*Day 2—Friday, April 8, 2011*

Habitat Committee—8 a.m.
Scientific and Statistical Committee—8 a.m.

*Day 3—Saturday, April 9, 2011*

California State Delegation —7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Scientific and Statistical Committee—8 a.m.
Enforcement Consultants—4:30 p.m.

*Day 4—Sunday, April 10, 2011*

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Needed
Tribal Policy Group—As Needed
Tribal and Washington Technical Group—As Needed

*Day 5—Monday, April 11, 2011*

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Needed
Tribal Policy Group—As Needed
Tribal and Washington Technical Group—As Needed

*Day 6—Tuesday, April 12, 2011*

California State Delegation—7 a.m.

Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Needed
Tribal Policy Group—As Needed
Tribal and Washington Technical Group—As Needed

*Day 7—Wednesday, April 13, 2011*

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Needed
Tribal Policy Group—As Needed
Tribal and Washington Technical Group—As Needed

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: March 16, 2011.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011–6512 Filed 3–18–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Nationwide Categorical Waivers Under Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (Recovery Act)

**AGENCY:** Department of the Air Force, 772d Enterprise Sourcing Squadron, DoD.

**ACTION:** Notice—Nationwide Categorical Waivers under Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (Recovery Act).

**SUMMARY:** The U.S. Department of Air Force, 772d ESS/PK, Senior Center Contracting Official (SOCO) hereby provides notice that on 4 March 2011 a waiver of the Buy American requirements of the American Recovery and Reinvestment Act of 2009, Public Law 1115 (Recovery Act) under the authority of section 1605(b)(2) [iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality] for the of the following construction items to be incorporated into the project FTQW094001 for the construction and replacement of military family housing units at Eielson AFB, Alaska under task order FA8903–06–D–8505–0019. The items are 1″ Collated Screws, Shank #10; 1–½″ (Taco) Air Scoops for Hydronic Heating Systems; 1–⅝″ Ceramic Coated Bugle Head Course Thread Screws; 2″ (Taco) Air Scoops for Hydronic Heating Systems; 2–½″ (Taco) Air Scoops for Hydronic Heating Systems; 2–½″ Collated Screws; 3″ Ceramic Coated Bugle Head Course Thread Screws; 3″ Spool Insulators; ¾″ Collated Screws, Shank #10; 3″;Bolt Guy Clamp; Ceiling Fan; Ceiling Fan w/Light Kit; Door Hinge Pin Stops; Exterior Wall Mount Two Head Flood Light w/270 Degree Motion Sensor & Brushed Nickel Finish; Ground Fault Circuit Interrupt (GFCI) Receptacles; Handrail Brackets; Maclean Power Systems Guy Attachment; Residential Style Satin Chrome Handrail Bracket; Satin Nickel Outdoor Sconce Light Fixture; Tamper-Resistant Ground Fault Circuit Interrupt (GFCI) Receptacles; Weather-Resistant Ground Fault Circuit Interrupt (GFCI) Receptacles; Pendant Bar Light Fixture; 24″ Bath Vanity Light Fixture; Pendant Chandelier Light Fixture; Linear Fluorescent Ceiling Lighting Fixture (48″ Lensed Fluorescent w/Dimming Ballast & Satin Aluminum Finish); 48″ Bath Vanity Light Fixture; 20″ Utility Shelf Bracket; Chrome Finish Residential Dishwasher Air Gap Cap Fitting; Satin Chrome Finish Convex Wall Mount Door Stops; Residential Microwave w/Range Hood; Residential Style Polished Chrome Towel Ring; Residential Style Polished Chrome Toilet Paper Holder; Residential Style Polished Chrome Double Robe Hook; Residential Style Bright Stainless Steel 60″ Curved Shower Rod & Flanges; Residential Style Polished Chrome 24″ Towel Bar; Residential Style Polished Chrome 30″ Towel Bar; Satin Nickel Finish Wall Mounted Spring Door Stop.

**DATES:** Effective Date 4 March 2011.

**ADDRESSES:** ESS/PK; 2261 Hughes Ave., Ste, 163, Lackland AFB, TX 78236–98612.

**FOR FURTHER INFORMATION CONTACT:** Sharon Money, Contracting Officer, 772d ESS/PKA, 2261 Hughes Ave., Ste, 163, Lackland AFB, TX 78236–98612.

**SUPPLEMENTARY INFORMATION:** Section 1605 of the Recovery Act requires that no appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States, or unless a waiver is granted by the head of the Federal department or agency. A waiver may be granted if the head of the Federal department or agency determines that one of three exceptions applies: (1) The application of Section 1605 requirements would be inconsistent with the public interest; (2) the iron, steel, or relevant manufactured good is not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality; or (3) the cost of domestic iron, steel or relevant manufactured goods will increase the cost of the overall project by more than 25 percent.

In accordance with Section 1605(c) of the Recovery Act, the Senior Center Contracting Official (SOCO) 772d ESS/PK has determined that the above items of manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The domestic nonavailability determination for these products is based on extensive market research and thorough investigation of the domestic manufacturing landscape. This research identified that these products are manufactured almost exclusively in China.

**Sharon L. Money,**

*Contracting Officer, 772d Enterprise Sourcing Squadron.*

[FR Doc. 2011–6502 Filed 3–18–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Public Hearing for the Draft Environmental Impact Statement for the TRIDENT Support Facilities Explosives Handling Wharf, Naval Base Kitsap Bangor, Silverdale, Kitsap County, WA

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality Regulations for implementing the procedural provisions of NEPA (Title 40 Code of Federal Regulations Parts 1500–1508), the Department of the Navy (Navy) has prepared and filed with the U.S. Environmental Protection Agency a Draft Environmental Impact Statement (EIS) to evaluate the potential environmental effects of constructing and operating a second Explosives Handling Wharf (EHW–2) at Naval Base Kitsap Bangor (NBK Bangor), Silverdale, WA. The U.S. Army Corps of Engineers (USACE) and the National Marine Fisheries Service (NMFS) are cooperating agencies for the EIS.

The Navy will conduct three public hearings to receive oral and written comments on the Draft EIS. Federal, State, and local agencies, elected officials, and other interested individuals and organizations are invited to be present or represented at the public hearings. This notice announces the dates and locations of the public hearings for this Draft EIS.

*Dates and Addresses:* Public hearings will be held on the following dates and locations:

1. April 19, 2011, at the North Kitsap High School Commons, 1780 Northeast Hostmark Street, Poulsbo, WA 98370;
2. April 20, 2011, at the Chimacum High School, 91 West Valley Road, Chimacum, WA 98325; and
3. April 21, 2011, at the Seattle Central Library, 1000 Fourth Avenue, Seattle, WA 98104.

All meetings will start with an open house session from 6 p.m. to 7:30 p.m. followed by a presentation and public comment period from 7:30 p.m. to 9 p.m. The open house sessions will allow individuals the opportunity to review summaries of the information presented in the Draft EIS. Navy representatives will be available during the open house sessions to clarify information related to the Draft EIS.

**FOR FURTHER INFORMATION CONTACT:** Naval Facilities Engineering Command Northwest, 1101 Tautog Circle, Silverdale, WA 98315–1101, Attn: Christine Stevenson, EHW–2 EIS Project Manager; or *http://ehw.nbkeis.com.*

**SUPPLEMENTARY INFORMATION:** A Notice of Intent to prepare this Draft EIS was published in the **Federal Register** on May 15, 2009 (74 FR 22900). Three public scoping meetings were held in Poulsbo, Port Ludlow, and Seattle, WA. The first public scoping meeting was held on June 23, 2009, at the Poulsbo Fire Station Main Headquarters, 911 Northeast Liberty Road, Poulsbo, WA. The second public scoping meeting was held on June 24, 2009, at the Port Ludlow Fire Station 31, 7650 Oak Bay Road, Port Ludlow, WA. The third public scoping meeting was held on June 25, 2009, at the Starbucks Corporate Headquarters, 2401 Utah Avenue South, 3rd Floor, Seattle, WA. The meeting was originally scheduled to be held at the John Stanford Center for Educational Excellence, 2445 3rd Avenue South, Seattle, WA but was relocated due to unforeseen venue cancellation. Notifications were made to the media immediately upon reserving the new venue and handouts with the new location were distributed to those arriving at the John Stanford Center for Educational Excellence.

The proposed action is to construct and operate an EHW–2 adjacent to, but separate from, the existing Explosives Handling Wharf (EHW–1) at the NBK Bangor waterfront. The proposed action consists of in-water and land-based construction and operations. NBK Bangor, located on Hood Canal approximately 20 miles west of Seattle, provides berthing and support services for OHIO Class ballistic missile submarines, hereafter referred to as TRIDENT submarines. As part of the Navy's sea-based strategic deterrence mission, the Navy Strategic Systems Programs (SSP) directs research, development, manufacturing, test, evaluation, and operational support of the TRIDENT Fleet Ballistic Missile program. SSP is the action proponent and the Navy is the lead agency for this project.

The purpose for the proposed action is to support future TRIDENT program requirements for TRIDENT submarines currently homeported at NBK Bangor and the TRIDENT II (D5 missile) Strategic Weapons System. The proposed action is needed to support TRIDENT program requirements of 400 operational days per year. The EHW–1 currently provides approximately 200 operational days per year due to required facility preventative maintenance and pile replacement. The Navy anticipates that after pile replacement concludes in 2024, the EHW–1 will provide approximately 300 operational days per year. The proposed EHW–2 would provide 300 operational days per year. Therefore, EHW–1 and the proposed EHW–2 would provide a total available capacity of approximately 500–600 operational days per year. The proposed EHW–2 would be designed to meet all TRIDENT program requirements.

SSP evaluated a range of alternatives that would meet action objectives, and applied screening criteria to identify those alternatives that were "reasonable" (*i.e.,* practical and feasible). Screening criteria included: capability for meeting TRIDENT mission requirements; ability to avoid or minimize environmental impacts; siting requirements including proximity to existing infrastructure; availability of waterfront property; constructability of essential project features; and explosives safety restrictions. Reasonable alternatives were carried through the Draft EIS analysis.

The Draft EIS considers six alternatives including the No Action Alternative. Alternatives include in-water and land-based components such as the wharf, access trestles, an abutment where the trestles connect to the shore, extension of an existing paved road, construction of a new upland gravel access road, and an upland construction staging area. The wharf proper (excluding access trestles) would lie approximately 600 feet offshore at water depths of 60 feet to 100 feet, and would consist of a covered ordnance handling area, a warping wharf, and lightning protection towers. A warping wharf is a long narrow wharf extension used to position submarines prior to moving into the operations area of the EHW–2.

The six alternatives considered in this Draft EIS are as follows:

(1) Alternative 1 (Combined Trestle, Large Pile Wharf)—access trestles would be combined over shallow water to reduce impacts to shallow-water habitat and resources. The wharf would be supported primarily on large (up to 48-inch diameter) piles and smaller (24-inch to 36-inch diameter) piles. Alternative 1 is the preferred alternative.

(2) Alternative 2 (Combined Trestle, Conventional Pile Wharf)—access trestles would be combined as for Alternative 1 but would use a conventional pile wharf supported on a larger number of smaller piles (24-inch to 36-inch diameter). The dimensions of the conventional pile wharf would be the same as the large pile wharf. Pile driving would take longer than for Alternative 1.

(3) Alternative 3 (Separate Trestles, Large Pile Wharf)—access trestles would be completely separate. There would be more trestle piles and greater overwater area, including more area over shallow water. The large pile wharf would be the same as for Alternative 1.

(4) Alternative 4 (Separate Trestles, Conventional Pile Wharf)—access trestles would be separate as for Alternative 3 and would use a

conventional pile wharf as for Alternative 2.

(5) Alternative 5 (Combined Trestle, Floating Wharf)—access trestles would be combined as for Alternatives 1 and 2. This alternative would employ a floating wharf rather than a pile-supported wharf. The wharf would be supported on large concrete pontoons and connected to mooring dolphins. The floating wharf would be larger than the pile-supported wharves and would entail considerably fewer piles than Alternatives 1 through 4.

(6) No Action Alternative—there would be no construction or operation of the EHW–2. The Navy would not have the required facilities to perform routine operations and upgrades required to maintain the current fleet of TRIDENT submarines at NBK Bangor through 2042, the life of the current TRIDENT weapons systems. The No Action Alternative is considered in accordance with Section 1502.14(d) of the NEPA regulation.

The Draft EIS evaluates the potential environmental effects associated with the construction and operation of the EHW–2 at NBK Bangor, WA. Alternatives were evaluated within several environmental resource areas including marine, upland, and social environments. These resource areas include: hydrography (currents and tides), water quality, sediment, underwater noise, marine vegetation, plankton, benthic communities including shellfish, marine fish, marine mammals, marine birds, threatened and endangered species, geology and soils, surface water and groundwater, vegetation, wetlands, wildlife, noise, air quality, cultural resources, American Indian traditional resources, coastal and shoreline management, land use and recreation, aesthetics, socioeconomics, utilities and energy, transportation, and public health and safety. Methods to reduce or minimize impacts to affected resources are addressed. The analysis includes an evaluation of the direct, indirect, and cumulative impacts.

All action alternatives would have the same types of environmental impacts; however, the magnitude of these impacts would vary among the alternatives. The principal types of marine impacts during project construction would include pile driving noise (and its effects on marine biota) and turbidity. In the long term, impacts would include loss and shading of marine habitat including eelgrass, macroalgae and benthic community, and interference with the migration of juvenile salmon, some species of which are protected under the Endangered Species Act (ESA). All action alternatives would have the potential to adversely affect fish and bird species protected under the ESA, and marine mammals (behavioral disturbance) protected under the ESA and the Marine Mammal Protection Act (MMPA). Injury is not expected to any marine mammal or bird. Upland construction would result in permanent and temporary impacts to forest, shrub lands, and wetlands; however, most areas would be replanted following construction and mitigation would offset the permanent loss of the wetland area. Wildlife would be disturbed by construction noise, especially pile driving, but no terrestrial animals or plants protected under the ESA, the Migratory Bird Treaty Act, or Bald and Golden Eagle Protection Act would be affected. Measures are proposed to mitigate these impacts. Recreational and residential areas would be disturbed by pile driving noise. Mitigation measures would be implemented to minimize impacts from pile driving noise. Construction barges could affect marine traffic in Hood Canal and would affect vehicle traffic on the Hood Canal Floating Bridge. Mitigation measures would be implemented to minimize impacts from marine construction traffic.

In accordance with Section 7 of the ESA, the Navy is consulting with NMFS and the U.S. Fish and Wildlife Service for potential impacts to Federally listed species. The Navy is also consulting with NMFS regarding potential effects on Essential Fish Habitat under the Magnuson Stevens Fishery Conservation and Management Act, and working with NMFS to ensure compliance with the MMPA. The Navy will submit an application to the USACE for a permit under Section 10 of the Rivers and Harbors Act, and Section 404 of the Clean Water Act. Navy analysis has indicated that under the Clean Air Act requirements, air pollutant emissions would not exceed thresholds for a major source for any alternative. Under all action alternatives, the setting of the EHW–1, which is eligible for listing under the National Register of Historic Places, would be adversely affected by the proposed action; however, the Navy will consult with the State Historic Preservation Officer (SHPO) and develop a mitigation plan. There would be a small potential for disturbance of archaeological resources during construction; if any such resources were encountered, the Navy would coordinate with the SHPO and affected American Indian Tribes. Access to Tribal fishing areas would not be affected by any alternative; however, implementation of the proposed action would adversely affect fish, which are Tribal treaty reserved resources. The Navy is conducting government-to-government consultation with the potentially affected Tribes. Mitigation is included as part of the proposed action to address the impacts to these aquatic resources.

The decision to be made by the Navy is to determine which of the alternatives analyzed in the EIS to implement, based upon reasonably foreseeable environmental impacts and operational needs.

The Draft EIS was distributed to Federal, State, and local agencies, elected officials, and other interested individuals and organizations. The public comment period will end on May 2, 2011. Copies of the Draft EIS are available for public review at the following libraries:

1. Jefferson County Rural Library, 620 Cedar Avenue, Port Hadlock, WA 98339;
2. Port Townsend Public Library, 1220 Lawrence Street, Port Townsend, WA 98368;
3. Poulsbo Library, 700 Northeast Lincoln Road, Poulsbo, WA 98370;
4. Silverdale Library, 3450 NW Carlton Street, Silverdale, WA 98383;
5. Sylvan Way Library, 1301 Sylvan Way, Bremerton, WA 98310; and
6. Seattle Central Library, 1000 Fourth Avenue, Seattle, WA 98104.

The TRIDENT Support Facilities EHW–2 Draft EIS is also available for electronic public viewing at: *http://ehw.nbkeis.com*. A paper copy of the executive summary or a single compact disc of the Draft EIS will be made available upon written request by contacting Naval Facilities Engineering Command Northwest, Attention: Ms. Christine Stevenson, EHW–2 EIS Project Manager, 1101 Tautog Circle, Silverdale, WA 98315–1101.

Federal, State, and local agencies, elected officials, and interested individuals and organizations are invited to be present or represented at the public hearings. Written comments can also be submitted during the open house sessions preceding the public hearings. Oral statements will be heard and transcribed by a court reporter; however, to ensure the accuracy of the record it is encouraged that all statements should also be submitted in writing. All statements, both oral and written, will become part of the public record on the Draft EIS and will be responded to in the Final EIS. Equal weight will be given to both oral and written statements. In the interest of available time, and to ensure all who wish to give an oral statement have the opportunity to do so, each speaker's

comments will be limited to three (3) minutes. If a long statement is to be presented, it should be summarized at the public hearing with the full text submitted either in writing at the hearing or mailed to Naval Facilities Engineering Command Northwest, Attention: Ms. Christine Stevenson, EHW–2 EIS Project Manager, 1101 Tautog Circle, Silverdale, WA 98315–1101. Comments may also be submitted online at *http://ehw.nbkeis.com/* during the comment period. All written comments must be postmarked by May 2, 2011, to ensure they become part of the official record. All comments will be addressed in the Final EIS.

Dated: 14 March 2011.

**D.J. Werner,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2011–6518 Filed 3–18–11; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 20, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: March 16, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

### Office of Postsecondary Education

*Type of Review:* Extension.

*Title of Collection:* Application for Grants under the Historically Black Colleges and Universities and Historically Black Graduate Institutions Programs.

*OMB Control Number:* 1840–0113.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Not-for-profit institutions; State, Local and Federal Governments.

*Total Estimated Number of Annual Responses:* 120.

*Total Estimated Annual Burden Hours:* 1,920.

*Abstract:* The collection of information is for the purpose of obtaining institutional and budgetary information needed to evaluate applications under the authority of Sections 321 and 326 of the Higher Education Act of 1965, as amended. The collection of information is gathered in two phases: Phase I—Formula Data and Phase II—The Project Plan. Both phases are submitted separately and individually by a select number of eligible institutions of higher education, as stipulated in the legislation.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4525. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–6540 Filed 3–18–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IN11–2–000]**

### Moussa I. Kourouma d/b/a Quntum Energy LLC; Notice of Designation of Commission Staff as Non-Decisional

March 14, 2011.

With respect to an order issued by the Commission on February 14, 2011 in the above-captioned docket, staff of the Office of Enforcement (OE), are designated as non-decisional in deliberations by the Commission in this docket. Accordingly, pursuant to 18 CFR 385.2202 (2010), they will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2010), they are prohibited from communicating with advisory staff concerning any deliberations in this docket.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6488 Filed 3–18–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL11–27–000]**

### Trans Bay Cable LLC; Notice of Filing

Take notice that on March 7, 2011, Trans Bay Cable LLC, filed a request for

a waiver of the annual submission requirements for FERC Form No. 715—Annual Transmission Planning and Evaluation Report.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on March 29, 2011.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6483 Filed 3–18–11; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER11–3026–000]**

### Aspen Merchant Energy LP; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Aspen Merchant Energy LP's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6484 Filed 3–18–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER11–3051–000]**

### Macho Springs Power I, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Macho Springs Power I, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6486 Filed 3–18–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER11–3053–000]**

### Holcim (US) Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Holcim (US) Inc.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6487 Filed 3–18–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER11–3028–000]**

### BBPC, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of BBPC, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6485 Filed 3–18–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Staff Attendance at Southwest Power Pool Strategic Planning Committee Meeting

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting of the Southwest Power Pool, Inc. (SPP) Strategic Planning Committee (SPC), as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

**SPP SPC**

March 28, 2011 (10 a.m.–4 p.m.), DFW Hyatt Regency, DFW Airport, Dallas, TX 75261. 972–453–1234.

The discussions may address matters at issue in the following proceedings:

Docket No. ER06–451, *Southwest Power Pool, Inc.*

Docket No. ER08–1419, *Southwest Power Pool, Inc.*

Docket No. ER09–659, *Southwest Power Pool, Inc.*

Docket No. ER09–1050, *Southwest Power Pool, Inc.*

Docket No. OA08–104, *Southwest Power Pool, Inc.*

Docket No. ER10–696, *Southwest Power Pool, Inc.*

Docket No. ER10–941, *Southwest Power Pool, Inc.*
Docket No. ER10–1069, *Southwest Power Pool, Inc.*
Docket No. ER10–1254, *Southwest Power Pool, Inc.*
Docket No. ER10–1269, *Southwest Power Pool, Inc.*
Docket No. ER10–1697, *Southwest Power Pool, Inc.*
Docket No. ER10–2244, *Southwest Power Pool, Inc.*
Docket No. ER11–13, *Southwest Power Pool, Inc.*
Docket No. ER11–2303, *Southwest Power Pool, Inc.*
Docket No. ER11–2428, *Southwest Power Pool, Inc.*
Docket No. ER11–2528, *Southwest Power Pool, Inc.*
Docket No. ER11–2711, *Southwest Power Pool, Inc.*
Docket No. ER11–2719, *Southwest Power Pool, Inc.*
Docket No. ER11–2725, *Southwest Power Pool, Inc.*
Docket No. ER11–2736, *Southwest Power Pool, Inc.*
Docket No. ER11–2758, *Southwest Power Pool, Inc.*
Docket No. ER11–2781, *Southwest Power Pool, Inc.*
Docket No. ER11–2783, *Southwest Power Pool, Inc.*
Docket No. ER11–2787, *Southwest Power Pool, Inc.*
Docket No. ER11–2828, *Southwest Power Pool, Inc.*
Docket No. ER11–2837, *Southwest Power Pool, Inc.*
Docket No. ER11–2861, *Southwest Power Pool, Inc.*
Docket No. ER11–2881, *Southwest Power Pool, Inc.*
Docket No. ER11–2916, *Southwest Power Pool, Inc.*

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Dated: March 14, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–6482 Filed 3–18–11; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2002–0036; FRL–9272–6]**

## Completion of the Requirement To Promulgate Emission Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces that EPA has completed the emission standards required by sections 112(c)(3) and (k)(3)(B) and 112(c)(6) of the Clean Air Act (CAA).

**ADDRESSES:** The EPA has established dockets for these two actions. The docket for EPA's action under section 112(c)(3) and (k)(3)(B) is Docket ID No. EPA–HQ–OAR–2002–0036. The docket for EPA's action under section 112(c)(6) is Docket ID No. EPA–HQ–OAR–2004–0505. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* confidential business information 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 through www.regulations.gov or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Nathan Topham, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–0483; fax number (919) 541–3207; e-mail address: *topham.nathan@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Section 112(c)(3) and (k)(3)(B) of the Clean Air Act (CAA) requires that, by November 15, 2000, EPA promulgate emission standards to assure that area sources accounting for 90 percent of the aggregate area source emissions of each of the 30 urban hazardous air pollutants (HAP) are subject to regulation.[1] Similarly, section 112(c)(6) of the CAA requires that, by November 15, 2000, EPA promulgate emission standards to assure that sources accounting for not less than 90 percent of the aggregate emissions of each of the seven HAP enumerated in section 112(c)(6)are subject to standards. As a result of lawsuits filed by Sierra Club alleging that EPA has failed to complete these actions by the statutory deadline, EPA is under a court order to complete these obligations. Under the order, which was most recently amended on January 20, 2011, EPA must complete these obligations by February 21, 2011.

The following two technical memoranda document the actions the Agency has taken to meet these requirements, Topham to Docket, *Emission Standards for Meeting the 90 Percent Requirement Under Section 112(c)(3) and Section 112(k)(3)(B) of the Clean Air Act* (found in Docket ID EPA–HQ–OAR–2002–0036); and Topham to Docket, *Emission Standards for Meeting the 90 Percent Requirement Under Section 112(c)(6) of the Clean Air Act* (found in Docket ID EPA–HQ–OAR–2004–0505). These documents are available in the dockets for these actions. Based on my review of these two documents, I conclude that EPA has completed sufficient standards to meet the 90 percent requirement under both sections 112(c)(3) and(k)(3)(B), and section 112(c)(6).

Dated: February 21, 2011.

**Lisa P. Jackson,**

*Administrator.*

[FR Doc. 2011–4489 Filed 3–18–11; 8:45 am]

**BILLING CODE 6560–50–P**

[1] For a list of the 30 urban HAP, *please see* National Air Toxics Program: The Integrate Urban Strategy, 64 FR 38706 (July 19, 1999).

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9284–5]**

## National and Governmental Advisory Committees to the U.S. Representative to the Commission for Environmental Cooperation

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting.

**SUMMARY:** Under the Federal Advisory Committee Act, Public Law 92–463, EPA gives notice of a meeting of the National Advisory Committee (NAC) and Governmental Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC). The National and Governmental Advisory Committees advise the EPA Administrator in her capacity as the U.S. Representative to the CEC Council. The Committees are authorized under Articles 17 and 18 of the North American Agreement on Environmental Cooperation (NAAEC), North American Free Trade Agreement Implementation Act, Public Law 103–182, and as

directed by Executive Order 12915, entitled "Federal Implementation of the North American Agreement on Environmental Cooperation." The NAC is composed of 13 members representing academia, environmental non-governmental organizations, and private industry. The GAC consists of 12 members representing state, local, and Tribal governments. The Committees are responsible for providing advice to the U.S. Representative on a wide range of strategic, scientific, technological, regulatory, and economic issues related to implementation and further elaboration of the NAAEC.

The purpose of the meeting is to provide advice on the CEC's 2011 Draft Operational Plan & Budget, and discuss other regional trans-boundary environmental issues. The meeting will also include a public comment session. A copy of the agenda will be posted at *http://www.epa.gov/ocem/nacgac-page.htm.*

**DATES:** The National and Governmental Advisory Committees will hold an open meeting on Thursday, April 14, 2011, from 8:30 a.m. to 5 p.m., and Friday, April 15, from 8:30 a.m. until 2 p.m.

**ADDRESSES:** The meeting will be held at the Capital Hilton, 1001 16th Street NW., Washington, DC 20036. Telephone: 202–393–1000. The meeting is open to the public, with limited seating on a first-come, first-served basis.

**FOR FURTHER INFORMATION CONTACT:** Oscar Carrillo, Designated Federal Officer, *carrillo.oscar@epa.gov,* 202–564–0347, U.S. EPA, Office of Federal Advisory Committee Management and Outreach (1601–M), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** Requests to make oral comments, or provide written comments to the Committees, should be sent to Oscar Carrillo, Designated Federal Officer, at the contact information above.

*Meeting Access:* For information on access or services for individuals with disabilities, please contact Oscar Carrillo at 202–564–0347 or *carrillo.oscar@epa.gov.* To request accommodation of a disability, please contact Oscar Carrillo, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: March 9, 2011.

**Oscar Carrillo,**

*Designated Federal Officer.*

[FR Doc. 2011–6556 Filed 3–18–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Privacy Act of 1974, as Amended; System of Records; Nationwide Mortgage Licensing System and Registry

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of New Privacy Act System of Records.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) proposes to add one new system of records to its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a). This new system of records is entitled Nationwide Mortgage Licensing System and Registry and will be used to register residential mortgage loan originators employed by federally regulated depository institutions as required by the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act), 12 U.S.C. 5101. We hereby publish this notice for comment on the proposed system of records.

**DATES:** Comments on the proposed system of records must be received on or before April 20, 2011. The proposed systems of records will become effective 45 days following publication in the **Federal Register**, unless a superseding notice to the contrary is published before that date.

**ADDRESSES:** You may submit written comments by any of the following methods:

- *Agency Web site:* Located at *http://www.fdic.gov/regulations/laws/federal/propose.html.*

Follow instructions for submitting comments on this Web site.

- *E-mail:* Send to *comments@fdic.gov.* Include "Notice of New System of Records" in the subject line.
- *Mail:* Send to Hugo A. Zia, Supervisory Counsel, FOIA/Privacy Act Group, Attention: Comments, New Privacy Act System of Records, 550 17th Street, NW., Washington, DC 20429.

All submissions should refer to "Notice of New Privacy Act System of Records." By prior appointment, comments may also be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1005, Arlington, Virginia 22226, between 9 a.m. and 4 p.m. (EST), Monday to Friday.

**FOR FURTHER INFORMATION CONTACT:** Hugo A. Zia, Supervisory Counsel, FOIA/Privacy Act Group, FDIC, 550 17th Street, NW., Washington, DC 20429, (703) 562–2671.

**SUPPLEMENTARY INFORMATION:** In accordance with the Privacy Act of 1974, as amended, the FDIC has conducted a review of its Privacy Act systems of records and has determined that it needs to add one new system of records to cover personal information submitted by residential mortgage loan originators and maintained in the Nationwide Mortgage Licensing System and Registry (NMLSR) pursuant to the S.A.F.E. Act. The new system of records is designated as FDIC–30–64–0032 (Nationwide Mortgage Licensing System and Registry).

The S.A.F.E. Act requires an employee of a bank, savings association, credit union or Farm Credit System institution and certain of their subsidiaries that are regulated by a Federal banking agency or the Farm Credit Administration who acts as a residential mortgage loan originator to register with the NMLSR, obtain a unique identifier, and maintain this registration. The NMLSR collects and stores information concerning a residential mortgage loan originator's identity including personal history and experience and may include information related to any administrative, civil, or criminal findings by any governmental jurisdiction. The information will be collected by entering information online into the NMLSR Web site. Once collected, the information will be maintained in the NMLSR electronic system in a secured environment.

The NMLSR is a Web-based system owned and operated by the State Regulatory Registry LLC (SRR). SRR is a limited-liability company established by Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators as a subsidiary of CSBS to develop and operate nationwide systems for State regulators in the financial services industry. SRR has contracted with the Financial Industry Regulatory Authority (FINRA) to build and maintain the NMLSR system. FINRA operates similar systems in the securities industry. More information about this system is available at *http://mortgage.nationwidelicensingsystem.org/.*

**FDIC–30–64–0032**

**SYSTEM NAME:**

Nationwide Mortgage Licensing System and Registry.

**SECURITY CLASSIFICATION:**

Unclassified but sensitive.

**SYSTEM LOCATION:**

Financial Industry Regulatory Authority, 9509 Key West Avenue,

Rockville, MD 20850 (Background Check System data).

HP Enterprise Services Charlotte SMC, 9014 Research Drive, Charlotte, NC 28262 (Production Center).

HP Enterprise Services Plano SMC, 6901 Windcrest Drive, Plano, TX 75024 (Dual Use Test and Disaster Recovery Facility).

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Residential mortgage loan originators (MLOs) employed with: a depository institution; a subsidiary owned and controlled by a depository institution and regulated by a Federal banking agency; or an institution regulated by the Farm Credit Administration.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Contains information documenting identity, including name and former names, Social Security number, gender, date of birth, and place of birth; home and business contact information; the date on which the MLO becomes an employee with the institution; criminal history, including the results of a background check; financial services-related employment history; civil, arbitration, regulatory, and disciplinary actions arising out of the MLO's financial services; and licensure revocations and suspensions.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act (12 U.S.C. 5106)).

**PURPOSE(S):**

The system is utilized to register MLOs employed by state and federally regulated depository institutions in a national registry, as required by the S.A.F.E. Act. The information is maintained to support regulatory supervision while providing the general public with access to certain information concerning MLOs including names and employment histories.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside the FDIC as a routine use as follows:

(1) To appropriate Federal, State, and local authorities responsible for investigating or prosecuting a violation of, or for enforcing or implementing a statute, rule, regulation, or order issued, when the information indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto;

(2) To a court, magistrate, or other administrative body in the course of presenting evidence, including disclosures to counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal proceedings, when the FDIC is a party to the proceeding or has a significant interest in the proceeding, to the extent that the information is determined to be relevant and necessary;

(3) To a congressional office in response to an inquiry made by the congressional office at the request of the individual who is the subject of the record;

(4) To appropriate Federal, State, local authorities, and other entities when (a) it is suspected or confirmed that the security or confidentiality of information in the system has been compromised; (b) there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information; and (c) the disclosure is made to such agencies, entities, and persons who are reasonably necessary to assist in efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm; and

(5) To appropriate Federal agencies and other public authorities for use in records management inspections;

(6) To other Federal, State or foreign financial institutions supervisory or regulatory authorities;

(7) To depository institutions or their subsidiaries for use in registering employees as mortgage loan originators or renewing employee registrations;

(8) To appropriate Federal, State, and local authorities, agencies, arbitrators, and other parties responsible for processing any personnel actions or conducting administrative hearings or corrective actions or grievances or appeals, or if needed in the performance of other authorized duties;

(9) To contractors, grantees, volunteers, and others performing or working on a contract, service, grant, cooperative agreement, or project for the Federal Government;

(10) To the appropriate governmental or self-regulatory organizations when relevant to the organization's regulatory or supervisory responsibilities or if the information is relevant to a known or suspected violation of a law or licensing standard within that organization's jurisdiction;

(11) To third parties when the information relates to the employment history of, and publicly adjudicated disciplinary and enforcement actions against, mortgage loan originators that is included in Nationwide Mortgage Licensing System and Registry for access by the public in accordance with section 1507 of the S.A.F.E. Act.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are stored in electronic media.

**RETRIEVABILITY:**

Records are retrieved by an individual MLO's name or unique identification number and by the financial institution's name.

**SAFEGUARDS:**

Records are stored in a locked environment. Access to the system is limited to users who satisfy a comprehensive background check. The extent to which users have access is based on pre-determined roles. All data exchanges take place over an encrypted network.

**RETENTION AND DISPOSAL:**

There is presently no records control schedule covering the disposition and retention of FDIC records maintained in NMLSR. FDIC staff will work with the National Archives and Records Administration to establish disposition and retention authority for FDIC records maintained in NMLSR. No data or other FDIC records of the system will be destroyed prior to obtaining such disposition and retention authority.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Division of Risk Management Supervision, FDIC, 550 17th Street, NW., Washington, DC 20429.

State Regulatory Registry LLC, 1155 Connecticut Avenue, NW., Fifth Floor, Washington, DC 20036.

**NOTIFICATION PROCEDURES:**

Records created by a MLO in the Nationwide Mortgage Licensing System and Registry may be accessed or amended directly by the MLO. If assistance is required to access or amend such a record contact the NMLS Call Center at (240) 386–4444 or State Regulatory Registry LLC, 1155 Connecticut Avenue, NW., Fifth Floor, Washington, DC 20036. Any other individual wishing to determine if he or she is named in this system of records

or who is seeking access or amendment to records maintained in this system of records must submit a request in writing to *Privacy@FDIC.Gov* or to the Legal Division, FOIA/Privacy Act Group, FDIC, 550 17th Street, NW., Washington, DC 20429, in accordance with FDIC regulations at 12 CFR part 310. The request to the FDIC should contain: (1) A statement that it is made pursuant to the Privacy Act of 1974, (2) the name of the system of records expected to contain the records requested or a concise description of such system of records, (3) necessary information to verify the identity of the requester, including the requester's name and residence address, (4) a notarized statement attesting to the requester's identity, and (5) any other information that may assist in the rapid identification of the records for which access or amendment is being requested.

**RECORD ACCESS PROCEDURES:**

Same as "Notification Procedures" above.

**CONTESTING RECORD PROCEDURES:**

Same as "Notification Procedures" above except that the envelope mailed to the FDIC should be clearly marked "Privacy Act Amendment Request." A request to the FDIC for amendment of a record should contain the information set forth in "Notification Procedures" above. In addition, the request should also: (1) Specify the portion of the record requested to be amended, and (2) describe the nature of and reasons for each requested amendment in accordance with FDIC regulations at 12 CFR part 310.

**RECORD SOURCE CATEGORIES:**

Information maintained in this system is obtained from MLOs who submit information to the registry and the results of FBI background checks.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

By order of the Board of Directors.

Dated at Washington, DC, this 15th day of March, 2011.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2011–6568 Filed 3–18–11; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 4, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Lucinda Hill Alden, Los Angeles, California,* as trustee for The Gilbert D. Hill Descendant's Trust, The Roberta E. Hill Descendant's Trust, The Julie Hill Irrevocable Trust Dated April 7, 2003, and the Lucinda Hill Irrevocable Trust Dated April 7, 2003, all of Los Angeles, California, to retain control of Newell Bancshares, Inc., Newell, Iowa, and thereby indirectly control First Community Bank, Newell, Iowa.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Scott T. Athey, Enid, Oklahoma,* to acquire control of Security Financial Services Corporation, parent of The Security National Bank of Enid, both in Enid, Oklahoma.

Board of Governors of the Federal Reserve System, March 16, 2011.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2011–6541 Filed 3–18–11; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 14, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Home Financial Bancorp, Spencer, Indiana,* to become a bank holding by acquiring 100 percent of the voting shares of Owen Community Bank, s.b., Spencer, Indiana. In connection with this application, Applicant also proposes to engage through its subsidiary, OCB Insurance Agency, Inc., Spencer, Indiana, in the sale of insurance in a town less than 5,000, pursuant to section 225.28 (b)(11)(iii)(A) of Regulation Y.

B. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *The McGehee Bank Employee Stock Ownership Plan, McGehee, Arkansas,* to acquire additional direct ownership of up to 35 percent of Southeast Financial Bankstock Corporation, McGehee, Arkansas, and thereby increase its indirect control of McGehee Bank, McGehee, Arkansas.

Board of Governors of the Federal Reserve System, March 16, 2011.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2011–6542 Filed 3–18–11; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL TRADE COMMISSION

**[File No. 102 3055]**

### Legacy Learning Systems, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 15, 2011.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Legacy Learning Systems, File No. 102 3055" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at *http://www.ftc.gov/os/publiccomments.shtm.*

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. * * *," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: *https://ftcpublic.commentworks.com/ftc/legacylearningsystems* and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at *https://ftcpublic.commentworks.com/ftc/legacylearningsystems.* If this Notice appears at *http://www.regulations.gov/search/index.jsp,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at *http://www.ftc.gov/* to read the Notice and the news release describing it.

A comment filed in paper form should include the "Legacy Learning Systems, File No. 102 3055" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm.*

**FOR FURTHER INFORMATION CONTACT:** Stacey Ferguson (202–326–2361) or Victor DeFrancis (202–326–3495), FTC Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 15, 2010), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

## Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Legacy Learning Systems, Inc. and Lester Gabriel Smith, an officer and director of the corporation ("respondents").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The practices challenged in this case relate to the advertising of respondents' instructional courses via an online affiliate marketing program. According to the Commission's complaint, many of respondents' affiliates promoted respondents' instructional courses through positive endorsements in articles, blog posts, or other online editorial copy that contained hyperlinks to respondents' Web site in close proximity to the endorsements. For each sale of an instructional course to a consumer directed to respondents' Web site by an affiliate, respondents paid the affiliate a commission of 20 to 45 percent of the purchase price. The affiliates often posted endorsements

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

about respondents' instructional courses using statements that gave readers the impression the endorsements had been submitted by ordinary consumers or independent reviewers. Respondents failed to implement a reasonable monitoring program to ensure that these postings clearly and prominently disclosed the compensated nature of the affiliates' relationship to respondents.

The Commission's complaint alleges that respondents violated Section 5 of the FTC Act by disseminating or causing to be disseminated reviews of their instructional courses that misrepresented that they were those of independent, ordinary consumers. The complaint further alleges that respondents violated Section 5 by failing to disclose, or disclose adequately, that the affiliates receive financial compensation from the sale of respondents' products.

Part I of the proposed order prohibits respondents, in connection with the advertising of any product or service, from misrepresenting the status of any user or endorser of a product or service, including, but not limited to, misrepresenting that the user or endorser is an independent user or ordinary consumer of the product or service.

Part II prohibits respondents from making any representation about any user or endorser of a product or service unless they disclose, clearly and prominently, a material connection, when one exists, between the user or endorser of the product or service and any other party involved in promoting that product or service. The proposed order defines "material connection" as any relationship that materially affects the weight or credibility of any endorsement and would not be reasonably expected by consumers.

Part III requires respondents to take immediate steps to ensure compliance with Parts I and II of the order, including maintaining a system to review and monitor their affiliate representations and disclosures. The proposed order requires respondents to determine, on a semi-annual basis, their top fifty (50) revenue-generating affiliates, and then monitor, on a monthly basis, the Web sites of those affiliates and the Web sites of a random sample of fifty (50) of their remaining affiliates. Part III also requires respondents to terminate any affiliate who engages in conduct inconsistent with Parts I and II of the order and to maintain reports regarding compliance with Part III of the order.

Part IV requires respondents to serve copies of the order to prospective affiliates prior to their entry into respondents' affiliate program, and to current affiliates within ten days of the date of service of the order.

Part V requires respondents to pay to the Commission a sum of $250,000. This payment may be used in the Commission's sole discretion to provide appropriate relief, which may include, but is not limited to, the recision of contracts, payment of damages, and/or public notification respecting the unfair or deceptive acts or practices alleged in the complaint. If the Commission determines that such relief is wholly or partially impracticable, any or all such funds shall be paid to the United States Treasury.

Parts VI through X of the proposed order require respondents to: Keep copies of relevant consumer complaints and inquiries, documents demonstrating order compliance, and any documents relating to any representation covered by this order; provide copies of the order to certain of their personnel; notify the Commission of changes in corporate structure that might affect compliance obligations under the order; notify the Commission of changes in corporate business or employment as to respondent Lester Gabriel Smith individually; and file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2011–6491 Filed 3–18–11; 8:45 am]

**BILLING CODE 6750–01–P**

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## FEDERAL TRADE COMMISSION

**[File No. 102 3087]**

## Chitika, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 14, 2011.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Chitika, File No. 102 3087" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at *http://www.ftc.gov/os/publiccomments.shtm.*

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *" as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential", and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: *https://ftcpublic.commentworks.com/ftc/chitika* and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://ftcpublic.commentworks.com/ftc/chitika.* If this Notice appears at *http://www.regulations.gov/search/index.jsp,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

to it. You may also visit the FTC Web site at *http://www.ftc.gov/* to read the Notice and the news release describing it.

A comment filed in paper form should include the "Chitika, File No. 102 3087" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm.*

**FOR FURTHER INFORMATION CONTACT:** Peder Magee (202–326–3538) or Tracy Shapiro (202–326–2343), FTC Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 14, 2010), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

## Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Chitika, Inc. ("Chitika").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Chitika is a network advertiser that engages in online behavioral advertising, the practice of tracking consumers' activities online in order to serve them targeted advertisements based upon their individual Web browsing activity. Chitika offers an online behavioral advertising service in which it acts as an intermediary between Web site publishers and advertisers that wish to have their advertisements placed on websites. Chitika tracks the searches a consumer has conducted, the websites visited, and the content viewed in order to serve advertising targeted to the individual consumer's interests. When a consumer visits a Web site within Chitika's network of Web site publishers, Chitika sets a new cookie or automatically receives a cookie it has previously set in the consumer's browser (the "Chitika tracking cookie"). Chitika uses cookies to serve advertisements to consumers that are targeted to their interests.

The Commission alleges that representations Chitika made in its privacy policy regarding consumers' ability to opt out of receiving tracking cookies were false or misleading. Chitika's privacy policy stated that consumers could opt out of receiving Chitika cookies. For those consumers who elected to opt out, Chitika set an "opt-out cookie" in the consumer's browser so that no additional cookies would be set in the consumer's browser, no additional information would be added to a previously set Chitika tracking cookie, and the data previously placed in the cookie would no longer be used to target advertisements to the consumer. From at least May 2008 to February 28, 2010, however, Chitika delivered opt-out cookies that were set to expire after ten (10) days. Accordingly, the complaint alleges that Chitika deceived consumers and violated Section 5 of the FTC Act by making an unqualified claim that consumers could opt out of targeted advertising when the opt out expired in ten (10) days.

Part I of the proposed order prohibits Chitika from misrepresenting (1) the extent of its data collection about consumers and (2) the extent to which consumers are able to control the collection, use, or sharing of their data.

Part II of the proposed order requires Chitika to take a number of steps to improve the transparency of, and consumers' ability to control, its collection of consumer data for online behavioral advertising. First, within thirty (30) days after service of the proposed order, Chitika must place a clear and prominent notice with a hyperlink on the homepage of its Web site that states: "We collect information about your activities on certain websites to send you targeted advertisements. To opt out of Chitika's targeted ads, click *here.*" The mechanism that Chitika provides to allow consumers to prevent Chitika from collecting information about them must remain in effect for a minimum of five (5) years. Within close proximity to the mechanism, Chitika must disclose: (1) That Chitika collects information about consumers' activities on certain websites to deliver targeted ads; (2) that by opting out, Chitika will not collect this information to deliver such ads; (3) consumers' current choice status (*i.e.,* whether opted in or opted out of tracking); and (4) that consumers' choice is specific to the browser they are using (*i.e.,* if they switch browsers or devices, they will have to opt out again).

Part II of the proposed order includes two additional provisions. First, for a period of one (1) year, near the notice and hyperlink discussed above, Chitika's homepage must state that: "If you opted out of our targeted ads before March 1, 2010, the opt-out has expired and you must opt out again to avoid targeted ads."

The final provision in Part II requires that within any behaviorally targeted advertisement that Chitika serves, it must include a hyperlink that takes consumers directly to the required choice mechanism. The hyperlink text

must state: "Opt out?" When a consumer's cursor, or equivalent, is placed over the hyperlink, a box shall be visible that clearly and prominently states, "Opt out of Chitika's targeted ads."

Part III of the proposed order restricts Chitika's use of any data that it collected from consumers prior to March 1, 2010, the date on which Chitika extended the expiration date of its opt-out cookies from ten (10) days to ten (10) years. Specifically, the proposed order prevents Chitika from using, selling, or transferring "any information that can be associated with a Chitika user or a Chitika user's computer or device" that the company obtained prior to March 1, 2010. In addition to restricting the use of this data, within sixty (60) days after the service of the order, Chitika must delete any such information stored in Chitika users' cookies and any information retained in Chitika's files that would allow the information to be associated with a particular consumer or that consumer's computer or device.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Chitika to retain documents relating to its compliance with the order. Part V requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Chitika submit a report to the Commission detailing its compliance with the order. Part VIII provides that the order expires after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2011–6493 Filed 3–18–11; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–11–11BM]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Healthcare System Surge Capacity at the Community Level—New-National Center for Emerging and Zoonotic Infectious Diseases, (NCEZID), Centers for Disease Control and Prevention, (CDC).

*Background and Brief Description*

The Healthcare Preparedness Activity, Division of Healthcare Quality Promotion (DHQP) at the Centers for Disease Control and Prevention (CDC) works with other federal agencies, state governments, medical societies and other public and private organizations to promote collaboration amongst healthcare partners, and to integrate healthcare preparedness into federal, state and local public health preparedness planning. The goal of the Activity is to help local communities' healthcare delivery and public health sectors effectively and efficiently prepare for and respond to urgent and emergent threats.

Surge is defined as a marked increase in demand for resources such as personnel, space and material. Health care providers manage both routine surge (predictable fluctuations in demand associated with the weekly calendar, for example) as well as unusual surge (larger fluctuations in demand caused by rarer events such as pandemic influenza). Except in extraordinary cases, providers are expected to manage surge while adhering to their existing standards for quality and patient safety.

Currently, health care organizations are expected to prepare for and respond to surges in demand ranging from a severe catastrophe (for example, a nuclear detonation) to more common, less severe events (for example, a worse-than-usual influenza season). CDC and other federal agencies have dedicated considerable funding and technical assistance towards developing and coordinating community-level responses to surges in demand, but it remains a difficult task.

While there is extensive research on managing collaborations during times of extraordinary pressure where response to surge takes precedence over other activities, less is known about developing and maintaining integrated collaborations during periods where the system must respond to unusual surge but also continue the routine provision of health care. In particular, studies have not explored how these collaborations can build on sustainable relationships between a broad range of stakeholders (including primary care providers) in communities with different market structures and different degrees of investment in public health.

This study aims to generate information about the role of community-based collaborations in disaster preparedness that the CDC can use to develop its programs guiding and supporting these collaborations. This project will explore barriers and facilitators to coordination on surge response in ten communities, eight of which have been studied longitudinally since the mid-1990s as part of the Center for Studying Health System Change's (HSC's) Community Tracking Study (CTS). Interviews of local healthcare stakeholders will be conducted at 10 sites.

Interviews will be conducted at a total of 63 organizations over the two years of this project. Within each of the ten communities studied, two emergency practitioner respondents (one from a safety-net hospital and one from a non-safety-net hospital), two primary care providers (one from a large practice and one from a small practice) and two local preparedness experts (one from the County or local public health agency, and one coordinator or collaboration leader) will be interviewed. In three sites (Phoenix, Greenville and Seattle) an additional respondent will be identified from an outlying rural area to offer the perspective of providers in those communities. There is no cost to respondents except their time. The total annualized burden is 63 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

| Respondent category | Number of respondents | Number of responses per respondent | Average burden response (in hours) |
|---|---|---|---|
| Emergency Department and Primary Care | 43 | 1 | 1 |
| Public Health and Preparedness/Coalition Leader | 20 | 1 | 1 |

**Petunia Gissendaner,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–6504 Filed 3–18–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–2318–N]**

**RIN 0938–AQ42**

### Medicaid Program; State Allotments for Payment of Medicare Part B Premiums for Qualifying Individuals: Federal Fiscal Year 2010 and Federal Fiscal Year 2011

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice contains charts providing the States' final allotments available to pay the Medicare Part B premiums for Qualifying Individuals (QIs) for the Federal fiscal year (FY) 2010 and the preliminary QI allotments for FY 2011. The amounts of these QI allotments were determined in accordance with the methodology set forth in regulations and reflect funding for the QI program made available under recent legislation.

**DATES:** *Effective dates:* This notice is effective on February 25, 2011. The final QI allotments for payment of Medicare Part B premiums for FY 2010 are effective October 1, 2009. The preliminary QI allotments for FY 2011 are effective October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Richard Strauss, (410) 786–2019.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Allotments for FY 2010*

Section 111 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) (Pub. L. 110–275) and section 2 of the QI Program Supplemental Funding Act of 2008 (the SFA) (Pub. L. 110–379) provided $480 million for FY 2009 and $150 million for the first quarter of FY 2010 (that is, through December 31, 2009). Section 5005 of the American Recovery and Reinvestment Act of 2009 (ARRA, Pub. L. 111–5, enacted on February 17, 2009) extended the QI program by providing $412.5 million in additional funds for the remaining three quarters of FY 2010 and $150 million in funds for the first quarter of 2011 (that is, through December 31, 2010).

Most recently with respect to funding for the QI program for FY 2010, section 3 of the "Emergency Aid to American Survivors of the Haiti Earthquake Act" enacted on January 27, 2010 (Haiti Earthquake Act, Pub. L. 111–127) amended section 1933(g)(2)(M) of the Social Security Act (the Act) to provide an additional $50 million in funding for States' FY 2010 QI allotments. Prior to enactment of the Haiti Earthquake Act, there was only $562.5 million available for States' FY 2010 QI allotments. Under the current Medicaid statute, as amended by the Haiti Earthquake Act, a total of $612.5 million is available for States' QI program in FY 2010.

### *B. Allotments for FY 2011 and Thereafter*

As previously stated, section 5005 of the American Recovery and Reinvestment Act of 2009 (ARRA, Pub. L. 111–5, enacted on February 17, 2009) extended the QI program by providing $150 million in additional funds for the first quarter of FY 2011 (that is, through December 31, 2010). Section 3 of the "Emergency Aid to American Survivors of the Haiti Earthquake Act" enacted on January 27, 2010 (Haiti Earthquake Act, Pub. L. 111–127) amended section 1933(g)(2)(M) of the Social Security Act (the Act) and provided an additional $15 million for States' FY 2011 QI allotments; that brings the total funds available for the QI program in FY 2011 to $165 million. Most recently, section 110 of the Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111–309, enacted on December 15, 2010) amended section 1933 of the Social Security Act and provides for $720 million for the QI program in FY 2011 in addition to the currently available $165 million for a total of $885 million available for funding the QI program for FY 2011. Finally, the Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111–309) also made available $280 million for the QI program for the first quarter of FY 2012 (that is, through December 31, 2011).

### *C. Current Regulations and Methodology for Calculating the Fiscal Year QI Allotments*

The amounts of the final FY 2010 and preliminary FY 2011 QI allotments, as contained in this notice, were determined in accordance with the methodology set forth in existing regulations at 42 CFR 433.10(c)(5), as amended in the **Federal Register** published on November 24, 2008 (73 FR 70893), and reflecting funding for the QI program made available under the legislation discussed above.

## II. Charts

The final QI allotments for FY 2010 and the preliminary QI allotments for FY 2011 are shown by State in Chart 1 and Chart 2 below, respectively:

Chart 1—Final Qualifying Individuals Allotments for October 1, 2009 through September 30, 2010

Chart 2—Preliminary Qualifying Individuals Allotments for October 1, 2010 through September 30, 2011

The following describes the information contained in the columns of Chart 1 and Chart 2:

Column A—*State.* Column A shows the name of each State.

Columns B through D show the determination of an Initial QI Allotment for FY 2010 (Chart 1) or FY 2011 (Chart 2) for each State, based only on the indicated Census Bureau data.

Column B—*Number of Individuals.* Column B contains the estimated average number of Medicare beneficiaries for each State that are not covered by Medicaid whose family income is at least 120 but less than 135 percent of the federal poverty level. With respect to the *final FY 2010 QI allotment (Chart 1),* Column B contains the number of such individuals for the years 2006 through 2008, as obtained from the Census Bureau's Annual Social and Economic Supplement to the 2009 Current Population Survey. With respect to the *preliminary FY 2011 QI*

*allotment (Chart 2),* Column B contains the number of such individuals for the years 2007 through 2009, as obtained from the Census Bureau's Annual Social and Economic Supplement to the 2010 Current Population Survey.

Column C—*Percentage of Total.* Column C provides the percentage of the total number of individuals for each State, that is, the Number of Individuals for the State in Column B divided by the sum total of the Number of Individuals for all States in Column B.

Column D—*Initial QI Allotment.* Column D contains each State's Initial QI Allotment for FY 2010 (Chart 1) or FY 2011 (Chart 2), calculated as the State's Percentage of Total in Column C multiplied by the total amount available Nationally for QI allotments for the fiscal year. The total amount available Nationally for QI allotments each fiscal year is $612,500,000 for FY 2010 (Chart 1) and $885,000,000 for FY 2011 (Chart 2).

Columns E through L show the determination of the States' Final QI Allotments for FY 2010 (Chart 1) or Preliminary QI Allotments for FY 2011 (Chart 2).

Column E—*FY 2010 Estimated QI Expenditures.* Column E contains the States' estimates of their total QI expenditures for FY 2010 (Chart 1) or FY 2011 (Chart 2) based on information obtained from States in the summer of 2010.

Column F—*Need (Difference).* Column F contains the additional amount of QI allotment needed for those States whose estimated expenditures in Column E exceeded their Initial QI allotments in Column D for FY 2010 (Chart 1) or for FY 2011 (Chart 2) for such States, Column F shows the amount in Column E minus the amount in Column D. For other "Non-Need" States, Column F shows "NA".

Column G—*Percent of Total Need States.* For States whose projected QI expenditures in Column E are greater than their initial QI allotment in Column D for FY 2010 (Chart 1) or FY 2011 (Chart 2), respectively, Column G shows the percentage of total need, determined as the amount for each Need State in Column F divided by the sum of the amounts for all States in Column F. For Non-Need States, the entry in Column G is "NA".

Column H—*Reduction Pool for Non-Need States.* Column H shows the amount of the pool of surplus QI allotments for FY 2010 (Chart 1) or FY 2011 (Chart 2), respectively, for those States that project QI expenditures for the fiscal year that are less than the Initial QI allotment for the fiscal year (referred to as non-need States). For States whose estimates of QI expenditures for FY 2010 or FY 2011, respectively, in Column E are equal to or less than their Initial FY 2010 or FY 2011 QI allotments in Column D for FY 2010 or FY 2011, Column H shows the amount in Column D minus the amount in Column E. For the States with a need, Column H shows "Need". The reduction pool of excess QI allotments is equal to the sum of the amounts in Column H.

Column I—*Percent of Total Non-Need States.* For States whose projected QI expenditures in Column E are less than their Initial QI allotment in Column D for FY 2010 (Chart 1) or FY 2011 (Chart 2), Column I shows the percentage of the total reduction pool in Column H, determined as the amount for each Non-Need State in Column H divided by the sum of the amounts for all States in Column H. For Need States, the entry in Column I is "Need".

Column J—*Reduction Adjustment for Non-Need States.* Column J shows the amount of adjustment needed to reduce the Initial QI allotments in Column D for FY 2010 (Chart 1) or FY 2011 (Chart 2) for Non-Need States in order to address the total need shown in Column F. The amount in Column J is determined as the percentage in column I for Non-Need States multiplied by the lesser of the total need in Column F (equal to the sum of Needs in Column F) or the total Reduction Pool in Column H (equal to the sum of the Non-Need amounts in Column H). For Need States, the entry in Column J is "Need".

Column K—*Increase Adjustment for Need States.*

Column K shows the amount of adjustment to increase the Initial QI Allotment in Column D for FY 2010 (Chart 1) or FY 2011 (Chart 2) for Need States in order to address the total need shown for the fiscal year in Column F. The amount in Column K is determined as the percentage in Column G for Need States multiplied by the lesser of the total need in Column F (equal to the sum of Needs in Column F) or the total Reduction Pool in Column H (equal to the sum of the Non-Need amounts in Column H). For Non-Need States, the entry in Column K is "NA".

Column L—*Final FY 2010 QI Allotment (Chart 1) or Preliminary FY 2011 QI Allotment (Chart 2).*

Column L contains the Final QI Allotment for each State for FY 2010 (Chart 1) or the Preliminary QI Allotment for FY 2011 (Chart 2). For States that need additional QI allotment amounts for the fiscal year based on Estimated QI Expenditures in Column E as compared to their Initial QI allotments in Column D for the fiscal year (States with a projected need amount are shown in Column F), Column L is equal to the Initial QI allotment in Column D for FY 2010 (Chart 1) or FY 2011 (Chart 2) plus the amount determined in Column K for Need States. For Non-Need States (States with a projected surplus in Column H), Column L is equal to the QI Allotment in Column D reduced by the Reduction Adjustment amount in Column J.

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CHART 1 - FINAL QUALIFYING INDIVIDUALS ALLOTMENTS FOR OCTOBER 1, 2009 THROUGH SEPTEMBER 30, 2010

| STATE | Initial QI Allotments for FY 2010 | | | FY 2010 Estimated QI Expenditures /1 | Need (Difference) | Pct of Tot. Need States | Reduction Pool for Non-Need States | Pct of Tot. Non-Need States | Reduction Adj. For Non-Need States | Increase Adj. For Need States | Final FY 2010 QI Allotment /2 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Number of Individuals /3 (000s) | Percentage of Total Col B/Tot. Col B | Initial QI Allotment Col C x $612,500,000 | | If E>D, E-D | F/(Tot. of F) | If D >= E, D - E | H/(Tot. of H) | Col. I x $70,805,667 | Col. G x $70,805,667 | |
| A | B | C | D | E | F | G | H | I | J | K | L |
| Alabama | 30 | 2.07% | $12,707,469 | $16,853,517 | $4,146,048 | 5.8555% | Need | Need | Need | $4,146,048 | $16,853,517 |
| Alaska | 2 | 0.14% | $847,165 | $130,695 | NA | NA | $716,470 | 0.4671% | $330,743 | NA | $516,422 |
| Arizona | 16 | 1.11% | $6,777,317 | $15,520,457 | $8,743,140 | 12.3481% | Need | Need | Need | $8,743,140 | $15,520,457 |
| Arkansas | 20 | 1.41% | $8,612,840 | $11,494,933 | $2,882,093 | 4.0704% | Need | Need | Need | $2,882,093 | $11,494,933 |
| California | 104 | 7.19% | $44,052,559 | $27,893,801 | NA | NA | $16,158,758 | 10.5349% | $7,459,337 | NA | $36,593,222 |
| Colorado | 16 | 1.08% | $6,636,123 | $4,152,709 | NA | NA | $2,483,414 | 1.6191% | $1,146,414 | NA | $5,489,709 |
| Connecticut | 19 | 1.29% | $7,906,870 | $3,882,739 | NA | NA | $4,024,131 | 2.6236% | $1,857,652 | NA | $6,049,218 |
| Delaware | 5 | 0.32% | $1,976,717 | $2,245,596 | $268,879 | 0.3797% | Need | Need | Need | $268,879 | $2,245,596 |
| District of Columbia | 3 | 0.21% | $1,270,747 | $0 | NA | NA | $1,270,747 | 0.8285% | $586,612 | NA | $684,134 |
| Florida | 119 | 8.21% | $50,265,099 | $51,407,902 | $1,142,803 | 1.6140% | Need | Need | Need | $1,142,803 | $51,407,902 |
| Georgia | 31 | 2.17% | $13,272,245 | $27,821,805 | $14,549,560 | 20.5486% | Need | Need | Need | $14,549,560 | $27,821,805 |
| Hawaii | 4 | 0.25% | $1,553,135 | $1,018,832 | NA | NA | $534,303 | 0.3483% | $246,649 | NA | $1,306,486 |
| Idaho | 5 | 0.37% | $2,259,106 | $1,832,669 | NA | NA | $426,437 | 0.2780% | $196,855 | NA | $2,062,250 |
| Illinois | 67 | 4.63% | $28,380,014 | $21,596,726 | NA | NA | $6,783,288 | 4.4225% | $3,131,356 | NA | $25,248,657 |
| Indiana | 29 | 2.01% | $12,283,887 | $6,382,001 | NA | NA | $5,901,886 | 3.8478% | $2,724,476 | NA | $9,559,410 |
| Iowa | 16 | 1.13% | $6,918,511 | $3,400,668 | NA | NA | $3,517,843 | 2.2935% | $1,623,935 | NA | $5,294,576 |
| Kansas | 15 | 1.06% | $6,494,929 | $3,329,636 | NA | NA | $3,165,293 | 2.0637% | $1,461,188 | NA | $5,033,741 |
| Kentucky | 24 | 1.68% | $10,307,169 | $13,937,422 | $3,630,253 | 5.1271% | Need | Need | Need | $3,630,253 | $13,937,422 |
| Louisiana | 23 | 1.61% | $9,883,587 | $17,319,895 | $7,436,308 | 10.5024% | Need | Need | Need | $7,436,308 | $17,319,895 |
| Maine | 6 | 0.41% | $2,541,494 | $4,859,469 | $2,317,975 | 3.2737% | Need | Need | Need | $2,317,975 | $4,859,469 |
| Maryland | 15 | 1.01% | $6,212,540 | $5,892,385 | NA | NA | $320,155 | 0.2087% | $147,793 | NA | $6,064,748 |
| Massachusetts | 37 | 2.54% | $15,531,351 | $10,122,884 | NA | NA | $5,408,467 | 3.5261% | $2,496,700 | NA | $13,034,650 |
| Michigan | 46 | 3.16% | $19,343,592 | $10,920,487 | NA | NA | $8,423,105 | 5.4916% | $3,888,342 | NA | $15,455,250 |
| Minnesota | 23 | 1.59% | $9,742,393 | $5,294,643 | NA | NA | $4,447,750 | 2.8998% | $2,053,206 | NA | $7,689,186 |
| Mississippi | 15 | 1.01% | $6,212,540 | $12,640,691 | $6,428,151 | 9.0786% | Need | Need | Need | $6,428,151 | $12,640,691 |
| Missouri | 32 | 2.24% | $13,695,828 | $5,880,505 | NA | NA | $7,815,323 | 5.0953% | $3,607,773 | NA | $10,088,055 |
| Montana | 7 | 0.48% | $2,965,076 | $1,261,331 | NA | NA | $1,703,745 | 1.1108% | $786,497 | NA | $2,178,579 |
| Nebraska | 9 | 0.62% | $3,812,241 | $2,823,567 | NA | NA | $988,674 | 0.6446% | $456,400 | NA | $3,355,841 |
| Nevada | 8 | 0.55% | $3,388,658 | $3,395,770 | $7,112 | 0.0100% | Need | Need | Need | $7,112 | $3,395,770 |
| New Hampshire | 7 | 0.46% | $2,823,882 | $1,755,128 | NA | NA | $1,068,754 | 0.6968% | $493,367 | NA | $2,330,515 |
| New Jersey | 29 | 2.01% | $12,283,887 | $9,984,723 | NA | NA | $2,299,164 | 1.4990% | $1,061,359 | NA | $11,222,528 |
| New Mexico | 12 | 0.85% | $5,224,182 | $3,698,173 | NA | NA | $1,526,009 | 0.9949% | $704,448 | NA | $4,519,733 |
| New York | 92 | 6.36% | $38,969,571 | $40,686,815 | $1,717,244 | 2.4253% | Need | Need | Need | $1,717,244 | $40,686,815 |
| North Carolina | 58 | 4.03% | $24,708,967 | $25,680,694 | $971,727 | 1.3724% | Need | Need | Need | $971,727 | $25,680,694 |
| North Dakota | 3 | 0.23% | $1,411,941 | $658,672 | NA | NA | $753,269 | 0.4911% | $347,730 | NA | $1,064,211 |
| Ohio | 70 | 4.84% | $29,650,761 | $21,103,398 | NA | NA | $8,547,363 | 5.5726% | $3,945,703 | NA | $25,705,058 |
| Oklahoma | 18 | 1.22% | $7,483,287 | $8,757,448 | $1,274,161 | 1.7995% | Need | Need | Need | $1,274,161 | $8,757,448 |
| Oregon | 18 | 1.24% | $7,624,481 | $10,850,368 | $3,225,887 | 4.5560% | Need | Need | Need | $3,225,887 | $10,850,368 |
| Pennsylvania | 77 | 5.30% | $32,474,643 | $27,233,339 | NA | NA | $5,241,304 | 3.4171% | $2,419,533 | NA | $30,055,110 |
| Rhode Island | 4 | 0.28% | $1,694,329 | $2,069,374 | $375,045 | 0.5297% | Need | Need | Need | $375,045 | $2,069,374 |
| South Carolina | 23 | 1.61% | $9,883,587 | $10,209,013 | $325,426 | 0.4596% | Need | Need | Need | $325,426 | $10,209,013 |
| South Dakota | 3 | 0.21% | $1,270,747 | $1,328,002 | $57,255 | 0.0809% | Need | Need | Need | $57,255 | $1,328,002 |
| Tennessee | 34 | 2.35% | $14,401,798 | $23,497,223 | $9,095,425 | 12.8456% | Need | Need | Need | $9,095,425 | $23,497,223 |
| Texas | 128 | 8.88% | $54,359,728 | $17,015,169 | NA | NA | $37,344,559 | 24.3473% | $17,239,298 | NA | $37,120,430 |
| Utah | 9 | 0.65% | $3,953,435 | $1,925,259 | NA | NA | $2,028,176 | 1.3223% | $936,263 | NA | $3,017,172 |
| Vermont | 3 | 0.18% | $1,129,553 | $3,340,730 | $2,211,177 | 3.1229% | Need | Need | Need | $2,211,177 | $3,340,730 |
| Virginia | 34 | 2.33% | $14,260,604 | $8,893,831 | NA | NA | $5,366,773 | 3.4989% | $2,477,453 | NA | $11,783,151 |
| Washington | 25 | 1.71% | $10,448,363 | $7,827,805 | NA | NA | $2,620,558 | 1.7085% | $1,209,723 | NA | $9,238,640 |
| West Virginia | 15 | 1.06% | $6,494,929 | $5,478,012 | NA | NA | $1,016,917 | 0.6630% | $469,437 | NA | $6,025,491 |
| Wisconsin | 35 | 2.40% | $14,684,186 | $3,904,806 | NA | NA | $10,779,380 | 7.0278% | $4,976,065 | NA | $9,708,121 |
| Wyoming | 3 | 0.23% | $1,411,941 | $711,466 | NA | NA | $700,475 | 0.4567% | $323,359 | NA | $1,088,582 |
| Total | 1,446 | 100.00% | $612,500,000 | $529,923,183 | $70,805,667 | 100.0000% | $153,382,484 | 100.0000% | $70,805,667 | $70,805,667 | $612,500,000 |

Footnotes:

/1 FY 2010 Estimates from July 2010 CMS Survey of States

/2 For Need States, Final FY 2010 QI Allotment is equal to Initial QI Allotment in Column D increased by amount in Column K
For Non-Need States, Final FY 2010 QI Allotment is equal to Initial QI Allotment in Column D reduced by amount in Column J

/3 Three-year average (2006-2008) of number (000) of Medicare beneficiaries in State who are not enrolled in Medicaid but whose incomes are at least 120% but less than 135% of Federal poverty level
Source: Census Bureau Annual Social and Economic Supplement (ASEC) to the 2009 Current Population Survey (CPS)

CHART 2 - PRELIMINARY QUALIFYING INDIVIDUALS ALLOTMENTS FOR OCTOBER 1, 2010 THROUGH SEPTEMBER 30, 2011

| STATE | Initial QI Allotments for FY 2011 | | | FY 2011 Estimated QI Expenditures /1 | Need (Difference) | Pct of Tot. Need States | Reduction Pool for Non-Need States | Pct of Tot. Non-Need States | Reduction Adj. For Non-Need States | Increase Adj. For Need States | Preliminary FY 2011 QI Allotment /2 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Number of Individuals /3 (000s) | Percentage of Total | Initial QI Allotment | | | | | | | | |
| | | Col B/Tot. Col B | Col C x $885,000,000 | | If E>D, E-D | F/(Tot. of F) | If D >= E, D - E | H/(Tot. of H) | Col. I x $53,345,492 | Col. G x $53,345,492 | QI Allotment /2 |
| A | B | C | D | E | F | G | H | I | J | K | L |
| Alabama | 40 | 2.75% | $24,363,386 | $32,994,784 | $8,631,398 | 16.1802% | Need | Need | Need | $8,631,398 | $32,994,784 |
| Alaska | 2 | 0.14% | $1,218,169 | $149,024 | NA | NA | $1,069,145 | 0.3820% | $203,755 | NA | $1,014,415 |
| Arizona | 21 | 1.45% | $12,790,778 | $18,474,779 | $5,684,001 | 10.6551% | Need | Need | Need | $5,684,001 | $18,474,779 |
| Arkansas | 23 | 1.58% | $14,008,947 | $13,530,067 | NA | NA | $478,880 | 0.1711% | $91,264 | NA | $13,917,683 |
| California | 103 | 7.09% | $62,735,719 | $32,999,286 | NA | NA | $29,736,433 | 10.6234% | $5,667,088 | NA | $57,068,631 |
| Colorado | 18 | 1.24% | $10,963,524 | $5,032,419 | NA | NA | $5,931,105 | 2.1189% | $1,130,334 | NA | $9,833,190 |
| Connecticut | 19 | 1.31% | $11,572,608 | $7,944,459 | NA | NA | $3,628,149 | 1.2962% | $691,443 | NA | $10,881,166 |
| Delaware | 6 | 0.41% | $3,654,508 | $2,352,445 | NA | NA | $1,302,063 | 0.4652% | $248,144 | NA | $3,406,364 |
| District of Columbia | 3 | 0.21% | $1,827,254 | $0 | NA | NA | $1,827,254 | 0.6528% | $348,233 | NA | $1,479,021 |
| Florida | 106 | 7.30% | $64,562,973 | $60,736,403 | NA | NA | $3,826,570 | 1.3670% | $729,257 | NA | $63,833,716 |
| Georgia | 41 | 2.82% | $24,972,471 | $33,423,470 | $8,450,999 | 15.8420% | Need | Need | Need | $8,450,999 | $33,423,470 |
| Hawaii | 4 | 0.28% | $2,436,339 | $1,199,986 | NA | NA | $1,236,353 | 0.4417% | $235,621 | NA | $2,200,718 |
| Idaho | 6 | 0.41% | $3,654,508 | $1,906,592 | NA | NA | $1,747,916 | 0.6244% | $333,113 | NA | $3,321,395 |
| Illinois | 65 | 4.47% | $39,590,502 | $25,330,763 | NA | NA | $14,259,739 | 5.0943% | $2,717,582 | NA | $36,872,920 |
| Indiana | 37 | 2.55% | $22,536,132 | $7,004,664 | NA | NA | $15,531,468 | 5.5486% | $2,959,945 | NA | $19,576,188 |
| Iowa | 21 | 1.45% | $12,790,778 | $4,357,976 | NA | NA | $8,432,802 | 3.0126% | $1,607,100 | NA | $11,183,678 |
| Kansas | 17 | 1.17% | $10,354,439 | $3,693,144 | NA | NA | $6,661,295 | 2.3798% | $1,269,491 | NA | $9,084,948 |
| Kentucky | 27 | 1.86% | $16,445,286 | $18,932,080 | $2,486,794 | 4.6617% | Need | Need | Need | $2,486,794 | $18,932,080 |
| Louisiana | 30 | 2.06% | $18,272,540 | $21,221,008 | $2,948,468 | 5.5271% | Need | Need | Need | $2,948,468 | $21,221,008 |
| Maine | 5 | 0.34% | $3,045,423 | $6,698,185 | $3,652,762 | 6.8474% | Need | Need | Need | $3,652,762 | $6,698,185 |
| Maryland | 17 | 1.17% | $10,354,439 | $7,205,785 | NA | NA | $3,148,654 | 1.1249% | $600,062 | NA | $9,754,377 |
| Massachusetts | 35 | 2.41% | $21,317,963 | $11,989,128 | NA | NA | $9,328,835 | 3.3327% | $1,777,864 | NA | $19,540,099 |
| Michigan | 47 | 3.23% | $28,626,979 | $17,085,712 | NA | NA | $11,541,267 | 4.1231% | $2,199,503 | NA | $26,427,476 |
| Minnesota | 22 | 1.51% | $13,399,862 | $6,579,079 | NA | NA | $6,820,783 | 2.4367% | $1,299,886 | NA | $12,099,976 |
| Mississippi | 17 | 1.17% | $10,354,439 | $20,985,344 | $10,630,905 | 19.9284% | Need | Need | Need | $10,630,905 | $20,985,344 |
| Missouri | 34 | 2.34% | $20,708,878 | $6,383,954 | NA | NA | $14,324,924 | 5.1176% | $2,730,005 | NA | $17,978,873 |
| Montana | 6 | 0.41% | $3,654,508 | $1,435,545 | NA | NA | $2,218,963 | 0.7927% | $422,884 | NA | $3,231,624 |
| Nebraska | 7 | 0.48% | $4,263,593 | $3,324,330 | NA | NA | $939,263 | 0.3356% | $179,002 | NA | $4,084,590 |
| Nevada | 9 | 0.62% | $5,481,762 | $4,020,578 | NA | NA | $1,461,184 | 0.5220% | $278,468 | NA | $5,203,293 |
| New Hampshire | 6 | 0.41% | $3,654,508 | $2,430,447 | NA | NA | $1,224,061 | 0.4373% | $233,278 | NA | $3,421,230 |
| New Jersey | 29 | 2.00% | $17,663,455 | $12,022,216 | NA | NA | $5,641,239 | 2.0153% | $1,075,092 | NA | $16,588,363 |
| New Mexico | 12 | 0.83% | $7,309,016 | $4,665,798 | NA | NA | $2,643,218 | 0.9443% | $503,737 | NA | $6,805,279 |
| New York | 88 | 6.06% | $53,599,449 | $51,754,350 | NA | NA | $1,845,099 | 0.6592% | $351,634 | NA | $53,247,815 |
| North Carolina | 51 | 3.51% | $31,063,317 | $28,518,186 | NA | NA | $2,545,131 | 0.9093% | $485,044 | NA | $30,578,273 |
| North Dakota | 3 | 0.21% | $1,827,254 | $783,830 | NA | NA | $1,043,424 | 0.3728% | $198,853 | NA | $1,628,401 |
| Ohio | 69 | 4.75% | $42,026,841 | $27,161,649 | NA | NA | $14,865,192 | 5.3106% | $2,832,967 | NA | $39,193,874 |
| Oklahoma | 17 | 1.17% | $10,354,439 | $9,916,064 | NA | NA | $438,375 | 0.1566% | $83,544 | NA | $10,270,895 |
| Oregon | 19 | 1.31% | $11,572,608 | $14,217,580 | $2,644,972 | 4.9582% | Need | Need | Need | $2,644,972 | $14,217,580 |
| Pennsylvania | 72 | 4.96% | $43,854,095 | $31,903,835 | NA | NA | $11,950,260 | 4.2692% | $2,277,448 | NA | $41,576,647 |
| Rhode Island | 6 | 0.41% | $3,654,508 | $2,253,888 | NA | NA | $1,400,620 | 0.5004% | $266,926 | NA | $3,387,582 |
| South Carolina | 24 | 1.65% | $14,618,032 | $9,579,380 | NA | NA | $5,038,652 | 1.8001% | $960,252 | NA | $13,657,779 |
| South Dakota | 4 | 0.28% | $2,436,339 | $1,700,431 | NA | NA | $735,908 | 0.2629% | $140,247 | NA | $2,296,091 |
| Tennessee | 34 | 2.34% | $20,708,878 | $26,031,900 | $5,323,022 | 9.9784% | Need | Need | Need | $5,323,022 | $26,031,900 |
| Texas | 117 | 8.05% | $71,262,904 | $20,365,747 | NA | NA | $50,897,157 | 18.1831% | $9,699,841 | NA | $61,563,064 |
| Utah | 9 | 0.62% | $5,481,762 | $2,264,027 | NA | NA | $3,217,735 | 1.1495% | $613,227 | NA | $4,868,535 |
| Vermont | 2 | 0.14% | $1,218,169 | $4,110,340 | $2,892,171 | 5.4216% | Need | Need | Need | $2,892,171 | $4,110,340 |
| Virginia | 33 | 2.27% | $20,099,794 | $10,533,875 | NA | NA | $9,565,919 | 3.4174% | $1,823,046 | NA | $18,276,747 |
| Washington | 21 | 1.45% | $12,790,778 | $9,527,675 | NA | NA | $3,263,103 | 1.1657% | $621,873 | NA | $12,168,905 |
| West Virginia | 15 | 1.03% | $9,136,270 | $6,455,158 | NA | NA | $2,681,112 | 0.9578% | $510,959 | NA | $8,625,311 |
| Wisconsin | 32 | 2.20% | $19,490,709 | $4,449,393 | NA | NA | $15,041,316 | 5.3735% | $2,866,533 | NA | $16,624,176 |
| Wyoming | 2 | 0.14% | $1,218,169 | $793,420 | NA | NA | $424,749 | 0.1517% | $80,948 | NA | $1,137,222 |
| Total | 1,453 | 100.00% | $885,000,000 | $658,430,178 | $53,345,492 | 100.0000% | $279,915,314 | 100.0000% | $53,345,492 | $53,345,492 | $885,000,000 |

Footnotes:

/1 FY 2011 Estimates from July 2010 CMS Survey of States

/2 For Need States, Preliminary FY 2011 QI Allotment is equal to Initial QI Allotment in Column D increased by amount in Column K

For Non-Need States, Preliminary FY 2011 QI Allotment is equal to Initial QI Allotment in Column D reduced by amount in Column J

/3 Three-year average (2007-2009) of number (000) of Medicare beneficiaries in State who are not enrolled in Medicaid but whose incomes are at least 120% but less than 135% of Federal poverty level

Source: Census Bureau Annual Social and Economic Supplement (ASEC) to the 2010 Current Population Survey (CPS)

BILLING CODE 4120–01–C

## III. Waiver of Notice With Comment and 30-Day Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on a proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule, or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and its reasons in the rule issued. In addition, we also normally provide a delay of 30 days in the effective date. However, if adherence to this procedure would be impractical, unnecessary, or contrary to public interest, we may waive the delay in the effective date in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

We are publishing this notice without a comment period or delay in effective date because of the need to notify individual States of the limitations on Federal funds for their Medicaid expenditures for payment of Medicare Part B premiums for qualifying individuals. Some States have

experienced deficits in their current allotments that have caused them to deny benefits to eligible applicants, while other States project a surplus in their allotments. This notice adjusts the allocation of Federal funds, which will reduce the impact of States denying coverage to eligible QIs when there is sufficient funding to cover all or some of these individuals. Because access to Medicare Part B coverage for QIs, who without this coverage would have difficulty paying for needed health care, is critically important, we believe that it is in the public interest to waive the usual notice and comment procedure which we undertake before making a rule final. Moreover, we are not making any changes to the process we use for allocating allotments. We are simply implementing a process already set forth in regulations. For these reasons, we also believe a notice and comment process would be unnecessary.

Therefore, for the reasons discussed above, we find that good cause exists to dispense with the normal requirement that a notice cannot become effective any earlier than 30 days after its publication. States that will have access to additional funds for QIs need to know that these funds are available as soon as possible. While we believe the surplus States that will have diminished amounts available for this FY will have sufficient funds for enrolling all potential QIs in their States, they also need to know as soon as possible that a certain amount of their unused allocation will no longer be available to them for this FY.

## IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

## V. Regulatory Impact Statement

We have examined the impact of this notice as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). This notice does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any one year. Individuals and States are not included in the definition of a small entity.

This notice codifies our procedures for implementing provisions of the Balanced Budget Act of 1997 to allocate, among the States, Federal funds to provide Medicaid payment for Medicare Part B premiums for low-income Medicare beneficiaries. The total amount of Federal funds available during a Federal fiscal year and the formula for determining individual State allotments are specified in the law. We have applied the statutory formula for the State allotments. Because the data specified in the law were not initially available, we used comparable data from the U.S. Census Bureau on the number of possible qualifying individuals in the States. This notice also permits, in a specific circumstance, reallocation of funds to enable enrollment of all eligible individuals to the extent of the available funding.

We believe that the statutory provisions implemented in this notice will have a positive effect on States and individuals. Federal funding at the 100 percent matching rate is available for Medicare cost-sharing for Medicare Part B premium payments for qualifying individuals and, with the reallocation of the State allotments, a greater number of low-income Medicare beneficiaries will be eligible to have their Medicare Part B premiums paid under Medicaid. The changes in allotments will not result in fewer individuals receiving the QI benefit in any State. The FY 2010 and FY 2011 costs for this provision have been included in the Mid-session Review of the FY 2011 President's Budget.

Section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis for any rule that may have a significant impact on the operations of a substantial number of small rural hospitals. The analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined and certify that this notice will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $130 million. This notice will have no consequential effect on the governments mentioned or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. Since this notice does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this notice was not reviewed by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: February 9, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Dated: *February 28, 2011*

**Kathleen Sebelius,**

*Secretary.*

[FR Doc. 2011–6565 Filed 3–18–11; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–P–0176]**

### SEDASYS Computer-Assisted Personalized Sedation System; Ethicon Endo-Surgery, Inc.'s, Petition for Review of FDA's Denial of Premarket Approval

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that it intends to refer for review before an advisory committee Ethicon Endo-Surgery Inc.'s (EES's), petition for review of the Agency's denial of premarket approval for its SEDASYS computer-assisted personalized sedation system (SEDASYS system).

**ADDRESSES:** Submissions related to the petition should be filed with the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Tarita Rooths, Regulations, Policy, and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–9138.

**SUPPLEMENTARY INFORMATION:** On February 26, 2010, the Center for Devices and Radiological Health (CDRH) issued a not approvable letter in response to the premarket approval application (PMA) (PMA P080009) submitted by EES for the SEDASYS system. The SEDASYS system is intended for use by gastroenterologists as a drug-delivery system for the administration of propofol for minimal-to-moderate sedation in healthy patients undergoing a colonoscopy or esophagogastroduodenoscopy. CDRH determined the PMA for the SEDASYS system not to be approvable under § 814.44(f) (21 CFR 814.44(f)) because it concluded that the data and information offered in support of the PMA did not provide a reasonable assurance that the device is safe under the conditions of use prescribed, recommended, or suggested in the proposed labeling, as required by section 515(d)(2)(A) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

On March 25, 2010, EES requested administrative review of the not approvable letter. Submitted in the form of a petition for reconsideration under 21 CFR 10.33 (*see* § 814.44(f)(2)), EES's request stated that, in accordance with § 814.44(f), EES considered the not approvable letter to be a denial of approval of PMA P080009 under § 814.45 (21 CFR 814.45). Pursuant to section 515(d)(4) of the FD&C Act, EES requested review of this denial under section 515(g)(2) (21 U.S.C. 360e(g)(2)) of the FD&C Act.

Accordingly, as required by § 814.45(e)(3), CDRH issued an order denying approval of the PMA for the SEDASYS system on October 26, 2010 (Ref. 1). Pursuant to section 515(g)(2) of the FD&C Act, on November 5, 2010, FDA granted EES's petition for review of the order denying PMA P080009.

In accordance with section 515(g)(2) of the FD&C Act, the Commissioner of Food and Drugs (the Commissioner) or her designee is referring PMA P080009 and the basis for the order denying its approval to an advisory committee of qualified experts. After independent study of the data and information furnished by the parties, and other data and information before it, the advisory committee will submit to the Commissioner a report and recommendation with respect to the order, together with the underlying data and information and a statement of the reasons or basis for the recommendation (section 515(g)(2)(A) of the FD&C Act). The Commissioner will provide a copy of that report and recommendation to the petitioner (id.), as well as to CDRH. At this time, the Commissioner also anticipates offering both the petitioner and CDRH the opportunity to submit comments on the report and recommendation before the final order is rendered. In keeping with section 515(g)(2)(C) of the FD&C Act, the Commissioner will make the report and recommendation public and issue an order either affirming or reversing the denial of approval.

In 1999, FDA established a standing advisory committee known as the Medical Devices Dispute Resolution Panel to provide advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies (see the charter for the Medical Devices Advisory Committee (MDAC charter)) (Ref. 2). In a guidance document entitled "Resolving Scientific Disputes Concerning the Regulation of Medical Devices, A Guide to Use of the Medical Devices Dispute Resolution Panel" (July 2, 2001) (the Guidance), FDA clarified that the Medical Devices Dispute Resolution Panel was established, in part, to receive referrals of petitions for advisory committee review under section 515(g)(2) of the FD&C Act (Ref. 3).

Accordingly, the Commissioner will refer EES's petition for review to this advisory committee for a report and recommendation with respect to the order denying PMA P080009. The Office of the Commissioner will select the temporary members of, and any consultants to, the advisory committee, and otherwise ensure that the proceeding is conducted in accordance with section 515(g)(2) of the FD&C Act, the Federal Advisory Committee Act, FDA's regulations in 21 CFR part 14 governing its public advisory committees, the MDAC charter, and any other applicable laws or regulations. The Office of the Commissioner will also perform the other duties assigned to FDA under section 515(g)(2) of the FD&C Act. The Office of the Commissioner will publish a **Federal Register** notice concerning the advisory committee meeting at a later date.

Although no statute or regulation requires that separation of functions be applied to this proceeding, the Agency is observing separation of functions as a matter of policy in this matter. As the Center responsible for the action under review, CDRH will be, like EES, a party to the advisory committee hearing and will be responsible for presenting its position at that meeting.

In addition, as a corollary to its decision to observe a separation of functions, until the Commissioner issues an order either affirming or reversing the order denying approval of PMA P080009, the Office of the Commissioner will not engage in any *ex parte* communication (see 21 CFR 10.3(a)) with anyone participating as a party to the hearing or any person outside the Agency with respect to the matter under consideration.[1] Any written *ex parte* communication will be immediately served on the two parties and filed in the docket. Any oral *ex parte* communication will be immediately memorialized in writing, served on both parties to the hearing, and filed in the docket.

All documents filed in this matter are filed under Docket No. FDA–2010–P–0176 and are available for public review in the Division of Dockets Management (*see* **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday. Persons with access to the Internet may obtain

[1] Communications regarding procedural matters between the Office of the Commissioner and the advisory committee will not be treated as *ex parte* communications.

documents in the docket at *http://www.regulations.gov*.

**References**

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857, under Docket No. FDA–2010–P–0176 and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Letter from Christy Foreman, FDA, CDRH, to Ken Charak, Ethicon Endo-Surgery, Inc., containing the order denying approval of the PMA for the SEDASYS system, October 26, 2010.

2. Charter Medical Devices Advisory Committee; Charter Amendment, Medical Devices Advisory Committee; FDA; July 15, 2008, *http://www.fda.gov/AdvisoryCommittees/Committees MeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/ucm124098.htm*.

3. "Resolving Scientific Disputes Concerning the Regulation of Medical Devices, A Guide To Use of the Medical Devices Dispute Resolution Panel; Final Guidance for Industry and FDA" FDA, CDRH; July 2, 2001, *http://www.fda.gov/MedicalDevices/DeviceRegulationand Guidance/GuidanceDocuments/default.htm*.

Dated: March 11, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–6520 Filed 3–18–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–E–0400]**

### Determination of Regulatory Review Period for Purposes of Patent Extension; VPRIV

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for VPRIV and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

**ADDRESSES:** Submit electronic comments to *http://www.regulations.gov*. Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

**SUPPLEMENTARY INFORMATION:** The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product VPRIV (velaglucerase alfa). VPRIV is indicated for long-term enzyme replacement therapy for pediatric and adult patients with type 1 Gaucher Disease. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for VPRIV (U.S. Patent No. 7,138,262) from Shire Human Genetic Therapies, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 30, 2010, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of VPRIV represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for VPRIV is 2,221 days. Of this time, 2,041 days occurred during the testing phase of the regulatory review period, while 180 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* January 30, 2004. The applicant claims May 20, 2004, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 30, 2004, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* August 31, 2009. FDA has verified the applicant's claim that the new drug application (NDA) for VPRIV (NDA 22–575) was initially submitted on August 31, 2009.

3. *The date the application was approved:* February 26, 2010. FDA has verified the applicant's claim that NDA 22–575 was approved on February 26, 2010.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 687 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments and ask for a redetermination by May 20, 2011. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by September 19, 2011. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (*See* H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. It is no longer necessary to send three copies of mailed comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket number found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on *http://www.regulations.gov* may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 14, 2011.

**Jane A. Axelrad,**

*Associate Director for Policy, Center for Drug Evaluation and Research.*

[FR Doc. 2011–6514 Filed 3–18–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–E–0241]**

### Determination of Regulatory Review Period for Purposes of Patent Extension; ATRYN

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for ATRYN and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human biological product.

**ADDRESSES:** Submit electronic comments to *http://www.regulations.gov.* Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002. 301–796–3602.

**SUPPLEMENTARY INFORMATION:** The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human biologic product ATRYN (antithrombin (recombinant)). ATRYN is indicated for the prevention of peri-operative and peri-partum thromboembolic events in hereditary antithrombin deficient patients. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for ATRYN (U.S. Patent No. 6,441,145) from GTC Biotherapeutics, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 17, 2010, FDA advised the Patent and Trademark Office that this human biological product had undergone a regulatory review period and that the approval of ATRYN represented the first permitted commercial marketing or use of the recombinant product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for ATRYN is 4,468 days. Of this time, 4,285 days occurred during the testing phase of the regulatory review period, while 183 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* November 15, 1996. The applicant claims November 14, 1996, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was November 15, 1996, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* August 8, 2008. The applicant claims January 31, 2008, as the date the biologics license application (BLA) for ATRYN (BLA 125284) was initially submitted. However, FDA records indicate that BLA 125284 was submitted on August 8, 2008.

3. *The date the application was approved:* February 6, 2009. FDA has verified the applicant's claim that BLA 125284 was approved on February 6, 2009.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,243 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments and ask for a redetermination by May 20, 2011. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by September 19, 2011. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (*See* H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. It is no longer necessary to send three copies of mailed comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with

the docket number found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on *http://www.regulations.gov* may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 14, 2011.

**Jane A. Axelrad,**

*Associate Director for Policy, Center for Drug Evaluation and Research.*

[FR Doc. 2011–6509 Filed 3–18–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**ADDRESSES:** Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

**UOK 268 Cell Line for Hereditary Leiomyomatosis and Renal Cell Carcinoma**

*Description of Technology:* Hereditary Leiomyomatosis and Renal Cell Carcinoma (HLRCC) is an extremely aggressive cancer syndrome with no effective treatment regimen and currently no cure. The progress of identifying HLRCC treatments and cures has likely been hindered due to the lack of an HLRCC model for studying the cancer syndrome and for screening therapeutic drug candidates.

This technology describes the UOK 268 cell line, a spontaneously immortalized renal tumor cell line that may be of great interest to industry for studying HLRCC, drug screening, and searching for tumor markers related to diagnosis, prognosis, and drug resistance. This cell line is only the second spontaneously immortalized cancer cell line of its kind in the world and is unique in that it is a primary tumor cell model (the other cell line, UOK 262, is from a metastasis cell model). The UOK 268 cell line is an established, clonal, immortalized renal cancer cell line derived from the long-term culture of aggressive tumor tissues of HLRCC in a specially designed culture medium under strict culture conditions. The UOK 268 exhibits an array of HLRCC kidney cancer characteristics that can promote protein and fatty acid biosynthesis and modulate HIF activities in a manner conducive to cancer cell proliferation.

*Benefits:*

• This is only one of two immortalized HLRCC cell lines, and is unique in that it is from a primary tumor cell model.

• Developing a diagnostic to search for tumor targets and screen for HLRCC and related cancers drug candidates will have significant benefits, including early detection and treatment.

*Applications:*

• *In vitro* and *in vivo* cell model for understanding the biology of HLRCC and related cancers, including growth, motility, invasion, and metabolite production.

• High throughput screening to test for drug candidates that could be used to treat particular cancers, such as HLRCC.

• Diagnostic tool for the diagnosis, prognosis, and drug resistance of tumor markers.

*Advantages:*

• *Cell line is derived from a HLRCC patient:* This cell line is anticipated to retain many features of primary HLRCC samples and novel HLRCC antigens identified from this cell line are likely to correlate with antigens expressed on human HLRCC tumors. Studies performed using this cell lines may have a direct correlation to the initiation, progression, treatment, and prevention of HLRCC in humans.

• *Molecular and genetic features are well characterized:* The inventors have elucidated many physical characteristics of the cell lines and their data reveals previously unrecognized coordination between mammalian glucose and iron metabolisms through AMPK signaling, and a novel mechanism for modulating HIF activities in renal cancers.

*Inventors:* W. Marston Linehan and Youfeng Yang (NCI)

*Publications:*

1. Youfeng Yang et al. Distinct Mito-transcriptome Profiling in Fumarate Hydratase-deficient Novel Primary Tumor Cell Line UOK268 Leads to Better Understanding of Early Human HLRCC-associated Cancer with Multiple Dysregulated Molecular Events and Metabolic Shunts. *Under submission.*

2. Wing-Hang Tong et al. Hypoactivation of AMPK pathway and remodeling of iron metabolism in hereditary leiomyomatosis and renal cell carcinoma tumorigenesis. *Under resubmission.*

*Patent Status:* HHS Reference No. E–254–2010/0—Research Tool. Patent protection is not being pursued for this technology.

*Licensing Status:* Available for licensing.

*Licensing Contact:* Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

*Collaborative Research Opportunity:* The Center for Cancer Research, Urologic Oncology Branch, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize UOK268 as human HLRCC primary cell line model to comparing previously established UOK262, which was from metastasis lympho node. UOK 268 is a unique cell model for studying the underlying molecular derangements associated with impaired oxidative phosphorylation in cancer and for evaluating novel therapeutic approaches for this HLRCC-associated kidney cancer. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Agonistic Human Monoclonal Antibodies Against DR4**

*Description of Technology:* The tumor necrosis factor (TNF)-related apoptosis-inducing ligand (TRAIL) and its functional receptors, DR4 and DR5, have been recognized as promising targets for cancer treatment. Therapeutics targeting TRAIL and its receptors are not only effective in killing many types of tumors but they also synergize with traditional therapies, and show efficacy against tumors that are otherwise resistant to conventional treatments.

The researchers at the NIH have developed two human monoclonal antibodies (mAbs) that bind to death receptor 4 (“DR4”). One of the mAbs is agonistic and inhibits the growth of ST486 cells with IC50 of about 10nM. The two mAbs were selected from a human phage-displayed Fab library by panning against a recombinant DR4

extracellular domain. Therefore the two mAbs are fully human. These antibodies could have considerable potential as cancer therapeutics alone or in combination with other drugs. Further, these antibodies could be used as a research tool for the study of DR4.

*Applications:*

• The DR4 antibodies could be promising candidate cancer therapeutics. Ongoing phase I and II clinical trials with mostly DR5-targeting agonistic antibodies have indicated that they are safe and could be efficacious for certain indications.

• DR4 is expressed in a broad range of solid tumors and malignancies and therefore antibodies to DR4 would be also useful reagents to study this expression.

*Development Status:* Pre-clinical proof of principle

*Inventors:* Dimiter S. Dimitrov (NCI) *et al.*

*Publication:* Feng Y, Xiao X, Zhu Z, Dimitrov D. Identification and characterization of a novel agonistic anti-DR4 human monoclonal antibody. MAbs. 2010 Sep-Oct;2(5):565–570. [PubMed: 20581445]

*Patent Status:* U.S. Provisional Application No. 61/355,449 filed 16 Jun 2010 (HHS Reference No. E–158–2010/0–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

*Collaborative Research Opportunity:* The National Cancer Institute, Membrane Structure and Function Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize topic of invention or related laboratory interests. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Gene Signature for Predicting Solid Tumors Patient Prognosis**

*Description of Technology:* A progressive sequence of somatic mutations and epigenetic changes of oncogenes or tumor suppressor genes are believed to cause tumor development. However, high genomic instability in tumors causes the accumulation of genomic aberrations that do not contribute to tumor progression. Therefore it is important to distinguish between 'driver' mutations which are functionally important and 'passenger' mutations which do not provide a selective advantage to the tumor cells.

The current invention describes a driver gene signature for predicting survival in patients with solid malignancies including hepatocellular carcinoma (HCC) and breast cancer. The gene signature includes ten cancer-associated genes, and the NIH researchers further discovered that a decrease in DNA copy number or mRNA expression of some genes is associated with poor prognosis in HCC tumors and breast cancer, while a decrease in DNA copy number or mRNA expression of a few other genes is associated with good prognosis. They have also demonstrated that at least four of these cancer-associated genes are functional tumor suppressor genes. Thus, these genes may be potential molecular targets of HCC and breast cancer.

Available for licensing is a method of predicting the prognosis of a patient diagnosed with HCC or breast cancer by detecting expression of one or more cancer-associated genes, and a method of identifying an agent for use in treating HCC.

*Applications:*

• Prognosis for hepatocellular carcinoma (HCC) and breast cancer patient survival.

• Potential new method to identify therapeutic treatment for HCC and breast cancer patients.

*Development Status:* Early-stage development.

*Market:*

• Hepatocellular carcinoma (HCC) is the most frequent malignant tumor in the liver and the third leading cause of cancer death worldwide. Systemic chemotherapy has been shown to be ineffective and tumor recurrence rate after surgical resection is high due to relapse and metastasis. Therefore, the development of new drugs will be crucial to prevent relapse and to prolong patient survival.

• Breast cancer

*Inventors:* Dr. Xin Wei Wang and Dr. Stephanie Roessler (NCI)

*Patent Status:*

• U.S. Provisional Application No. 61/198,813 filed 10 Nov 2008 (HHS Reference No. E–024–2009/0–US–01)

• PCT Application No. PCT/US2009/063883 filed 10 Nov 2009, which published as WO 2010/054379 on 14 May 2010 (HHS Reference No. E–024–2009/0–PCT–02)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Betty B. Tong, PhD; 301–594–6565; *tongb@mail.nih.gov.*

*Collaborative Research Opportunity:* The National Cancer Institute, Center for Cancer Research, Laboratory of Human Carcinogenesis, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this Gene Signature for Predicting Hepatocellular Carcinoma Patient Prognosis. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Prevention of Head and Neck Cancer Using Rapamycin and Its Analogs**

*Description of Technology:* It is frequently observed in head and neck squamous cell carcinoma (HNSCC), a cancer occurring mostly in the mouth, that the Akt/mTOR pathway is abnormally activated. Therefore, inhibiting this signaling pathway may help in treating this disease. Rapamycin and its analogs are known to inhibit the activity of mTOR so in principle they could serve as therapeutics for treating HNSCC.

Researchers at the NIH have developed a method of potentially preventing or treating HNSCC through the inhibition of mTOR activity. The proof of this principle was demonstrated by rapid regression of mouth tumors in mice afflicted with Cowden syndrome with the administration of rapamycin. Like HNSCC, development of this disease is linked to over activation of the Akt/mTOR pathway. Furthermore, the therapeutic potential of rapamycin was demonstrated using mice in experiments that model chronic exposure to tobacco, which promotes the development of HNSCC. Therefore, inhibitors of mTOR have considerable potential in the prevention and treatment of HNSCC.

*Applications:* Preventing the development of oral cancer using mTOR inhibitors to halt progression of pre-cancerous lesions.

*Development Status:* Pre-clinical proof of principle.

*Market:*

• Approximately 500,000 new cases of squamous cell carcinomas of the head and neck arise every year making it the 6th most common cancer in the world.

• Frequently, prognosis is poor due to late detection of cancer.

*Inventors:* J. Silvio Gutkind et al. (NIDCR)

*Publications:*

1. Squarize CH, Castilho RM, Gutkind JS. Chemoprevention and treatment of experimental Cowden's disease by mTOR inhibition with rapamycin. Cancer Res. 2008 Sep 1;68(17):7066–7072. [PubMed: 18757421]

2. Czerninski R, Amornphimoltham P, Patel V, Molinolo AA, Gutkind JS. Targeting mTOR by rapamycin prevents

tumor progression in an oral-specific chemical carcinogenesis model. Cancer Prevention Res. 2009 Jan;2(1):27–36. [PubMed: 19139015]

3. Raimondi AR, Molinolo A, Gutkind JS. Rapamycin prevents early onset of tumorigenesis in an oral-specific K-ras and p53 two-hit carcinogenesis model. Cancer Res. 2009 May 15;69(10):4159–4166. [PubMed: 19435901]

*Patent Status:* U.S. Patent Application No. 13/059,335 filed August 20, 2009 (HHS Reference No. E–302–2008/0–US–05) and related international filings

*Related Technology:* International Application No. PCT/IL2010/000694 filed August 25, 2010 (HHS Reference No. E–282–2009/0–PCT–02), entitled "Prevention and Treatment of Oral and Lips Diseases Using Sirolimus and Derivatives Sustained Release Delivery Systems for Local Application to the Oral Cavity and Lips"

*Licensing Status:* Available for licensing.

*Licensing Contact:* Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov*

*Collaborative Research Opportunity:* The National Institute of Dental and Craniofacial Research, Oral and Pharyngeal Cancer Branch, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact David W. Bradley, PhD at *bradleyda@nidcr.nih.gov* for more information.

**Three-Dimensional Co-Culture Assay System for Angiogenesis and Metastasis**

*Description of Technology:* This technology features an assay for the detection and measurement of angiogenesis (formation of new blood vessels) and metastasis (spread of cancer). The inventors have developed a three-dimensional co-culture system that closely mimics the *in vivo* environment in which angiogenesis and metastatic tumors develop. The co-culture system consists of cancerous cells (tumor spheroid or biopsy), endothelial cells, and a combination of other mammalian cells (mast cells, adipocytes, fibroblasts, macrophages, *etc.*). The cancerous cells can be obtained from cell lines or biopsied tumors from various cancers, such as melanoma, ovarian cancer, hepatocellular cancer, or colon cancer. Cells in the three-dimensional co-culture system express a fluorescent protein having a different emission spectrum. Consequently, the co-culture systems can be used to identify, monitor, and measure changes in morphology, migration, proliferation and apoptosis of cells involved in angiogenesis and/or metastasis. The co-cultures are developed in 96-well plates to allow rapid and efficient screening for whether a drug impacts multiple cell types, modulates angiogenesis and/or has a therapeutic impact on metastasis. This technology not only represents an important tool for angiogenesis and cancer research, but also may be developed into a diagnostic test that allows the development of personalized therapies for cancer and other angiogenesis-mediated disease.

*Applications:*

- Personalized therapies for cancer and other angiogenesis-mediated diseases
- Screening for cytotoxic compounds, modulators of angiogenesis, and anti-metastatic compounds
- Basic research applications, such as fluorescence-activated cell sorting (FACS), time-lapse cinematography, and confocal microscopy

*Advantages:*

- Closely mimics tumor microenvironment
- Efficient screening method for basic research, drug discovery and for clinical use

*Development Status:* Experimental data available; inventors have also developed a high-throughput screening assay based on this technology

*Inventors:* Changge Fang, Enrique Zudaire, Frank Cuttitta (NCI)

*Patent Status:*

- U.S. Provisional Application No. 60/976,732 filed 01 Oct 2007 (HHS Reference No. E–281–2007/0–US–01)
- U.S. Application No. 12/802,666 filed 10 Jun 2010 (HHS Reference No. E–281–2007/1–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Tara L. Kirby, PhD; 301.435.4426; *kirbyt@mail.nih.gov.*

*Collaborative Research Opportunity:* We are very interested in setting up collaborations with pharmaceutical, biomedical, or academic investigators to use our technology in the form of a CRADA or joint grant submission (*e.g.* DOD). These studies could include expanding the complexity of a 3D co-culture by increasing the partner cell number—paralleling the current model of in vivo angiogenesis. Our existing co-culture assay incorporates both immortalized tumor and endothelial cells. However, other anatomically distinct cells could be added (*e.g.* pericytes, inflammatory cells [mast cell or macrophages], or fibroblasts) to more accurately mimic the in vivo setting. In addition, a more thorough analysis of our prior xenograft biopsy studies for assessing drug sensitivity could be done using a variety of human tumor cell lines that include lung, colon, breast, prostate, and ovarian cancer. Finally, this collaboration would segue into clinical studies taking biopsy material from cancer patients (following approved IRB protocols) to evaluate anti-angiogenic drug sensitivities to determine the most appropriate FDA reviewed/certified anti-cancer drugs.

The National Cancer Institute, Radiation Oncology Branch, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology as noted above. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Dated: March 15, 2011.

**Richard U. Rodriguez,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 2011–6570 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**ADDRESSES:** Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

**Synthetic Peptide Inhibitors of the Wnt Pathway**

*Description of Technology:* Available for licensing are peptide inhibitors of

the Wnt signaling pathway, a pathway that is activated in many cancer types. To date, there are few small molecules that target canonical Wnt/β-catenin signaling and those that have been discovered have low potency and do not directly target β-catenin, the pathway's key signal mediator. The investigators have developed peptide inhibitors that selectively target a conserved region in β-catenin essential for promoting cell growth but not cell adhesion and differentiation. Furthermore, these peptides have been synthetically modified to enhance cell penetration and structure stability thereby increasing their potency and efficacy. Interestingly, these peptides inhibit the canonical Wnt signaling pathway but not non-canonical Wnt signaling. As a result, these inhibitors potentially provide effective chemotherapies for tumors, such as colon and cervical, which depend upon canonical Wnt signaling. Moreover, as these inhibitors do not disrupt non-canonical Wnt signaling, which plays a role in kidney, lung, and vascular development, and they are likely to have minimal negative side effects. Additionally, these peptides can serve as an effective tool for researches to elucidate the roles of Wnt canonical and non-canonical signaling in development and many pathological conditions.

*Applications:*

- Cancer therapeutics
- Research tool to study Wnt signaling pathways

*Advantages:*

- Selective inhibitors that target cell growth but not differentiation
- Synthetic molecules with increased stability and cell penetration that can be manufactured in large quantities under GMP conditions

*Development Status:* The technology is currently in the pre-clinical stage of development.

*Market:* Peptide drug market is growing at a compound annual rate of 7.5% with an estimated value in excess of $13 billion in 2010

*Inventors:* Nadya Tarasova, Alan Perantoni, Shunsuke Tanigawa (NCI)

*Related Publication:* S Tanigawa et al. Wnt4 induces nephronic tubules in metanephric mesenchyme by a non-canonical mechanism. Dev Biol. 2011 Jan 20. E-pub ahead of print, doi:10.1016/j.physletb.2003.10.071. [PubMed: 21256838]

*Patent Status:* U.S. Provisional Application No. 61/422,857 filed 14 Dec 2010 (HHS Reference No. E–021–2011/0–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Jennifer Wong; 301–435–4633; *wongje@mail.nih.gov.*

*Collaborative Research Opportunity:* The Center for Cancer Research, Cancer and Inflammation Program and Cancer and Developmental Biology Laboratory, are seeking statements of capability or interest from parties interested in collaborative research to further develop and commercialize Wnt pathway inhibitors. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Therapeutic Approach for Autoimmune Diseases, Inflammatory Diseases and Cancers by Blocking CIKS–TRAF6 Interactions**

*Description of Technology:* CIKS (also known as Act1 or TRAF3IP2) is an intracellular adaptor protein involved in the signaling pathway of IL–17 cytokines. Interaction between CIKS and tumor necrosis factor receptor-associated factor (TRAF 6) is important for IL–17 signaling and collectively, IL–17, CIKS, and TRAF6 are involved in inflammatory responses associated with autoimmune diseases, inflammatory diseases, and cancers. Inhibition of CIKS activity has been shown to prevent and alleviate pathological symptoms in an animal model of rheumatoid arthritis and multiple sclerosis, and it is hypothesized that disruption of the interaction between CIKS and TRAF6 is a therapeutic strategy for the selective prevention of certain IL–17-mediated diseases.

NIAID investigators have discovered a short sequence within CIKS that is responsible for CIKS interaction with TRAF6. The disclosed sequence can be used to develop blocking peptides for the treatment of IL–17-mediated autoimmune diseases, inflammatory diseases, and cancers.

*Applications:* Therapeutics for IL–17-mediated diseases, such as inflammatory diseases, autoimmune diseases, and cancer.

*Advantages:* Selective inhibition of CIKS–TRAF6 interactions.

*Development Status:* Basic research.

*Inventors:* Ulrich Siebenlist, Soeren U. Soender, Sun Saret (NIAID).

*Publications:*

1. Pisitkun P, *et al.* (2010) [PubMed: 20662069]
2. Claudio E, *et al.* (2009) [PubMed: 19155511]

*Patent Status:* U.S. Provisional Application No. 61/418,782 filed 01 Dec 2010 (HHS Reference No. E–268–2010/0–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Tara L. Kirby, PhD; 301–435–4426; *tarak@mail.nih.gov.*

**Tiopronin Specifically Kills and Re-sensitizes Multi-Drug Resistant Cells to Chemotherapy**

*Description of Technology:* One of the major hindrances to successful cancer chemotherapy is the development of multi-drug resistance (MDR) in cancer cells. MDR is frequently caused by the increased expression or activity of ABC transporter proteins in response to the toxic agents used in chemotherapy. The increased expression or activity of the ABC transporter proteins causes the toxic agents to be removed from cells before they can kill the cell. As a result, research has generally been directed to overcoming MDR by inhibiting the activity of ABC transporters, thus causing the chemotherapeutic agents to remain in the cell long enough to exert their effects. However, compounds that inhibit ABC transporter activity often elicit strong and undesirable side-effects due to the inhibition of ABC transporter function in normal cells, thereby restricting their usefulness as therapeutics.

Investigators at the NIH have now discovered that the amino acid analog Tiopronin has the ability to kill multi-drug resistant cancer cells while leaving normal cells relatively unharmed. This suggests that Tiopronin can be developed as a therapeutic for multi-drug resistant cancers. Furthermore, Tiopronin re-sensitizes multi-drug resistant cells to chemotherapeutic agents over time. This may allow cyclical administration of chemotherapeutics without the development of permanent resistance to the agents, increasing the effectiveness of chemotherapy as a cancer treatment.

Importantly, Tiopronin is not an inhibitor of ABC transporter function because it kills multi-drug resistant cells without affecting the activity of ABC transporters. As a result, the undesirable side-effects that have prevented the use of inhibitors of ABC transporters as therapeutics should not affect the therapeutic application of Tiopronin.

*Applications:*

- Treatment of cancers associated with MDR, either alone or in combination with other therapeutics
- Resensitization of multi-drug resistant cells to chemotherapeutic agents, allowing cyclical administration of chemotherapy

*Advantages:*

- Tiopronin capitalizes on one of the most common drawbacks to cancer therapies (MDR) by using it as an advantage for treating cancer

- Tiopronin does not inhibit the activity of ABC transporters, thereby reducing the chance of undesired side-effects during treatment
- The effects of Tiopronin correlates with the level of ABC transporter expression, allowing healthy cells to better survive treatments
- Tiopronin can also improve the effectiveness of chemotherapy by re-sensitizing resistant cells that were previously considered impervious to treatment
- Tiopronin has already been approved for use in humans for the treatment of cytinuria, facilitating the pathway for use in humans as a treatment for cancer

*Development Status:* Preclinical stage of development, *in vitro* data

*Inventors:* Andrew S. Goldsborough et al. (NCI)

*US Patent Status:* US Provisional Application 61/407,948 (E–227–2010/0–US–01)

*Licensing Status:* The technology is available for exclusive licensing.

*Licensing Contact:* David Lambertson, PhD; 301–435–4632; *lambertsond@mail.nih.gov.*

*Collaborative Research Opportunity:* The National Cancer Institute, Multidrug Resistance Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Identification of EGFR as a Receptor for AAV6 Transduction**

*Description of Technology:* AAV vectors offer unique advantages in gene therapy applications. Studies have shown that these replication deficient parvovirus vectors can deliver DNA to specific tissues and confer long-term transgene expression in a variety of systems. Although many studies have looked at the tissue-specific expression elicited by each of the AAV serotypes, a true understanding of how AAV transduces these tissues is still unclear. Of the large AAV family, only a few receptors or co-receptors have been identified. The ability to better target transduction to specific tissues on the basis of the receptors that each serotype uses for entry is essential for selecting a serotype given the receptor expression in specific tissue, or to exploit altered receptor expression under disease conditions.

AAV6 has been reported to effectively transduce muscle, lung, brain, and multiple types of tumors, including gliomas and lung adenocarcinomas. By using a bioinformatics based screen approach, the NIH investigators discovered that the epidermal growth factor receptor (EGFR) is a co-receptor for AAV6 infection in mammalian cells, and is necessary for efficient vector internalization.

*Applications and Market:* Improved gene therapy applications.

*Development Status:* Pre-clinical stage of development.

*Inventors:* John A. Chiorini, Melodie L. Weller, Michael Schmidt (NIDCR)

*Publication:* Weller ML, Amornphimoltham P, Schmidt M, Wilson PA, Gutkind JS, Chiorini JA. Epidermal growth factor receptor is a co-receptor for adeno-associated virus serotype 6. Nat Med. 2010 Jun;16(6):662–664. [PubMed: 20473307]

*Patent Status:* U.S. Utility Patent Application No. 12/879,142 filed 10 Sep 2010 (HHS Reference No. E–194–2010/0–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Betty B. Tong, PhD; 301–594–6565; *tongb@mail.nih.gov.*

**Therapeutic Approach to Neurodegenerative Disorders Using a TFP5-Peptide**

*Description of Technology:* This invention discloses methods for treating neurodegenerative diseases by administering cyclin dependent kinase 5 (Cdk5) inhibitory peptides derived from P35, the activator of Cdk5. Abnormally hyperactive Cdk5 has been shown to be associated with a variety of neurodegenerative disorders. Disclosed in this invention are isolated peptide fragments, pharmaceutical compositions and methods for use of such for treating subjects with a neurodegenerative disease, such as Alzheimer's disease (AD), Amyotrophic Lateral Sclerosis (ALS) and Parkinson's disease (PD). An inhibitory fragment, TFP5, disclosed in this invention, has been shown to ameliorate symptoms of AD in disease animal models without any evidence of toxicity. In particular, TFP5 treatment of rat cortical neurons reduced hyperactivation of Cdk5 upon neuronal stress and insults. Following intraperitoneal (ip) injection, TFP5 was capable of crossing the BBB and localizing within the brain where it was found to rescue memory deficits and pathology in a double transgenic mouse (APP/PS1) AD model.

*Applications:* Therapeutic developments (AD, PD, ALS)

*Advantages:* The products are small peptides that pass the blood brain barrier.

*Market:* Development for AD, PD, and ALS.

*Development Status:* Pre-clinical; some animal data

*Inventors:* Harish C. Pant (NINDS)

*Patent Status:* U.S. Provisional Application No. 61/387,839 filed 29 Sep 2010 (HHS Reference No. E–144–2010/0–US–01)

*Licensing Status:* Available for licensing.

*Licensing Contact:* Steven H. Standley, PhD; 301–435–4074; *sstand@mail.nih.gov.*

*Collaborative Research Opportunity:* The National Institute of Neurological Disorders and Stroke, Neuronal Cytoskeletal Protein Regulation Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize topic of invention or related laboratory interests. Please contact Heather Gunas, J.D., M.P.H., at 301–451–3944 or *gunash@mail.nih.gov* for more information.

Dated: March 15, 2011.

**Richard U. Rodriguez,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 2011–6569 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; GISTE, the Geospatial Information Systems Tool (5558).

*Date:* April 18, 2011.

*Time:* 1:30 p.m. to 3 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Gerald L. McLaughlin, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4238, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, 301–402–6626, *gm145a@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Research Works: Enrollment Workflow (2219).

*Date:* April 28, 2011.

*Time:* 9:30 a.m. to 12 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1439, *lf33c@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; NIDA's Science Meetings Logistical Support (1144).

*Date:* May 3–4, 2011.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1439, *lf33c@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Research Support Services for NIDA AIDS Research Program (1207).

*Date:* May 5, 2011.

*Time:* 9:30 a.m. to 12 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1439, *lf33c@nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Development & Manufacture of Pharmaceutical Products/Addiction Treatment (8899).

*Date:* May 24, 2011.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

*Contact Person:* Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1439, *lf33c@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6584 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel, R25 Summer Programs.

*Date:* March 30, 2011.

*Time:* 11 a.m. to 1 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Gerald L. McLaughlin, PhD, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4238, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, 301–402–6626, *gm145a@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6578 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel, Functional Development of the Mammary Gland.

*Date:* April 14, 2011.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Peter Zelazowski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6902, *peter.zelazowski@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6575 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Board on Medical Rehabilitation Research.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the contact person listed below in advance of the meeting.

*Name of Committee:* National Advisory Board on Medical Rehabilitation Research.

*Date:* May 2–3, 2011.

*Time:* May 2, 2011, 8:30 a.m. to 5 p.m.

*Agenda:* NICHD Director's Report presentation, NCMRR Director's Report presentation and various reports on Medical Research Initiatives.

*Place:* Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

*Time:* May 3, 2011, 8:30 a.m. to 12 p.m.

*Agenda:* Other business dealing with the NAMBRR Board.

*Place:* Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

*Contact Person:* Ralph Nitkin, PhD, Director, B.S.C.D., Biological Sciences and Career Development, NCMRR, Eunice Kennedy Shriver National Institute Of Child Health and Human Development, 6100 Executive Boulevard, Rockville, MD 20892–9304, (301) 402–4206, *nitkinr@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page:*http://www.nichd.nih.gov/about/ncmrr.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment program, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6573 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Heart, Lung, and Blood Institute Special Emphasis Panel, Loan Repayment Program Review, which was published in the **Federal Register** on January 11, 2011, FR 2011–583.

This meeting was originally scheduled for February 1, 2011 but will take place on May 4, 2011. The meeting is closed to the public.

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6572 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel, "SPORT".

*Date:* April 12, 2011.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), Bethesda, MD 20814.

*Contact Person:* Rita Anand, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 15, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–6571 Filed 3–18–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2011–0119; OMB Control Numbers: 1625–0020, 1625–0022, 1625–0029 and 1625–0031]**

### Information Collection Request to Office of Management and Budget

**AGENCY:** Coast Guard, DHS.

**ACTION:** Sixty-day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collections of information: 1625–0020, Security Zones, Regulated Navigation Areas and Safety Zones, 1625–0022, Application for Tonnage Measurement of Vessels, 1625–0029, Self-propelled Liquefied Gas Vessels, and l625–0031, Plan Approval and Records for Electrical Engineering Regulations—Title 46 CFR Subchapter J.

Our ICRs describe the information we seek to collect from the public. Before submitting these ICRs to OIRA, the Coast Guard is inviting comments as described below.

**DATES:** Comments must reach the Coast Guard on or before May 20, 2011.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number [USCG–2011–0119] to the Docket Management Facility (DMF) at the U.S. Department of Transportation

(DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–611), ATTN PAPERWORK REDUCTION ACT MANAGER, US COAST GUARD, 2100 2ND ST SW. STOP 7101, WASHINGTON DC 20593–7101.

**FOR FURTHER INFORMATION CONTACT:** Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval for the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–0119], and must be received by May 20, 2011. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the "Privacy Act" paragraph below.

## Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–0119], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type "USCG–2011–0119" in the "Keyword" box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

*Viewing comments and documents:* To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0019" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

## Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

## Information Collection Requests

1. *Title:* Security Zones, Regulated Navigation Areas, and Safety Zones.

*OMB Control Number:* 1625–0020.

*Summary:* The Coast Guard collects this information only when someone seeks a security zone, regulated navigation area, or safety zone. It uses the information to assess the need to establish one of these areas.

*Need:* Section 1226 and 1231 of 33 U.S.C. and 50 U.S.C. 191 and 195, and parts 6 and 165 of 33 CFR give the Coast Guard Captain of the Port (COTP) the authority to designate security zones in the U.S. for as long as the COTP deems necessary to prevent damage or injury. Section 1223 of 33 U.S.C. authorizes the Coast Guard to prescribe rules to control vessel traffic in areas he or she deems hazardous because of reduced visibility, adverse weather, or vessel congestion. Section 1225 of 33 U.S.C. authorizes the Coast Guard to establish rules to allow the designation of safety zones where access is limited to authorized persons, vehicles, or vessels to protect the public from hazardous situations.

*Forms:* Not applicable.

*Respondents:* Federal, State, and local government agencies, owners and operators of vessels and facilities.

*Frequency:* On occasion.

*Burden Estimate:* The estimated burden has decreased from 296 hours to 272 hours a year.

2. *Title:* Application for Tonnage Measurement of Vessels.

*OMB Control Number:* 1625–0022.

*Summary:* The information is used by the Coast Guard to determine a vessel's tonnage. Tonnage in turn helps to determine licensing, inspection, safety requirements, and operating fees.

*Need:* Under 46 U.S.C. 14104 certain vessels must be measured for tonnage. Coast Guard regulations for this measurement are contained in 46 CFR part 69.

*Forms:* CG–5397.

*Respondents:* Owners of vessels.

*Frequency:* On occasion.

*Burden Estimate:* The estimated burden has decreased from 33,499 hours to 19,160 hours a year.

3. *Title:* Self-propelled Liquefied Gas Vessels.

*OMB Control Number:* 1625–0029.

*Summary:* We need the information sought in this collection, which includes forms CG–4355 and CG–5148, to ensure compliance with our rules for the design and operation of liquefied gas carriers.

*Need:* Section 3703 and 9101 of 46 U.S.C. authorizes the Coast Guard to establish regulations to protect life, property, and the environment from the hazards associated with the carriage of dangerous liquid cargo in bulk. Part 154 of 46 CFR prescribes these rules for the carriage of liquefied gases in bulk on self-propelled vessels by governing the design, construction, equipment, and operation of these vessels and the safety of personnel aboard them.

*Forms:* CG–4355, CG–5148.

*Respondents:* Owners and operators of self-propelled vessels carrying liquefied gas.

*Frequency:* On occasion.

*Burden Estimate:* The estimated burden has increased from 6,566 hours to 6,754 hours a year.

4. *Title:* Plan Approval and Records for Electrical Engineering Regulations—Title 46 CFR Subchapter J.

*OMB Control Number:* 1625–0031.

*Summary:* The information sought here is needed to ensure compliance with our rules on electrical engineering for the design and construction of U.S.-flag commercial vessels.

*Need:* Sections 3306 and 3703 of 46 U.S.C. authorize the Coast Guard to establish rules to promote the safety of life and property in commercial vessels. The electrical engineering rules appear at 46 CFR chapter I, subchapter J (parts 110 through 113).

*Forms:* None.

*Respondents:* Owners, operators, shipyards, designers, and manufacturers of vessels.

*Frequency:* On occasion.

*Burden Estimate:* The estimated burden has increased from 3,529 hours to 4,754 hours a year.

Dated: March 14, 2011.

**R. E. Day,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.*

[FR Doc. 2011–6499 Filed 3–18–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Exxon Valdez Oil Spill Trustee Council; Notice of Meeting

**AGENCY:** Office of the Secretary, Department of the Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Department of the Interior, Office of the Secretary is announcing a public meeting of the *Exxon Valdez* Oil Spill Public Advisory Committee.

**DATES:** April 13, 2011, at 10 a.m.

**ADDRESSES:** Exxon Valdez Oil Spill Trustee Council Office, 441 West 5th Avenue, Suite 500, Anchorage, Alaska.

**FOR FURTHER INFORMATION CONTACT:** Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 "C" Street, Suite 119, Anchorage, Alaska 99501, (907) 271–5011.

**SUPPLEMENTARY INFORMATION:** The Public Advisory Committee was created by Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991, and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska,* Civil Action No. A91–081 CV. The meeting agenda will include a review of the proposals received in response to the Invitation for Fiscal Year 2012 project proposals.

**Willie R. Taylor,**

*Director, Office of Environmental Policy and Compliance.*

[FR Doc. 2011–6532 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–RG–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Wildland Fire Executive Council Meeting Schedule

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice of meetings.

**SUMMARY:** In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., 2, the U.S. Department of the Interior, Office of the Secretary, Wildland Fire Executive Council (WFEC) will meet as indicated below.

**DATES:** The meetings will be held on the first Friday of each month from 9 a.m. to 11 a.m. Eastern Time as follows: April 1, 2011; May 6, 2011; June 3, 2011; July 1, 2011; August 5, 2011; September 2, 2011; October 7, 2011; November 4, 2011; December 2, 2011.

**ADDRESSES:** Meetings will be held from 9 a.m. to 11 a.m. Eastern Time in the McArdle Room (First Floor Conference Room) in the Yates Federal Building, USDA Forest Service Headquarters, 1400 Independence Ave., SW., Washington, DC 20250,

**FOR FURTHER INFORMATION CONTACT:** Roy Johnson, Designated Federal Officer, 300 E Mallard Drive, Suite 170, Boise, Idaho 83706; telephone (202) 503–8502; fax (202) 606–3150; or e-mail *Roy_Johnson@ios.doi.gov*.

**SUPPLEMENTARY INFORMATION:** The WFEC is established as a discretionary advisory committee under the authorities of the Secretary of the Interior and Secretary of Agriculture, in furtherance of 43 U.S.C. 1457 and provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a–742j), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et. seq*), the National Wildlife Refuge System improvement Act of 1997 (16 U.S.C. 668dd–668ee), and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*) and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2. The Secretary of the Interior and Secretary of Agriculture certify that the formation of the WFEC is necessary and is in the public interest.

The purpose of the WFEC is to provide advice on coordinated national-level wildland fire policy and to provide leadership, direction, and program oversight in support of the Wildland Fire Leadership Council. Questions related to the WFEC should be directed to Roy Johnson (Designated Federal Officer) at *Roy_Johnson@ios.doi.gov* or 202–503–8502 or 300 E. Mallard Drive, Suite 170, Boise, Idaho, 83706–6648.

*Meeting Agenda:* The meeting agenda will be: (1) Welcome and introduction of Council members; (2) Overview of prior meeting and action tracking; (3) Members' round robin to share information and identify key issues to be addressed; (4) Wildland Fire Management Cohesive Strategy; (5) Wildland Fire Issues; (6) Council Members' review and discussion of sub-committee activities; (7) Future Council activities; and (8) Public comments and closing remarks (from 10:30 to 11). Participation is open to the public.

*Public Input:* All WFEC meetings are open to the public. Members of the public who wish to participate must notify Shari Shetler at *Shari_Shetler@ios.doi.gov* no later than the third Friday of the month preceding the meeting. Those who are not committee members and wish to present oral statements or obtain information should contact Shari Shetler via e-mail no later than the third Friday preceding the meeting. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Questions about the agenda or written comments may be e-mailed or submitted by U.S. Mail to: Department of the Interior, Office of the Secretary, Office of Wildland Fire, Attention: Shari Shetler, 300 E. Mallard Drive, Suite 170, Boise, Idaho 83706–6648. WFEC requests that written comments be received by the third Friday of the month preceeding the scheduled meeting. Attendance is open to the public, but limited space is available. Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Ms. Shetler at (202) 527–0133 at least seven calendar days prior to the meeting.

Dated: March 3, 2011.

**Roy Johnson,**

*Designated Federal Officer.*

[FR Doc. 2011–6590 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–J4–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R7–FHC–2011–N057; 71490–1351–0000–L5]**

### Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0066; Marine Mammal Marking, Tagging, and Reporting Certificates

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on March 31, 2011. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

**DATES:** You must submit comments on or before April 20, 2011.

**ADDRESSES:** Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, MS 2042–PDM, Arlington, VA 22203 (mail), or *INFOCOL@fws.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Hope Grey at *INFOCOL@fws.gov* (e-mail) or 703–358–2482 (telephone). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 1018–0066.

*Title:* Marine Mammal Marking, Tagging, and Reporting Certificates, 50 CFR 18.23(f).

*Service Form Number(s):* 3–2414, 3–2415, and 3–2416.

*Type of Request:* Extension of currently approved collection.

*Description of Respondents:* Individuals and households.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* On occasion.

| Activity | Number of respondents | Number of responses | Completion time per response | Total annual burden hours |
|---|---|---|---|---|
| 3–2414 (polar bear) | 25 | 25 | 15 minutes | 6 |
| 3–2415 (walrus) | 620 | 620 | 15 minutes | 155 |
| 3–2416 (sea otter) | 750 | 750 | 15 minutes | 188 |
| Totals | 1,395 | 1,395 | ..... | 349 |

*Abstract:* Under section 101(b) of the Marine Mammal Protection Act of 1972 (MMPA), as amended (16 U.S.C. 1361–1407), Alaska Natives residing in Alaska and dwelling on the coast of the North Pacific or Arctic Oceans may harvest polar bears, northern sea otters, and Pacific walrus for subsistence or handicraft purposes. Section 109(i) of the MMPA authorizes the Secretary of the Interior to prescribe marking, tagging, and reporting regulations applicable to the Alaska Native subsistence and handicraft take.

On behalf of the Secretary, we implemented regulations at 50 CFR 18.23(f) for Alaska Natives harvesting polar bear, northern sea otter, and Pacific walrus. These regulations enable us to gather data on the Alaska Native subsistence and handicraft harvest and on the biology of polar bear, northern sea otter, and Pacific walrus in Alaska to determine what effect such take may be having on these populations. The regulations also provide us with a means of monitoring the disposition of the harvest to ensure that any commercial use of products created from these species meets the criteria set forth in section 101(b) of the MMPA. We use three forms to collect the information: FWS Form 3–2414 (Polar Bear Tagging Certificates), FWS Form 3–2415 (Walrus Tagging Certificates), and FWS Form 3–2416 (Sea Otter Tagging Certificates). These forms replace forms R7–50, R7–51, and R7–52. The information we collect includes, but is not limited to:

- Date of kill.
- Sex of the animal.
- Kill location.

• Age of the animal (*i.e.,* adult, subadult, cub, or pup).
• Form of transportation used to make the kill of polar bears.
• Amount of time (*i.e.,* hours/days hunted) spent hunting polar bears.
• Type of take (live-killed or beach-found) for walrus.
• Number of otters present in and number of otters harvested from pod.
• Condition of the bear and whether or not polar bear cubs were present.
• Name of the hunter or possessor of the specified parts at the time of marking, tagging, and reporting.

*Comments:* On October 18, 2010, we published in the **Federal Register** (75 FR 63850) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on December 17, 2010. We received two comments. The Marine Mammal Commission submitted a letter of support for the data collection as proposed. A second comment opposed this information collection as unworthy of continued support and a burden to general taxpayers. In this comment, subsistence marine mammal hunters were misidentified as fishermen. We note the concerns raised by this individual; however, the harvest of marine mammals by certain Alaska Natives for certain purposes is specifically exempted from otherwise prohibited activities by section 101(b) of the Marine Mammal Protection Act (MMPA) of 1972, as amended (16 U.S.C. 1361 *et seq.*). A Marking, Tagging and Reporting Program is also specifically mandated by this same Act. We did not make any changes to our information collection.

We again invite comments concerning this information collection on:
• Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
• The accuracy of our estimate of the burden for this collection of information;
• Ways to enhance the quality, utility, and clarity of the information to be collected; and
• Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: March 14, 2011.

**Tina A. Campbell,**

*Chief, Division of Policy and Directives Management, Fish and Wildlife Service.*

[FR Doc. 2011–6533 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–FHC–2011–N047; 94140–1341–0000–N5]**

### Aquatic Nuisance Species Task Force Meeting

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a meeting of the Aquatic Nuisance Species (ANS) Task Force. The meeting is open to the public. The meeting topics are identified in the **SUPPLEMENTARY INFORMATION** section.

**DATES:** The ANS Task Force will meet from 8 a.m. to 5 p.m. on Wednesday, May 4; and Thursday May 5; and from 8 a.m. to noon on Friday, May 6, 2011.

**ADDRESSES:** The ANS Task Force meeting will take place at the Hilton Little Rock Medical Center, 925 South University Avenue, Little Rock, AR 72204 (501–664–5020). You may inspect minutes of the meeting at the office of the Chief, Division of Fisheries and Aquatic Resource Conservation, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Arlington, VA 22203, during regular business hours, Monday through Friday. You may also view the minutes on the ANS Task Force Web site at: *http://anstaskforce.gov/meetings.php.*

**FOR FURTHER INFORMATION CONTACT:** Susan Mangin, Executive Secretary, ANS Task Force, at (703) 358–2466, or by e-mail at *Susan_Mangin@fws.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces meetings of the ANS Task Force. The ANS Task Force was established by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (Pub. L. 106–580, as amended).

Topics that the ANS Task Force plans to cover during the meeting include:
• Asian carp.
• Lionfish.
• New Zealand mud snails.
• Recreational guidelines.

The agenda and other related meeting information are on the ANS Task Force Web site at: *http://anstaskforce.gov/meetings.php.*

Dated: March 14, 2011.

**Jeffrey Underwood,**

*Acting Assistant Director—Fisheries and Habitat Conservation.*

[FR Doc. 2011–6508 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Information Collection for IDEIA Part B and C Child Count; Comment Request

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Submission to the Office of Management and Budget.

**SUMMARY:** As required by the Paperwork Reduction Act, the Bureau of Indian Education (BIE), U.S. Department of the Interior (Interior) is submitting a proposed information collection related to the Individuals with Disabilities Education Improvement Act (IDEIA) to the Office of Management and Budget (OMB) for review. The IDEIA provides that the Secretary of the Interior will allocate funding for the coordination of assistance for special education and related services for American Indian children 0 to 5 years of age with disabilities on reservations served by elementary schools for Indian children that are operated or funded by the Department of the Interior ("Bureau-funded schools"). The BIE allocates this funding to Tribes and Tribal organizations. In support of this allocation, the BIE collects information on the number of American Indian children 0 to 5 years of age with disabilities on reservations served by Bureau-funded schools. This notice requests comments on that information collection.

**DATES:** Submit comments on or before April 20, 2011.

**ADDRESSES:** You may submit comments on the information collection to the Desk Officer for the Department of the Interior at the Office of Management and Budget, by facsimile to (202) 395–5806 or you may send an e-mail to: *OIRA_DOCKET@ omb.eop.gov.* Please send a copy of your comments to Brandi A. Sweet, Program Analyst, U.S. Department of the Interior, Bureau of Indian Education, 1849 C Street, NW., MS–3609–MIB, Washington, DC 20240, or via facsimile (202) 208–3312; or via e-mail to *Brandi.Sweet@bie.edu.*

**FOR FURTHER INFORMATION CONTACT:** Brandi Sweet (202) 208–5504.

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The IDEIA, 20 U.S.C. 1411(h)(4)(c) and 1443(b)(3), requires Tribes and Tribal organizations to submit certain information to the Secretary of the Interior. Under the IDEIA, the U.S. Department of Education provides funding to the Secretary of the Interior for the coordination of assistance for special education and related services for Indian children 0 to 5 years of age with disabilities on reservations served by Bureau-funded schools. The Secretary of the Interior, through the BIE, then allocates this funding to Tribes and Tribal organizations based on the number of such children served. In order to allow the Secretary of the Interior to determine what amounts to allocate to whom, the IDEIA requires Tribes and Tribal organizations to submit information to Interior. The BIE collects this information on two forms, one for Indian children 3 to 5 years of age covered by IDEIA Part B, and one for Indian children 0 to 2 years of age covered by IDEIA Part C.

In IDEIA Part B—Assistance for Education of All Children with Disabilities, 20 U.S.C. 1411(h)(4)(D) requires Tribes and Tribal organizations to use the funds to assist in child find, screening, and other procedures for the early identification of Indian children 3 through 5 years of age, parent training, and the provision of direct services. In IDEIA Part C—Infants and Toddlers with Disabilities, 20 U.S.C. 1443(b)(4) likewise requires Tribes and Tribal organizations to use the funds to assist in child find, screening, and other procedures for early identification of Indian children under 3 years of age and for parent training and early intervention services.

The Paperwork Reduction Act of 1995 provides an opportunity for interested parties to comment on proposed information collection requests. The BIE is proceeding with this public comment period to obtain an information collection clearance from the Office of Management and Budget (OMB).

## II. Request for Comments

The BIE requests your comments on this collection concerning: (a) The necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) The accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) Ways we could enhance the quality, utility and clarity of the information to be collected; and (d) Ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section. Before including your address, phone number, e-mail address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

## III. Data

*OMB Control Number:* 1076—0NEW.

*Type of Review:* Existing collection in use without an OMB number.

*Title:* IDEIA Part B and Part C Child Count.

*Brief Description of Collection:* Indian Tribes and Tribal organizations served by elementary or secondary schools for Indian children operated or funded by the Department of the Interior that receive allocations of funding under the IDEIA for the coordination of assistance for Indian children 0 to 5 years of age with disabilities on reservations must submit information to the BIE. The information must be provided on two forms. The Part B form addresses Indian children 3 to 5 years of age on reservations served by Bureau-funded schools. The Part C form addresses Indian children up to 3 years of age on reservations served by Bureau-funded schools. The information required by the forms includes counts of children as of a certain date each year. Response is required to obtain a benefit.

*Respondents:* Indian Tribes and Tribal organizations.

*Number of Respondents:* 61 each year.

*Estimated Time per Response:* 20 hours per form.

*Frequency of Response:* Twice (Once per year for each form).

*Total Annual Burden to Respondents:* 2,440 hours.

Dated: March 14, 2011.

**Alvin Foster,**

*Acting Chief Information Officer—Indian Affairs.*

[FR Doc. 2011–6577 Filed 3–18–11; 8:45 am]

BILLING CODE 4310–4M–P

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## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Final Determination Against Acknowledgment of the Juaneño Band of Mission Indians

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Final Determination.

**SUMMARY:** The Department of the Interior (Department) gives notice that the Assistant Secretary–Indian Affairs (AS–IA) has determined the petitioner known as the Juaneño Band of Mission Indians is not an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner does not satisfy all seven of the criteria set forth in 25 CFR 83.7, and therefore, does not meet the requirements for a government-to-government relationship with the United States.

**DATES:** This determination is final and will become effective 90 days from publication of this notice in the **Federal Register** on June 20, 2011, unless a request for reconsideration is filed before the Interior Board of Indian Appeals pursuant to 25 CFR 83.11.

**ADDRESSES:** Requests for a copy of the final determination that includes the summary evaluation under the criteria should be addressed to the Office of the Assistant Secretary–Indian Affairs, *Attention:* Office of Federal Acknowledgment, 1951 Constitution Avenue, NW., MS: 34B–SIB, Washington, DC 20240, and is available at *http://www.bia.gov/WhoWeAre/AS–IA/OFA/RecentCases/index.htm.*

**FOR FURTHER INFORMATION CONTACT:** R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

**SUPPLEMENTARY INFORMATION:** Pursuant to 25 CFR 83.10(h), the Department publishes this notice that the Juaneño Band of Mission Indians (JBB), Petitioner #84B, is not an Indian tribe within the meaning of Federal law. The Department issued a proposed finding (PF) to decline to acknowledge the petitioner on November 23, 2007, and published notice of that preliminary determination in the **Federal Register** on December 3, 2007. This final determination (FD) affirms the PF that the Juaneño Band of Mission Indians

(JBB), c/o Joe Ocampo, 1108 E. Fourth Street, Santa Ana, California 92701 and Sonia Johnston, P.O. Box 25628, Santa Ana, California 92799, does not satisfy all seven of the criteria set forth in part 83 of title 25 of the Code of Federal Regulations (25 CFR part 83), specifically criteria at 83.7(a), 83.7(b), 83.7(c), and 83.7(e), and therefore does not meet the requirements for a government-to-government relationship with the United States.

The acknowledgment process is based on the regulations at 25 CFR part 83. Under these regulations, the petitioner has the burden to present evidence that it meets the seven mandatory criteria in section 83.7. The JBB petitioner does not satisfy criteria 83.7(a), 83.7(b), 83.7(c), and 83.7(e). The JBB petitioner meets the requirements of criteria 83.7(d), 83.7(f), and 83.7(g).

Criterion 83.7(a) requires that external observers have identified the petitioner as an American Indian entity on a substantially continuous basis since 1900. The evidence in the record does not demonstrate that external observers identified the petitioner, or a group from which the petitioner evolved, as an American Indian entity on a substantially continuous basis from 1900 to 1997. There are identifications of the JBB petitioner as an American Indian entity between 1997 and 2005. Because the petitioner, or a group from which the petitioner has evolved, has not been identified as an American Indian entity on a substantially continuous basis since 1900, the petitioner does not meet the requirements of criterion 83.7(a).

Criterion 83.7(b) requires that a predominant portion of the petitioning group has comprised a distinct community from historical times to the present. The evidence in the record demonstrates that the JBB petitioner did not evolve from the historical SJC Indian tribe as a distinct community. The FD concludes that evidence in the record indicates that a community of SJC Indians persisted around and at the former SJC Mission until 1862, when a smallpox epidemic killed almost half the estimated Indian population (88 of 200) in a period of less than 3 months. No evidence in the record indicates that the community was able to recover from this event. The petitioner, as it is currently constituted, consists of members whose ancestors functioned as part of the general population of SJC residents since the mid-19th century. There is no evidence in the record that the petitioner's SJC Indian ancestors were distinct within this community after 1862, or were part of an Indian entity that evolved from the SJC Indian tribe in 1834; rather they appear to have been Indian individuals who became absorbed into the general, ethnically-mixed population of Old Mexican/Californio families, as well as with non-SJC Indians who moved to the town prior to 1900. The totality of the evidence does not demonstrate that the petitioner's mid-19th century ancestors formed a distinct SJC Indian community within a larger Spanish-speaking, Catholic, Old Mexican/Californio community after 1862, nor does it demonstrate that the petitioner's SJC Indian ancestors formed a distinct community from which the current JBB petitioner evolved since 1862. Therefore, the JBB petitioner does not meet the requirements of criterion 83.7(b).

Criterion 83.7(c) requires that the petitioning group has maintained political influence over its members as an autonomous entity from historical times to the present. The evidence submitted for the FD, in combination with the evidence already in the record for the PF, is insufficient to satisfy the requirements of criterion 83.7(c) for any time from 1835 to the present. The petitioner's comments on the PF did not provide evidence sufficient to satisfy the requirements of criterion 83.7(c) and new documents related to Clarence Lobo's leadership between the late 1940s and 1965 provided little information on the political composition of the group or a bilateral relationship between leaders and members. Third party comments included in the record largely agree with the conclusions reached in the PF. After 1834, there is insufficient evidence that there were any internal processes or other mechanisms that the group used as a means of influencing or controlling the behavior of its members in significant respects, or made decisions for the group which substantially affected its members, or represented the group in dealing with outsiders in matters of consequence. Therefore, the petitioner does not meet the requirements of criterion 83.7(c).

Criterion 83.7(d) requires that the petitioner provide a copy of its governing document including its membership criteria. The petitioner submitted a copy of its governing document which includes its membership criteria. Therefore, the JBB petitioner meets the requirements of criterion 83.7(d).

Criterion 83.7(e) requires that the petitioner's members descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. The February 28, 2009, JBB membership list includes 455 living members, both adults and minors. The evidence in the record indicates that 85 percent of the petitioner's members claim descent from individuals who were members of the historical Indian tribe at SJC Mission as it existed between 1776 and 1834. However, the FD finds that only 53 percent (241 of 455) of JBB members have demonstrated such descent. The petitioner has not demonstrated for this FD that its members descend from an historical Indian tribe. Therefore, the JBB petitioner does not meet the requirements of criterion 83.7(e).

Criterion 83.7(f) requires that the petitioner's membership be composed principally of persons who are not members of another federally recognized Indian tribe. A review of the membership rolls of those Indian tribes in California that would most likely include the JBB petitioner's members revealed that the petitioner's membership is composed principally of persons who are not members of any federally acknowledged North American Indian tribe. Therefore, the JBB petitioner meets the requirements of criterion 83.7(f).

Criterion 83.7(g) requires that the petitioner not be subject to congressional legislation that has terminated or forbidden the Federal relationship. A review of the available documentation showed no evidence that the petitioning group was the subject of congressional legislation to terminate or prohibit a Federal relationship as an Indian tribe. Therefore, the JBB petitioner meets the requirements of criterion 83.7(g).

Based on this final determination, the Department determines not to extend Federal acknowledgment as an Indian tribe to the petitioner known as the Juaneño Band of Mission Indians (JBB).

A copy of the FD that includes the summary evaluation under the criteria and summarizes the evidence, reasoning, and analyses that are the basis for the FD will be provided to the petitioner and interested parties, and is available to other parties upon written request. It will be posted on the Bureau of Indian Affairs Web site *http://www.bia.gov/WhoWeAre/AS–IA/OFA/RecentCases/index.htm.* Requests for a copy of the FD should be addressed to the Federal Government as instructed in the **ADDRESSES** section of this notice.

After the publication of notice of the FD in the **Federal Register**, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA) under the procedures set forth in section 83.11 of the regulations. The

IBIA must receive this request no later than 90 days after the publication of the FD in the **Federal Register**. The FD will become effective as provided in the regulations 90 days from the **Federal Register** publication unless a request for reconsideration is received within that time.

Dated: March 15, 2011.

**Larry Echo Hawk,**

*Assistant Secretary–Indian Affairs.*

[FR Doc. 2011–6472 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–G1–P**

## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

## Final Determination Against Acknowledgment of the Juaneño Band of Mission Indians, Acjachemen Nation

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Final Determination.

**SUMMARY:** The Department of the Interior (Department) gives notice that the Assistant Secretary-Indian Affairs (AS–IA) has determined the petitioner known as the Juaneño Band of Mission Indians, Acjachemen Nation, is not an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner does not satisfy all seven of the criteria set forth in the applicable regulations, and therefore, does not meet the requirements for a government-to-government relationship with the United States.

**DATES:** This determination is final and will become effective 90 days from publication of this notice in the **Federal Register** on June 20, 2011, unless the petitioner or an interested party files within 90 days a request for reconsideration before the Interior Board of Indian Appeals pursuant to 25 CFR 83.11.

**ADDRESSES:** Requests for a copy of the final determination that includes the summary evaluation under the criteria should be addressed to the Office of the Assistant Secretary-Indian Affairs, Attention: Office of Federal Acknowledgment, 1951 Constitution Avenue, NW., MS: 34B–SIB, Washington, DC 20240, and is available at *http://www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm.*

**FOR FURTHER INFORMATION CONTACT:** R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

**SUPPLEMENTARY INFORMATION:** Pursuant to 25 CFR 83.10(h), the Department publishes this notice that the Juaneño Band of Mission Indians, Acjachemen Nation (JBA), Petitioner #84A, is not an Indian tribe within the meaning of Federal law. The Department issued a proposed finding (PF) to decline to acknowledge the petitioner on November 23, 2007, and published notice of that preliminary determination in the **Federal Register** on December 3, 2007. This final determination (FD) affirms the PF that the Juaneño Band of Mission Indians, Acjachemen Nation (JBA), c/o Anthony Rivera, Jr., 31411–A La Matanza Street, San Juan Capistrano, California 92675–2674, does not satisfy all seven of the criteria set forth in part 83 of title 25 of the *Code of Federal Regulations* (25 CFR part 83), specifically criteria at 83.7(a), 83.7(b), 83.7(c), and 83.7(e), and therefore does not meet the requirements for a government-to-government relationship with the United States.

The acknowledgment process is based on the regulations at 25 CFR part 83. Under these regulations, the petitioner has the burden to present evidence that it meets the seven mandatory criteria in section 83.7. The JBA petitioner does not satisfy criteria 83.7(a), 83.7(b), 83.7(c), and 83.7(e). The JBA petitioner meets the requirements of criteria 83.7(d), 83.7(f), and 83.7(g).

Criterion 83.7(a) requires that external observers have identified the petitioner as an American Indian entity on a substantially continuous basis since 1900. The evidence in the record does not demonstrate that external observers identified the petitioner, or a group from which the petitioner evolved, as an American Indian entity on a substantially continuous basis from 1900 to 1997. There are identifications of the JBA petitioner as an American Indian entity between 1997 and 2005. Because the petitioner, or a group from which the petitioner has evolved, has not been identified as an American Indian entity on a substantially continuous basis since 1900, the petitioner does not meet the requirements of criterion 83.7(a).

Criterion 83.7(b) requires that a predominant portion of the petitioning group has comprised a distinct community from historical times to the present. The evidence in the record demonstrates that the JBA petitioner did not evolve from the historical SJC Indian tribe as a distinct community. The FD concludes that evidence in the record indicates that a community of SJC Indians persisted around and at the former SJC Mission until 1862, when a smallpox epidemic killed almost half the estimated Indian population (88 of 200) in a period of less than 3 months. No evidence in the record indicates that the community was able to recover from this event. The petitioner, as it is currently constituted, consists of members whose ancestors functioned as part of the general population of SJC residents since the mid-19th century. There is no evidence in the record that the petitioner's SJC Indian ancestors were distinct within this community after 1862, or were part of an Indian entity that evolved from the SJC Indian tribe in 1834; rather they appear to have been Indian individuals who became absorbed into the general, ethnically-mixed population of Old Mexican/Californio families, as well as with non-SJC Indians who moved to the town prior to 1900. The totality of the evidence does not demonstrate that the petitioner's mid-19th century ancestors formed a distinct SJC Indian community within a larger Spanish-speaking, Catholic, Old Mexican/Californio community after 1862, nor does it demonstrate that the petitioner's SJC Indian ancestors formed a distinct community from which the current JBA petitioner evolved since 1862. Therefore, the JBA petitioner does not meet the requirements of criterion 83.7(b).

Criterion 83.7(c) requires that the petitioning group has maintained political influence over its members as an autonomous entity from historical times to the present. The evidence submitted for the FD, in combination with the evidence already in the record for the PF, is insufficient to satisfy the requirements of criterion 83.7(c) for any time from 1835 to the present. The petitioner's comments on the PF did not provide evidence sufficient to satisfy the requirements of criterion 83.7(c) and new documents related to Clarence Lobo's leadership between the late 1940s and 1965 provided little information on the political composition of the group or a bilateral relationship between leaders and members. Third party comments included in the record largely agree with the conclusions reached in the PF, and the responses offered by the petitioner provide little new information regarding the political authority and influence in the group over time. After 1834, there is insufficient evidence that there were any internal processes or other mechanisms that the group used as a means of influencing or controlling the behavior of its members in significant respects, or made decisions for the group which substantially affected its members, or represented the group in dealing with outsiders in matters of consequence. Therefore, the petitioner

does not meet the requirements of criterion 83.7(c).

Criterion 83.7(d) requires that the petitioner provide a copy of its governing document including its membership criteria. The petitioner submitted a copy of its governing document which includes its membership criteria. Therefore, the JBA petitioner meets the requirements of criterion 83.7(d).

Criterion 83.7(e) requires that the petitioner's members descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. The March 12, 2009, JBA membership list includes 1,940 living members, both adults and minors. The evidence in the record indicates that all of the petitioner's members claim descent from individuals who were members of the historical Indian tribe at SJC Mission as it existed between 1776 and 1834. However, the FD finds that only 61 percent (1,182 of 1,940) of JBA members have demonstrated such descent. The petitioner has not demonstrated for this FD that its members descend from an historical Indian tribe. Therefore, the JBA petitioner does not meet the requirements of criterion 83.7(e).

Criterion 83.7(f) requires that the petitioner's membership be composed principally of persons who are not members of another federally recognized Indian tribe. A review of the membership rolls of those Indian tribes in California that would most likely include the JBA petitioner's members revealed that the petitioner's membership is composed principally of persons who are not members of any federally acknowledged North American Indian tribe. Therefore, the JBA petitioner meets the requirements of criterion 83.7(f).

Criterion 83.7(g) requires that the petitioner not be subject to congressional legislation that has terminated or forbidden the Federal relationship. A review of the available documentation showed no evidence that the petitioning group was the subject of congressional legislation to terminate or prohibit a Federal relationship as an Indian tribe. Therefore, the JBA petitioner meets the requirements of criterion 83.7(g).

Based on this final determination, the Department determines not to extend Federal acknowledgement as an Indian tribe to the petitioner known as the Juaneño Band of Mission Indians, Acjachemen Nation (JBA).

A copy of the FD that includes the summary evaluation under the criteria and summarizes the evidence, reasoning, and analyses that are the basis for the FD will be provided to the petitioner and interested parties, and is available to other parties upon written request. It will be posted on the Bureau of Indian Affairs Web site *http://www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm.* Requests for a copy of the FD should be addressed to the Federal Government as instructed in the **ADDRESSES** section of this notice.

After the publication of notice of the FD in the **Federal Register**, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA) under the procedures set forth in section 83.11 of the regulations. The IBIA must receive this request no later than 90 days after the publication of the FD in the **Federal Register**. The FD will become effective as provided in the regulations 90 days from the **Federal Register** publication unless a request for reconsideration is received within that time.

Dated: March 15, 2011.

**Larry Echo Hawk,**

*Assistant Secretary–Indian Affairs.*

[FR Doc. 2011–6470 Filed 3–18–11; 8:45 am]

**BILLING CODE 4310–G1–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NRNHL–0311–6924; 2280–665]**

### Landmarks Committee of the National Park System Advisory Board Meeting

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of Meeting.

**SUMMARY:** Notice is hereby given in accordance with the Federal Advisory Committee Act [5 U.S.C. Appendix (1988)], that a meeting of the Landmarks Committee of the National Park System Advisory Board will be held beginning at 1 p.m. on May 24, 2011, at the following location. The meeting will continue beginning at 9 a.m. on May 25 and 26, 2011.

**DATES:** May 24, 2011, at 1 p.m.; May 25–26, 2011, at 9 a.m.

*Location:* The 2nd Floor Board Room of the National Trust for Historic Preservation, 1785 Massachusetts Avenue, NW., Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Patricia Henry, National Historic Landmarks Program, National Park Service; 1849 C Street, NW. (2280); Washington, DC 20240; Telephone (202) 354–2216; E-mail: *Patty_Henry@nps.gov.*

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting of the Landmarks Committee of the National Park System Advisory Board is to evaluate nominations of historic properties in order to advise the National Park System Advisory Board of the qualifications of each property being proposed for National Historic Landmark (NHL) designation, and to make recommendations regarding the possible designation of those properties as National Historic Landmarks to the National Park System Advisory Board at its subsequent meeting at a place and time to be determined. The Committee also makes recommendations to the National Park System Advisory Board regarding amendments to existing designations and proposals for withdrawal of designation. The members of the Landmarks Committee are:

Mr. Ronald James, Chair,
Dr. James M. Allan,
Dr. Cary Carson,
Dr. Darlene Clark Hine,
Mr. Luis Hoyos, AIA,
Dr. Barbara J. Mills,
Dr. William J. Murtagh,
Dr. Franklin Odo,
Dr. William D. Seale,
Dr. Michael E. Stevens.

The meeting will be open to the public. Pursuant to 36 CFR part 65, any member of the public may file, for consideration by the Landmarks Committee of the National Park System Advisory Board, written comments concerning the National Historic Landmarks nominations, amendments to existing designations, or proposals for withdrawal of designation.

Comments should be submitted to J. Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service; 1849 C Street, NW. (2280); Washington, DC 20240; E-mail: *Paul_Loether@nps.gov.* Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The National Park System Advisory Board and its Landmarks Committee may consider the following nominations:

**Nominations**

*Arizona*

- FORT APACHE AND THEODORE ROOSEVELT SCHOOL, Fort Apache, AZ
- 1956 GRAND CANYON UNITED–TWA AVIATION ACCIDENT SITE, Grand Canyon NP, AZ

*California*

- CARRIZO PLAIN ARCHEOLOGICAL DISTRICT, California Valley, CA

*Florida*

- FLORIDA SOUTHERN COLLEGE HISTORIC DISTRICT, Lakeland, FL

*Indiana*

- PINŠIWA HOUSE (CHIEF JEAN–BAPTISTE DE RICHARDVILLE HOUSE), Fort Wayne, IN

*Kentucky*

- CAMP NELSON ARCHEOLOGICAL SITE, Jessamine County, KY

*Michigan*

- MEADOW BROOK HALL, Rochester, MI

*Montana*

- DEER MEDICINE ROCKS, Lame Deer, MT

*New York*

- GARDNER EARL MEMORIAL CHAPEL AND CREMATORIUM, Troy, NY
- MONTAUK POINT LIGHTHOUSE, Montauk, NY
- THE TOWN HALL, New York, NY
- USS *SLATER,* Albany, NY
- WEST POINT FOUNDRY ARCHEOLOGICAL SITE, Cold Spring, NY

*Ohio*

- WRIGHT FIELD HISTORIC DISTRICT, Wright-Patterson AFB, OH

*Pennsylvania*

- BRADDOCK CARNEGIE LIBRARY, Braddock, PA
- HISTORIC MORAVIAN BETHLEHEM HISTORIC DISTRICT, Bethlehem, PA

*Rhode Island*

- GENERAL JAMES MITCHELL VARNUM HOUSE, East Greenwich, RI

*South Dakota*

- STRATOBOWL, Rapid City, SD

*Virginia*

- EYRE HALL, Northampton County, VA
- SAINT PETER'S PARISH CHURCH, New Kent County, VA

**Proposed Amendments to Existing Designations**

- FORT BENTON HISTORIC DISTRICT, Fort Benton, MT (updated documentation and boundary clarification)
- NANTUCKET HISTORIC DISTRICT, Nantucket, MA (updated documentation)

Dated: March 8, 2011.

**J. Paul Loether,**

*Chief, National Register of Historic Places and National Historic Landmarks Program; National Park Service, Washington, DC.*

[FR Doc. 2011–6495 Filed 3–18–11; 8:45 am]

**BILLING CODE 4312–51–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 731–TA–340–E and 340–H (Third Review)]**

### Solid Urea From Russia and Ukraine

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice of Commission determinations to conduct full five-year reviews concerning the antidumping duty orders on solid urea from Russia and Ukraine.

**SUMMARY:** The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on solid urea from Russia and Ukraine would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

**DATES:** *Effective Date:* March 7, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:** On March 7, 2011, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group responses to its notice of institution (75 FR 74746, December 1, 2010) were adequate and that the respondent interested party group responses were inadequate. The Commission also found that other circumstances warranted conducting full reviews.[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

**Authority:** These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.
Issued: March 16, 2011.

**James R. Holbein,**

*Acting Secretary to the Commission.*

[FR Doc. 2011–6537 Filed 3–18–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–11–007]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** March 24, 2011 at 10 a.m.

**PLACE:** Room 110, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** 1. Agendas for future meetings: None.

2. Minutes.

3. Ratification List.

4. Vote in Inv. Nos. 731–TA–308–310 and 520–521 (Third Review) (Carbon Steel Butt-Weld Pipe Fittings from Brazil, China, Japan, Taiwan, and Thailand). The Commission is currently

[1] Vice Chairman Irving A. Williamson and Commissioner Charlotte R. Lane dissenting.

scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before March 30, 2011.

5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier notification of this meeting was not possible.

By order of the Commission.

Issued: March 15, 2011.

**William R. Bishop,**

*Hearings and Meetings Coordinator.*

[FR Doc. 2011–6718 Filed 3–17–11; 4:15 pm]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 1205–9]**

### Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States

**AGENCY:** United States International Trade Commission.

**ACTION:** Change in date for transmitting recommendations to the President.

**SUMMARY:** The Commission has changed the date on which it intends to report its recommendations to the President in this matter from December 13, 2010, to April 28, 2011, to allow more time to complete the report, including its recommendations. In an earlier notice the Commission had indicated it would transmit its recommendations by December 13, 2010 (see notice published in the **Federal Register** of December 2, 2010 (75 FR 75185)). This notice is being issued as an update only, and interested parties are not being asked or invited to submit additional views.

**ADDRESSES:** All Commission offices are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

**FOR FURTHER INFORMATION CONTACT:** David Beck, Director, Office of Tariff Affairs and Trade Agreements (202–205–2603, fax 202–205–2616, *david.beck@usitc.gov*), or Janis Summers, Attorney Advisor, Office of Tariff Affairs and Trade Agreements (202–205–2605, *janis.summers@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Affairs (202–205–1819, *margaret.olaughlin@usitc.gov*). Hearing impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet Web site at *http://www.usitc.gov.* (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. *http://www.usitc.gov/secretary/edis.htm.*

By order of the Commission.

Issued: March 15, 2011.

**James R. Holbein,**

*Acting Secretary to the Commission.*

[FR Doc. 2011–6506 Filed 3–18–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Inv. No. 337–TA–602]**

### In the Matter of Certain GPS Devices and Products Containing Same; Notice of Commission Determination To Rescind a Limited Exclusion Order and Cease and Desist Orders

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to rescind the limited exclusion order and cease and desist orders issued in the above-captioned investigation based on a settlement agreement.

**FOR FURTHER INFORMATION CONTACT:** Daniel E. Valencia, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–1999. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The underlying investigation was instituted on May 7, 2007, based on a complaint filed by Global Locate, Inc., a subsidiary of Broadcom Corporation (collectively, "Broadcom"). 72 FR 25777 (2007). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain GPS devices and products containing the same by reason of infringement of various claims of U.S. Patents. The complaint in the underlying investigation named various respondents. On January 15, 2009, the Commission found a violation of section 337 by the respondents by reason of infringement of all asserted patents. The Commission issued a limited exclusion order and also cease-and-desist orders against certain respondents. Respondents subsequently appealed the Commission's final determination to the United States Court of Appeals for Federal Circuit ("Federal Circuit"). On April 12, 2010, the Federal Circuit affirmed the Commission's Final Determination in all respects. *See SiRF Tech., Inc.* v. *Int'l Trade Comm'n,* 601 F.3d 1319 (Fed. Cir. 2010).

On August 16, 2010, the Commission instituted modification proceedings based on a petition seeking modification of the Commission's remedial orders filed by the respondents. On December 7, 2010, the Commission also instituted enforcement proceedings based on an enforcement complaint filed by Broadcom. These proceedings were terminated on February 28, 2011, based on a settlement agreement between Broadcom and the respondents.

On January 31, 2011, Broadcom and the respondents filed a joint motion for rescission of the remedial orders pursuant to the settlement agreement.

The Commission has determined that the settlement agreement satisfies the requirement of Commission Rule 210.76 (a)(1) (19 CFR 210.76(a)(1)) that there be changed conditions of fact or law. The Commission therefore has issued an order rescinding the limited exclusion order and cease and desist orders previously issued in this investigation.

The authority for the Commission's determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.76(a)(1) of the Commission's Rules of Practice and Procedure (19 CFR 210.76(a)(1)).

Issued: March 15, 2011.

By order of the Commission.

**James R. Holbein,**

*Acting Secretary to the Commission.*

[FR Doc. 2011–6505 Filed 3–18–11; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of a Stipulated Order for Preliminary Relief Pursuant to the Clean Water Act

Notice is hereby given that a proposed Stipulated Order for Preliminary Relief was lodged on March 15, 2011, with the United States District Court for the Northern District of California in *United States of America et al.* v. *City of Alameda, et al.,* Civ. No. C 09–05684 RS.

The United States of America and the People of the State of California ex rel. California State Water Resources Control Board and California Regional Water Quality Control Board, San Francisco Bay Region (together "Water Boards"), and Plaintiff-Intervenor San Francisco Baykeeper ("Baykeeper"), brought claims under Sections 301 and 402 of the Clean Water Act, 33 U.S.C. 1251, *et seq.,* against seven municipal defendants, including the City of Alameda, the City of Albany, the City of Berkeley, the City of Emeryville, the City of Oakland, the City of Piedmont and the Stege Sanitary District (together "Satellite Communities").

The United States, the Water Boards and Baykeeper allege that the Satellite Communities are in violation of the Clean Water Act and their National Pollutant Discharge Elimination System ("NPDES") Permits because they have unlawful sanitary sewer overflows ("SSOs") during wet weather. They also allege that the Satellite Communities are in violation of the operation and maintenance provisions of their NPDES Permits because they contribute excessive flow to treatment systems owned and operated by the East Bay Municipal Utilities District ("EBMUD"), which causes EBMUD to violate the Clean Water Act and its own NPDES permit.

The proposed Stipulated Order for Preliminary Relief complements a January 2009 interim settlement with EBMUD. Among other things, the EBMUD settlement requires EBMUD to study flow from the Satellite Communities and make recommendations to EPA and the Water Boards as to how that flow can be reduced to prevent discharges from three wet weather facilities ("WWFs").

This Stipulated Order for Preliminary Relief represents an interim solution that will move the parties toward a final resolution of the claims in the complaint. It will require the Satellite Communities to gather information that EBMUD will use to determine how to reduce flows to its system. It will also require the Satellite Communities to begin taking steps to reduce inflow and infiltration into their collection systems. This settlement, together with the earlier interim settlement with EBMUD, will provide EBMUD, EPA and the Water Boards with the information necessary to achieve a final settlement that will eliminate discharges from the WWFs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Stipulated Order for Preliminary Relief. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States et al.* v. *City of Alameda et al.,* DJ No. 90–5–1–1–09361/1.

The proposed Stipulated Order for Preliminary Relief may be examined at the Region 9 Office of the Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA, 94105. During the public comment period, the proposed Stipulated Order for Preliminary Relief may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Stipulated Order for Preliminary Relief may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $25.00 (25 cents per page reproduction cost) payable to the U.S. Treasury. The check should refer to *United States et al.* v. *City of Alameda, et al.,* DJ No. 90–5–1–1–09361/1.

**Henry Friedman,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2011–6534 Filed 3–18–11; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities: Proposed Collection Extension; Comment Request; Equal Access to Justice Act

**ACTION:** Notice.

**SUMMARY:** The Department of Labor is soliciting comments concerning the proposed extension of the information collection request (ICR) for applicants to obtain awards in administrative proceedings subject to the Equal Access to Justice Act.

**DATES:** Written comments must be submitted by May 20, 2011.

**ADDRESSES:** Comments may to be submitted by mail to the Department of Labor/Office of the Solicitor, Attn: Raymond E. Mitten, Jr., 200 Constitution Avenue, NW., Room N–2428, Washington, DC 20210. Comments also may be sent by e-mail to *DOL_PRA_Public@dol.gov.* Written comments limited to 10 pages or fewer may be transmitted by facsimile to (202) 693–5538.

**FOR FURTHER INFORMATION CONTACT:** Raymond E. Mitten, Jr., Counsel for Administrative Law, Division of Management and Administrative Legal Services, Office of the Solicitor, 200 Constitution Ave., NW., Washington, DC 20210, telephone (202) 693–5523. Copies of the referenced information collection request are available in room N–1301, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. A copy of the ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation, contact Michel Smyth at (202) 693–4129 or e-mail: *Smyth.Michel@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

*I. Background:* The Equal Access to Justice Act provides for the award of fees and expenses to certain parties involved in administrative proceedings with the United States. The statute requires, at 5 U.S.C. 504(a)(2), that a party seeking an award of fees and other expenses in a covered administrative proceeding must submit to the agency "an application which shows that the party is the prevailing party and is eligible to receive an award" under the Act. The Department of Labor's regulations implementing the Equal Access to Justice Act contain a subpart which specifies the contents of applications for an award, 29 CFR part 16, subpart B.

*II. Desired Focus of Comments:* The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3505(c)(2)(A)]. The program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of the collection requirements on respondents can be properly assessed. The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments submitted in response to this notice will be summarized and may be included in the request for OMB approval of the final information collection request. The comments will become a matter of public record.

*III. Current Action:* This notice requests an extension of the current Office of Management and Budget (OMB) approval of the paperwork requirements for the contents of applications for an award under the Equal Access to Justice Act.

*Type of Review:* Extension of a currently approved collection of information.

*Agency:* Department of Labor.

*Title:* Equal Access to Justice Act.

*OMB Control Number:* 1225–0013.

*Affected Public:* Individuals or household; Private section—businesses or other for-profits, not-for-profit institutions; State, Local, and Tribal Governments.

*Number of Respondents:* 10.

*Frequency:* On occasion.

*Total Responses:* 10.

*Average Time per Response:* 5 hours.

*Estimated Total Burden Hours:* 50 hours.

*Total Annualized Capital and Startup Costs:* $0.

*Total Annualized Operation and Maintenance Costs:* $0.

Dated: March 15, 2011.

**Michel Smyth,**

*Departmental Clearance Office.*

[FR Doc. 2011–6543 Filed 3–18–11; 8:45 am]

**BILLING CODE 4510–23–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

### Workforce Investment Act; Lower Living Standard Income Level

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice of determination of Lower Living Standard Income Level.

**SUMMARY:** Under Title I of the Workforce Investment Act (WIA) of 1998 (Pub. L. 105–220), the Secretary of Labor annually determines the Lower Living Standard Income level (LLSIL) for uses described in the law. WIA defines the term "Low Income Individual" as one who qualifies under various criteria, including an individual who received income for a six-month period that does not exceed the higher level of the poverty line or 70 percent of the LLSIL. This issuance provides the Secretary's annual LLSIL for 2011 and references the current 2011 Health and Human Services "Poverty Guidelines."

**DATES:** *Effective Date:* This notice is effective on the date of publication in the **Federal Register.**

**ADDRESSES:** Send questions about the Lower Living Standard Income Level calculations: Mr. Samuel Wright, Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210.

Send written youth program comments to: Mr. Evan Rosenberg, Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room N–4464, Washington, DC 20210.

*For Further Information on LLSIL:*

Please contact Mr. Samuel Wright, Telephone 202–693–2870; Fax 202–693–3015 (these are not toll free numbers); e-mail address *wright.samuel.e@dol.gov.*

*For Further Information on Federal Youth Programs:*

Evan Rosenberg, Telephone 202–693–3593; Fax 202–693–3532 (these are not toll free numbers).

**SUPPLEMENTARY INFORMATION:** It is the purpose of the Workforce Investment Act of 1998, to provide workforce investment activities through statewide and local workforce investment systems that increase the employment, retention, and earnings of participants. The Workforce Investment Act programs are intended to increase the occupational skill attainment by participants and the quality of the workforce thereby reducing welfare dependency, and enhance the productivity and competitiveness of the Nation.

The LLSIL is used for several purposes under WIA. Specifically, WIA Section 101(25) defines the term "low income individual" for eligibility purposes, and Sections 127(b)(2)(C) and 132(b)(1)(B)(v)(IV) define the terms "disadvantaged youth" and "disadvantaged adult" in terms of the poverty line or LLSIL for State formula allotments. The Governor and State/local workforce investment boards (WIBs) use the LLSIL for determining eligibility for youth and eligibility for adults for certain services. We encourage the Governors and State/local WIBs to consult WIA regulations and the preamble to the WIA Final Rule (published at 65 FR 49294 August 11, 2000) for more specific guidance in applying the LLSIL to program requirements. The Department of Health and Human Services (HHS) published the most current poverty-level guidelines in the **Federal Register** January 20, 2011 (Volume 76, Number 13) PP 3637–3638. The HHS 2011 Poverty guidelines may also be found on the Internet at: *http://aspe.hhs.gov/poverty/11poverty.shtml.* ETA plans to have the 2011 LLSIL available on its Web site at [*http://www.doleta.gov/llsil/2011/*].

WIA Section 101(24) defines the LLSIL as "that income level (adjusted for regional, metropolitan, urban and rural differences and family size) determined annually by the Secretary [of Labor] based on the most recent lower living family budget issued by the Secretary." The most recent lower living family budget was issued by the Secretary in the fall of 1981. The four-person urban family budget estimates, previously published by the Bureau of Labor Statistics (BLS), provided the basis for the Secretary to determine the LLSIL. BLS terminated the four-person family budget series in 1982, after publication of the fall 1981 estimates. Currently,

BLS provides data to ETA through which ETA develops the LLSIL tables, as provided in the Appendices.

ETA published the 2010 updates to the LLSIL in the **Federal Register** of May 7, 2010, pp 25296–25300. This notice again updates the LLSIL to reflect cost of living increases for 2010, by applying the percentage change in the most recent 2010 Consumer Price Index for All Urban Consumers (CPI–U) for an area, compared with the 2009 CPI–U to each of the May 7, 2010 LLSIL figures. Those updated figures for a family-of-four are listed in Appendix A, Table 1, by region for both metropolitan and non-metropolitan areas. Figures in all of the accompanying tables, in the Appendices, are rounded up to the nearest dollar. Since low income individuals, "disadvantaged adult" and "disadvantaged youth" may be determined by family income at 70 percent of the LLSIL, pursuant to WIA Sections 101(25), 127(b)(2)(C), and 132(b)(1)(B)(v)(IV), respectively, those figures are listed as well.

Jurisdictions included in the various regions, based generally on the Census Regions of the U.S. Department of Commerce, are as follows:

**Northeast**

Connecticut
Maine
Massachusetts
New Hampshire
New Jersey
New York
Pennsylvania
Rhode Island
Vermont
Virgin Islands

**Midwest**

Illinois
Indiana
Iowa
Kansas
Michigan
Minnesota
Missouri
Nebraska
North Dakota
Ohio
South Dakota
Wisconsin

**South**

Alabama
American Samoa
Arkansas
Delaware
District of Columbia
Florida
Georgia
Northern Marianas
Oklahoma
Palau
Puerto Rico
South Carolina
Kentucky
Louisiana
Marshall Islands
Maryland
Micronesia
Mississippi
North Carolina
Tennessee
Texas
Virginia
West Virginia

**West**

Arizona
California
Colorado
Idaho
Montana
Nevada
New Mexico
Oregon
Utah
Washington
Wyoming

Additionally, separate figures have been provided for Alaska, Hawaii, and Guam as indicated in Appendix B, Table 2.

For Alaska, Hawaii, and Guam, the year 2010 figures were updated from the April, 2010 "State Index" based on the ratio of the urban change in the State (using Anchorage for Alaska and Honolulu for Hawaii and Guam) compared to the West regional metropolitan change, and then applying that index to the West regional metropolitan change.

Data on 23 selected Metropolitan Statistical Areas (MSAs) are also available. These are based on annual and semiannual CPI–U changes for a 12-month period ending in December 2010. The updated LLSIL figures for these MSAs and 70 percent of the LLSIL are reported in Appendix C, Table 3.

Appendix D, Table 4 lists each of the various figures at 70 percent of the updated 2010 LLSIL for family sizes of one to six persons. Because tables 1–3 only list the LLSIL for a family of four, table 4 can be used to determine the LLSIL for families of one to six persons. For families larger than six persons, an amount equal to the difference between the six-person and the five-person family income levels should be added to the six-person family income level for each additional person in the family. Where the poverty level for a particular family size is greater than the corresponding LLSIL figure, the figure is shaded. A modified Excel version of Appendix D, Table 4, with the area names, will be available on the Department of Labor, Employment and Training Administration LLSIL Web page at [*http://www.doleta.gov/llsil/2011/*]. Appendix E, Table 5, indicates 100 percent of LLSIL for family sizes of one to six and is used to determine self-sufficiency as noted at 20 CFR 663.230 of the WIA regulations and WIA Section 134(d)(3)(A)(ii).

**Use of These Data**

Governors should designate the appropriate LLSILs for use within the State from Appendices A, B, and C, containing Tables 1 through 3. Appendices D and E, which contain Tables 4 and 5, which adjusts a family of four figure for larger and smaller families, may be used with any LLSIL designated. The Governor's designation may be provided by disseminating information on MSAs and metropolitan and non-metropolitan areas within the State or it may involve further calculations. For example, the State of New Jersey may have four or more LLSIL figures for Northeast metropolitan, Northeast non-metropolitan, portions of the State in the New York City MSA, and those in the Philadelphia MSA. If a workforce investment area includes areas that would be covered by more than one figure, the Governor may determine which is to be used.

Under 20 CFR 661.110, a State's policies and measures for the workforce investment system shall be accepted by the Secretary to the extent that they are consistent with the WIA and the WIA regulations.

**Disclaimer on Statistical Uses**

It should be noted, the publication of these figures is only for the purpose of meeting the requirements specified by WIA as defined in the law and regulations. BLS has not revised the lower living family budget since 1981, and has no plans to do so. The four-person urban family budget estimates series has been terminated. The CPI–U adjustments used to update the LLSIL for this publication are not precisely comparable, most notably because certain tax items were included in the 1981 LLSIL, but are not in the CPI–U. Thus, these figures should not be used for any statistical purposes, and are valid only for those purposes under WIA as defined in the law and regulations.

**Lower Living Standard Income Level for 2011**

Under Title I of the Workforce Investment Act of 1998 (Pub. L. 105–220), the Secretary of Labor annually determines the Lower Living Standard Income Level (LLSIL). This Notice announces the LLSIL tables for 2011.

WIA requires the Department of Labor to update and publish the LLSIL tables annually. The LLSIL tables are used for several purposes under WIA, including determining eligibility for youth.

Signed at Washington, DC this 14th day of March 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

## Attachments

## Appendix A

TABLE 1—LOWER LIVING STANDARD INCOME LEVEL

(for a family of four persons) by Region [1]

| Region [2] | 2011 adjusted LLSIL | 70 percent LLSIL |
|---|---|---|
| Northeast | | |
| Metro | $39,379 | $27,565 |
| Non-Metro [3] | 37,616 | 26,331 |
| Midwest | | |
| Metro | 34,776 | 24,343 |
| Non-Metro | 33,587 | 23,511 |
| South | | |
| Metro | 33,506 | 23,454 |
| Non-Metro | 32,771 | 22,940 |
| West | | |
| Metro | 37,920 | 26,544 |
| Non-Metro [4] | 36,402 | 25,481 |

[1] For ease of use, these figures are rounded to the next highest dollar.
[2] Metropolitan area measures were calculated from the weighted average CPI–Us for city size classes A and B/C. Non-metropolitan area measures were calculated from the CPI–Us for city size class D.
[3] Non-metropolitan area percent changes for the Northeast region are no longer available. The Non-metropolitan percent change was calculated using the U.S. average CPI–U for city size class D.
[4] Non-metropolitan area percent changes for the West region are unpublished data.

## Appendix B

TABLE 2—LOWER LIVING STANDARD INCOME LEVEL

(for a family of four persons)—Alaska, Hawaii and Guam [1]

| Region | 2011 Adjusted LLSIL | 70 percent LLSIL |
|---|---|---|
| Alaska | | |
| Metro | $45,182 | $31,627 |
| Non-Metro [2] | 45,674 | 31,972 |
| Hawaii, Guam | | |
| Metro | 48,867 | 34,207 |
| Non-Metro [2] | 48,760 | 34,132 |

[1] For ease of use, these figures are rounded to the next highest dollar.
[2] Non-Metropolitan percent changes for Alaska, Hawaii and Guam were calculated from the CPI–Us for city size class D in the Western Region.

## Appendix C

TABLE 3—LOWER LIVING STANDARD INCOME LEVEL

(for a family of four persons) 23 MSAs [1]

| Metropolitan statistical areas (MSAs) | 2011 Adjusted LLSIL | 70 percent LLSIL |
|---|---|---|
| Anchorage, AK | $46,311 | $32,418 |
| Atlanta, GA | 31,667 | 22,167 |
| Boston—Brockton—Nashua, MA/NH/ME/CT | 42,142 | 29,499 |
| Chicago—Gary—Kenosha, IL/IN/WI | 36,251 | 25,375 |
| Cincinnati—Hamilton, OH/KY/IN | 34,498 | 24,149 |
| Cleveland—Akron, OH | 35,937 | 25,156 |
| Dallas—Ft. Worth, TX | 31,520 | 22,064 |
| Denver—Boulder—Greeley, CO | 36,195 | 25,337 |
| Detroit—Ann Arbor—Flint, MI | 33,311 | 23,317 |
| Honolulu, HI | 49,943 | 34,960 |
| Houston—Galveston—Brazoria, TX | 31,143 | 21,800 |
| Kansas City, MO/KS | 33,328 | 23,330 |

TABLE 3—LOWER LIVING STANDARD INCOME LEVEL—Continued

(for a family of four persons) 23 MSAs [1]

| Metropolitan statistical areas (MSAs) | 2011 Adjusted LLSIL | 70 percent LLSIL |
|---|---|---|
| Los Angeles—Riverside—Orange County, CA | 40,035 | 28,024 |
| Milwaukee—Racine, WI | 34,380 | 24,066 |
| Minneapolis—St. Paul, MN/WI | 34,395 | 24,077 |
| New York—Northern NJ—Long Island, NY/NJ/CT/PA | 41,706 | 29,194 |
| Philadelphia—Wilmington—Atlantic City, PA/NJ/DE/MD | 37,930 | 26,551 |
| Pittsburgh, PA | 41,394 | 28,976 |
| St. Louis, MO/IL | 32,688 | 22,881 |
| San Diego, CA | 43,731 | 30,612 |
| San Francisco—Oakland—San Jose, CA | 40,514 | 28,360 |
| Seattle—Tacoma—Bremerton, WA | 41,029 | 28,720 |
| Washington—Baltimore, DC/MD/VA/WV [2] | 42,336 | 29,635 |

[1] For ease of use, these figures are rounded to the next highest dollar.
[2] Baltimore and Washington are now calculated as a single metropolitan statistical area.

## Appendix D

**Table 4—Seventy Percent of Updated 2011 Lower Living Standard Income Level (LLSIL), by Family Size**

To use the seventy percent LLSIL value, where it is stipulated for WIA programs, begin by locating the region or metropolitan area where they reside. These are listed in Tables 1, 2 and 3. After locating the appropriate region or metropolitan statistical area, find the seventy percent LLSIL amount for that location. The seventy percent LLSIL figures are listed in the last column to the right on each of the three tables. These figures apply to a family of four. Larger and smaller family eligibility is based on a percentage of the family of four. To determine eligibility for other size families consult table 4 and the instructions below.

To use Table 4, locate the seventy percent LLSIL value that applies to the individual's region or metropolitan area from Tables 1, 2 or 3. Find the same number in the "family of four" column of Table 4. Move left or right across that row to the size that corresponds to the individual's family unit. That figure is the maximum household income the individual is permitted in order to qualify as economically disadvantaged under WIA.

Where the HHS poverty level for a particular family size is greater than the corresponding LLSIL figure, the LLSIL figure appears in a shaded block. Individuals from these size families may consult the 2011 HHS poverty guidelines found in the **Federal Register**, Vol. 76, No. 13, January 20, 2011, pp. 3637–3638 (on the Internet at *http://aspe.hhs.gov/poverty/11fedreg.shtml*) to find the higher eligibility standard. Individuals from Alaska and Hawaii should consult the HHS guidelines for the generally higher poverty levels that apply in their States.

BILLING CODE 4510–FT–P

| Family Of One | Family of Two | Family of Three | Family of Four | Family of Five | Family of Six |
|---|---|---|---|---|---|
| $7,854 | $12,868 | $17,661 | $21,800 | $25,728 | $30,088 |
| 7,948 | 13,024 | 17,877 | 22,064 | 26,042 | 30,453 |
| 7,981 | 13,080 | 17,962 | 22,167 | 26,161 | 30,592 |
| 8,244 | 13,505 | 18,538 | 22,881 | 27,003 | 31,577 |
| 8,265 | 13,540 | 18,583 | 22,940 | 27,071 | 31,659 |
| 8,398 | 13,758 | 18,891 | 23,317 | 27,517 | 32,178 |
| 8,398 | 13,767 | 18,903 | 23,330 | 27,532 | 32,199 |
| 8,447 | 13,841 | 18,998 | 23,454 | 27,682 | 32,375 |
| 8,471 | 13,875 | 19,048 | 23,511 | 27,751 | 32,453 |
| 8,664 | 14,201 | 19,496 | 24,066 | 28,401 | 33,214 |
| 8,671 | 14,209 | 19,507 | 24,077 | 28,416 | 33,231 |
| 8,696 | 14,253 | 19,566 | 24,149 | 28,500 | 33,328 |
| 8,764 | 14,366 | 19,718 | 24,343 | 28,725 | 33,600 |
| 9,058 | 14,849 | 20,379 | 25,156 | 29,689 | 34,717 |
| 9,125 | 14,954 | 20,529 | 25,337 | 29,899 | 34,968 |
| 9,136 | 14,977 | 20,554 | 25,375 | 29,948 | 35,025 |
| 9,174 | 15,036 | 20,644 | 25,481 | 30,073 | 35,172 |
| 9,482 | 15,542 | 21,335 | 26,331 | 31,076 | 36,338 |
| 9,557 | 15,661 | 21,502 | 26,544 | 31,322 | 36,636 |
| 9,563 | 15,669 | 21,510 | 26,551 | 31,337 | 36,643 |
| 9,927 | 16,270 | 22,330 | 27,565 | 32,532 | 38,043 |
| 10,089 | 16,534 | 22,700 | 28,024 | 33,069 | 38,679 |
| 10,215 | 16,738 | 22,973 | 28,360 | 33,468 | 39,143 |
| 10,346 | 16,947 | 23,267 | 28,720 | 33,894 | 39,636 |
| 10,437 | 17,103 | 23,476 | 28,976 | 34,198 | 39,992 |

| Family Of One | Family of Two | Family of Three | Family of Four | Family of Five | Family of Six |
|---|---|---|---|---|---|
| 10,511 | 17,229 | 23,648 | 29,194 | 34,450 | 40,295 |
| 10,622 | 17,407 | 23,901 | 29,499 | 34,814 | 40,711 |
| 10,673 | 17,491 | 24,008 | 29,635 | 34,976 | 40,904 |
| 11,026 | 18,062 | 24,800 | 30,612 | 36,126 | 42,250 |
| 11,391 | 18,662 | 25,623 | 31,627 | 37,324 | 43,653 |
| 11,515 | 18,864 | 25,900 | 31,972 | 37,729 | 44,121 |
| 11,676 | 19,134 | 26,262 | 32,418 | 38,260 | 44,738 |
| 12,292 | 20,143 | 27,650 | 34,132 | 40,278 | 47,104 |
| 12,321 | 20,184 | 27,713 | 34,207 | 40,368 | 47,213 |
| 12,590 | 20,628 | 28,318 | 34,960 | 41,255 | 48,252 |

BILLING CODE 4510–FT–C

## Appendix E

### Table 5—Updated 2011 LLSIL (100%), By Family Size

To use the LLSIL to determine the minimum level for establishing self-sufficiency criteria at the State or local level, begin by locating the metropolitan area or region from Table 1, 2 or 3. Then locate the appropriate region or metropolitan statistical area and then find the 2011 Adjusted LLSIL amount for that location. These figures apply to a family of four. Locate the corresponding number in the family of four in the column below. Move left or right across that row to the size that corresponds to the individual's family unit. That figure is the minimum figure States must set for determining whether employment leads to self-sufficiency under WIA programs.

| Family of one | Family of two | Family of three | Family of four | Family of five | Family of six |
|---|---|---|---|---|---|
| $11,221 | $18,383 | $25,230 | $31,143 | $36,755 | $42,983 |
| 11,354 | 18,606 | 25,538 | 31,520 | 37,202 | 43,504 |
| 11,401 | 18,686 | 25,660 | 31,667 | 37,372 | 43,703 |
| 11,777 | 19,293 | 26,482 | 32,688 | 38,576 | 45,109 |
| 11,807 | 19,342 | 26,547 | 32,771 | 38,673 | 45,227 |
| 11,997 | 19,654 | 26,987 | 33,311 | 39,309 | 45,968 |
| 11,998 | 19,667 | 27,004 | 33,328 | 39,332 | 45,999 |
| 12,068 | 19,773 | 27,140 | 33,506 | 39,545 | 46,250 |
| 12,101 | 19,822 | 27,211 | 33,587 | 39,644 | 46,361 |
| 12,377 | 20,287 | 27,852 | 34,380 | 40,573 | 47,448 |
| 12,387 | 20,298 | 27,867 | 34,395 | 40,594 | 47,473 |
| 12,422 | 20,362 | 27,952 | 34,498 | 40,714 | 47,612 |
| 12,520 | 20,523 | 28,169 | 34,776 | 41,036 | 48,000 |
| 12,940 | 21,213 | 29,113 | 35,937 | 42,413 | 49,595 |
| 13,036 | 21,362 | 29,327 | 36,195 | 42,713 | 49,955 |
| 13,051 | 21,396 | 29,363 | 36,251 | 42,782 | 50,036 |
| 13,106 | 21,480 | 29,492 | 36,402 | 42,961 | 50,245 |
| 13,545 | 22,202 | 30,479 | 37,616 | 44,395 | 51,911 |
| 13,652 | 22,373 | 30,718 | 37,920 | 44,746 | 52,337 |
| 13,662 | 22,384 | 30,728 | 37,930 | 44,767 | 52,347 |
| 14,182 | 23,243 | 31,900 | 39,379 | 46,475 | 54,347 |
| 14,414 | 23,620 | 32,429 | 40,035 | 47,242 | 55,256 |
| 14,593 | 23,911 | 32,818 | 40,514 | 47,811 | 55,918 |
| 14,780 | 24,210 | 33,238 | 41,029 | 48,419 | 56,623 |
| 14,910 | 24,432 | 33,538 | 41,394 | 48,854 | 57,131 |
| 15,016 | 24,613 | 33,782 | 41,706 | 49,214 | 57,564 |
| 15,174 | 24,867 | 34,145 | 42,142 | 49,735 | 58,158 |
| 15,247 | 24,988 | 34,298 | 42,336 | 49,966 | 58,435 |
| 15,752 | 25,803 | 35,428 | 43,731 | 51,608 | 60,358 |

| Family of one | Family of two | Family of three | Family of four | Family of five | Family of six |
|---|---|---|---|---|---|
| 16,274 | 26,660 | 36,604 | 45,182 | 53,319 | 62,361 |
| 16,450 | 26,949 | 37,000 | 45,674 | 53,898 | 63,030 |
| 16,680 | 27,334 | 37,517 | 46,311 | 54,657 | 63,911 |
| 17,559 | 28,776 | 39,499 | 48,760 | 57,540 | 67,292 |
| 17,602 | 28,835 | 39,590 | 48,867 | 57,669 | 67,447 |
| 17,986 | 29,468 | 40,454 | 49,943 | 58,935 | 68,931 |

[FR Doc. 2011–6510 Filed 3–18–11; 8:45 am]

**BILLING CODE 4510–FT–P**

## DEPARTMENT OF LABOR

### Wage and Hour Division

### Proposed Extension of the Approval of Information Collection Requirements

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). 44 U.S.C. 3056(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Wage and Hour Division is soliciting comments concerning its proposal to extend Office of Management and Budget (OMB) approval of the Information Collection: Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before May 20, 2011.

**ADDRESSES:** You may submit comments identified by Control Number 1235–0006, by either one of the following methods: *E-mail: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via e-mail or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

**FOR FURTHER INFORMATION CONTACT:** Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice must be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:**

I. *Background:* The Wage and Hour Division (WHD) of the Department of Labor (DOL) administers the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 *et seq.* The MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. The MSPA also requires farm labor contractors and farm labor contractor employees to register with the U.S. Department of Labor and to obtain special authorization before housing, transporting, or driving covered workers. The MSPA requires that any person owning or controlling any facility or real property to be used for housing migrant agricultural workers shall not permit such housing to be occupied by any worker unless copy of a certificate of occupancy from the state, local or federal agency that conducted the housing safety and health inspection is posted at the site of the facility or real property. The certificate attests that the facility or real property meets applicable safety and health standards. Form WH–520 is an information gathering form and the certificate of occupancy that the Wage and Hour Division issues when it is the Federal agency conducting the safety and health inspection.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The DOL seeks an approval for the extension of this information collection that requires any person owning or controlling any facility or real property to be occupied by migrant agricultural workers to obtain a certificate of occupancy.

*Type of Review:* Extension.

*Agency:* Wage and Hour Division.

*Title:* Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act.

*OMB Number:* 1235–0006.

*Affected Public:* Business or other for-profit, Not-for-profit institutions, Farms.

*Total Respondents:* 300.

*Total Annual Responses:* 300.

*Estimated Total Burden Hours:* 20.

*Estimated Time per Response:* 3–4 minutes.

*Frequency:* Annual.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Costs (operation/maintenance):* $219.

Dated: March 15, 2011.

**Mary Ziegler,**

*Director, Division of Regulations, Legislation, and Interpretation.*

[FR Doc. 2011–6511 Filed 3–18–11; 8:45 am]

BILLING CODE 4510–27–P

## OFFICE OF MANAGEMENT AND BUDGET

### Fiscal Year 2011 Cost of Hospital and Medical Care Treatment Furnished by the Department of Defense Medical Treatment Facilities; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

**AGENCY:** Executive Office of the President, Office of Management and Budget.

**ACTION:** Notice.

**SUMMARY:** By virtue of the authority vested in the President by Section 2(a) of Public Law 87–693 (76 Stat. 593; 42 U.S.C. 2652), and delegated to the Director of the Office of Management and Budget (OMB) by the President through Executive Order No. 11060 of November 7, 1962 and Executive Order No. 11541 of July 1, 1970, the rates referenced below are hereby established. These rates are for use in connection with the recovery from tortiously liable third persons for the cost of inpatient medical services furnished by military treatment facilities through the Department of Defense (DoD). The rates have been established in accordance with the requirements of OMB Circular A–25, requiring reimbursement of the full cost of all services provided. The inpatient medical rates referenced are effective upon publication of this notice in the **Federal Register** and will remain in effect until further notice. Pharmacy rates are updated periodically. Previously published outpatient rates remain in effect until further notice. A full analysis of the rates is posted at the DoD's Uniform Business Office Web site: *http://www.tricare.mil/ocfo/_docs/FY_2011_DC_Inpt_Rate_dtd_9_28_10.pdf.* The rates can be found at: *http://www.tricare.mil/ocfo/mcfs/ubo/mhs_rates.cfm.*

**Jacob J. Lew,**

*Director.*

[FR Doc. 2011–6267 Filed 3–18–11; 8:45 am]

BILLING CODE 3110–01–P

## OFFICE OF MANAGEMENT AND BUDGET

### Fiscal Year 2010 Cost of Outpatient Medical, Dental, and Cosmetic Surgery Services Furnished by Department of Defense Medical Treatment Facilities; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

**AGENCY:** Executive Office of the President, Office of Management and Budget.

**ACTION:** Notice.

**SUMMARY:** By virtue of the authority vested in the President by section 2(a) of Public Law 87–603 (76 Stat. 593; 42 U.S.C. 2652), and delegated to the Director of the Office of Management and Budget (OMB) by the President through Executive Order No. 11541 of July 1, 1970, the rates referenced below are hereby established. These rates are for use in connection with the recovery from tortiously liable third persons for the cost of outpatient medical, dental and cosmetic surgery services furnished by military treatment facilities through the Department of Defense (DoD). The rates were established in accordance with the requirements of OMB Circular A–25, requiring reimbursement of the full cost of all services provided. The outpatient medical and dental rates referenced are effective upon publication of this notice in the **Federal Register** and will remain in effect until further notice. Pharmacy rates are updated periodically. Previously published inpatient rates remain in effect until further notice. A full analysis of the rates is posted at the DoD's Uniform Business Office Web Site: *http://www.tricare.mil/ocfo/_docs/CY_2010_Outpt_Med_Den_CS_Rates_dtd_6_29_10.pdf.* The rates can be found at: *http://www.tricare.mil/ocfo/mcfs/ubo/mhs_rates.cfm.*

**Jacob J. Lew,**

*Director.*

[FR Doc. 2011–6254 Filed 3–18–11; 8:45 am]

BILLING CODE 3110–01–P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Advisory Committee on the Electronic Records Archives (ACERA); Meeting

**AGENCY:** National Archives and Records Administration.

**ACTION:** Notice of Meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the National Archives and Records Administration (NARA) announces a meeting of the Advisory Committee on the Electronic Records Archives (ACERA). The committee serves as a deliberative body to advise the Archivist of the United States on technical, mission, and service related to the Electronic Records Archives (ERA). This includes, but is not limited to, advising and making recommendations to the Archivist on issues related to the development, implementation and use of the ERA system. This meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Electronic Records Archives Program at *era.program@nara.gov.* This meeting will be recorded for transcription purposes.

**DATES:** This meeting will be held on April 6, 2011, from 8:30 a.m. to 4:30 p.m. and April 7, 2011, from 9 a.m.—12 noon.

**ADDRESSES:** 700 Pennsylvania Avenue, NW., Washington, DC 20408–0001.

**FOR FURTHER INFORMATION CONTACT:** Charles Piercy, Acting Assistant Archivist for the Office of Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740 (301) 837—1583.

**SUPPLEMENTARY INFORMATION:**

**Agenda**

(1) Opening Remarks
(2) ERA Status Updates
(3) Subcommittee Breakouts
(4) Adjournment

Dated: March 17, 2011.

**Mary Ann Hadyka,**

*Committee Management Officer.*

[FR Doc. 2011–6700 Filed 3–18–11; 8:45 am]

BILLING CODE 7515–01–P

## NATIONAL SCIENCE FOUNDATION

### National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Task Force on Data Policies (DP), pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a workshop for the transaction of National Science Board business and other matters specified, as follows:

**DATE, TIME AND SUBJECT MATTER:**

**March 28, 2011**

8:00 Welcome, Board Processes, and Participant Introductions
8:20–10 Session I: The Vision of Data-Intensive Science
10:15–12 Session II: Reproducibility, First Steps and Guiding Principles
12:30 High Performance Cyberinfrastructure is Needed to Enable Data-Intensive Science and Engineering
1–3 Session III: Exemplars, Lessons Learned
3:15–5:30 Session IV: Impacts

**March 29, 2011**

8:30 National Science Foundation Perspective
8:45–10:30 Session V: Policy Issues
10:45–11 Public Comment Period
11–12:30 Session IV: Policy Issues (continued)
12:30 Adjourn

**STATUS:** Open.

**LOCATION:** This workshop/meeting will be held at the National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230. All visitors must contact the Board Office [call 703–292–7000 or send an e-mail message to *nationalsciencebrd@nsf.gov*] at least 24 hours prior to the teleconference and provide name and organizational affiliation. All visitors must report to the NSF visitor desk located in the lobby at the 9th and N. Stuart Streets entrance on the day of the teleconference to receive a visitor's badge.

**UPDATES & POINT OF CONTACT:** Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/.* Point of contact for this meeting is: Blane Dahl, National Science Board Office, 4201 Wilson Blvd., Arlington, VA 22230. *Telephone:* (703) 292–7000.

**Daniel A. Lauretano,**

*Counsel to the National Science Board.*

[FR Doc. 2011–6637 Filed 3–17–11; 11:15 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on April 6, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

**Wednesday, April 6, 2011—12 p.m. until 1 p.m.**

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee. Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or e-mail: *Kent.Howard@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010 (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Dated: March 15, 2011.

**Cayetano Santos,**

*Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2011–6527 Filed 3–18–11; 8:45 am]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for Review: Representative Payee Survey, RI 38–115

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** 60-Day Notice and request for comments.

**SUMMARY:** The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an existing information collection request (ICR) 3206–0208, Representative Payee Survey. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**DATES:** Comments are encouraged and will be accepted until May 20, 2011. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Linda Bradford (Acting), Deputy Associate Director, Retirement Operations, Retirement Services, 1900 E Street, NW., Room 3305, Washington,

DC 20415–3500 or send via electronic mail to *Martha.Moore@opm.gov.*

**FOR FURTHER INFORMATION CONTACT:** A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Publications Team, Office of Personnel Management, 1900 E Street, NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

**SUPPLEMENTARY INFORMATION:** The Representative Payee Survey is used to collect information about how the benefits paid to a representative payee have been used or conserved for the benefit of the incompetent annuitant.

*Analysis:*

*Agency:* Retirement Operations, Retirement Services, Office of Personnel Management.

*Title:* Representative Payee Survey.

*OMB Number:* 3206–0208.

*Frequency:* Annually.

*Affected Public:* Individuals or Households.

*Number of Respondents:* 11,000.

*Estimated Time per Respondent:* 20 minutes.

*Total Burden Hours:* 3,667.

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

[FR Doc. 2011–6574 Filed 3–18–11; 8:45 am]

**BILLING CODE 6325–38–P**

## RAILROAD RETIREMENT BOARD

### Proposed Collection; Comment Request

*Summary:* In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*Title and purpose of information collection:*

Request for Internet Services, OMB 3220–0198.

The RRB uses a Personal Identification Number (PIN)/Password system that allows RRB customers to conduct business with the agency electronically. As part of the system, the RRB collects information needed to establish a unique PIN/Password that allows customer access to RRB Internet-based services. The information collected is matched against records of the railroad employee that are maintained by the RRB. If the information is verified, the request is approved and the RRB mails a Password Request Code (PRC) to the requestor. If the information provided cannot be verified, the requestor is advised to contact the nearest field office of the RRB to resolve the discrepancy. Once a PRC is obtained from the RRB, the requestor can apply for a PIN/Password online. Once the PIN/Password has been established, the requestor has access to RRB Internet-based services. The RRB estimates that approximately 9,613 requests for PRC's and PIN/Passwords are received annually and that it takes 5 minutes per response to secure a PRC and 1.5 minutes to establish a PIN/Password. Completion is voluntary, however, the RRB will be unable to provide a PRC or allow a requestor to establish a PIN/Password (thereby denying system access), if the requests are not completed. The RRB proposes no changes to the PRC and PIN/Password screens.

*Additional Information or Comments:* To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363 or send an e-mail request to *Charles.Mierzwa@RRB.gov.* Comments regarding the information collection should be sent to Patricia A. Henaghan, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092 or *Patricia.Henaghan@RRR.GOV.* Comments should be received within 60 days of this notice.

**Charles Mierzwa,**

*Clearance Officer.*

[FR Doc. 2011–6516 Filed 3–18–11; 8:45 am]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 19b–4 and Form 19b–4, OMB Control No. 3235–0045, SEC File No. 270–38.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

- Rule 19b–4 (17 CFR 240.19b–4) and Form 19b–4—Filings with respect to proposed rule changes by self-regulatory organizations.

Section 19(b) of the Securities Exchange Act of 1934 ("Act") (15 U.S.C. 78s(b)) requires each self-regulatory organization ("SRO") to file with the Commission copies of any proposed rule, or any proposed change in, addition to, or deletion from the rules of such SRO. Rule 19b–4 (17 CFR 240.19b–4) implements the requirements of Section 19(b) by requiring the SROs to file their proposed rule changes on Form 19b–4 and by clarifying which actions taken by SROs are deemed proposed rule changes and so must be filed pursuant to Section 19(b).

The collection of information is designed to provide the Commission with the information necessary to determine, as required by the Act, whether the proposed rule change is consistent with the Act and the rules thereunder. The information is used to determine if the proposed rule change should be approved, disapproved, or if proceedings should be instituted to determine whether the proposed rule change should be approved or disapproved.

The respondents to the collection of information are self-regulatory organizations (as defined by the Act), including national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board.

Twenty-three respondents file an average total of 1,323 responses per year. Each response takes approximately 23.51 hours to complete. Thus, the estimated annual response burden is 31,105 hours. At an average cost per response of $6,945.64, the resultant total related cost of compliance for these respondents is $9,191,396.21 per year (1,323 responses × $6,945.64/response = $9,191,396.21).

Compliance with Rule 19b–4 is mandatory. Information received in response to Rule 19b–4 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 60 days of this notice.

Dated: March 15, 2011.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6513 Filed 3–18–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, March 24, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (8), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, March 24, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

A regulatory matter regarding a financial institution; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

March 17, 2011.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–6706 Filed 3–17–11; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64084; File No. SR–FINRA–2011–012]**

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to TRACE Reporting of Asset-Backed Securities

March 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 3, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the FINRA Rule 6700 Series and FINRA Rule 7730:

(1) In FINRA Rule 6710, to incorporate minor amendments to clarify, simplify or conform the defined terms, "TRACE–Eligible Security," "Reportable TRACE Transaction," "Agency Debt Security," "Asset-Backed Security" and "TRACE System Hours"; to add a defined term, "Securitizer"; and, to delete the defined terms "Sponsor" and "Issuing Entity";

(2) In FINRA Rule 6730, (A) to revise, renumber and conform the text of parallel reporting provisions in FINRA Rule 6730(a); (B) to incorporate minor amendments regarding the duration and expiration of the pilot program ("Pilot Program") for reporting Asset-Backed Securities transactions; (C) to consolidate reporting requirements for Asset-Backed Securities transactions that are executed other than during TRACE System Hours; (D) to simplify how settlement is reported for Asset-Backed Securities transactions; (E) to add alternative reporting requirements for Asset-Backed Securities transactions that are collateralized mortgage obligation ("CMO") or real estate mortgage investment conduit ("REMIC") transactions that occur prior to the issuance of the CMO or REMIC ("pre-issuance CMOs/REMICs"); and (F) to incorporate other minor technical, conforming or clarifying amendments to the Rule;

(3) In FINRA Rule 6760, to incorporate requirements that apply to Securitizers of Asset-Backed Securities, alternative notification requirements for pre-issuance CMOs/REMICs and minor technical, conforming or clarifying changes; and

(4) In FINRA Rule 7730, to add the Financial Information eXchange ("FIX") as a method to report transactions to TRACE, establish a system-related FIX fee, and incorporate a minor technical amendment.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, on the Commission's Web site at *http://www.sec.gov*, and at the Commission's Public Reference Room.

The proposed amendments set forth in Exhibit 5 are shown as changes to the FINRA Rule 6700 Series and FINRA Rule 7730 as amended by SR–FINRA–2009–065 ("TRACE ABS filing"), which was approved by the SEC on February 22, 2010.[3] The TRACE ABS filing is anticipated to become effective on May 16, 2011.[4] The proposed rule change

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61566 (February 22, 2010), 75 FR 9262 (March 1, 2010) (Order Approving File No. SR–FINRA–2009–065) ("TRACE ABS filing") and *Regulatory Notice* 10–23 (April 2010).

[4] *See* Securities Exchange Act Release No. 63223 (November 1, 2010), 75 FR 68654 (November 8,

amends or supplements the TRACE reporting and other requirements that will apply to Asset-Backed Securities transactions, with certain exceptions regarding minor conforming and other technical proposed amendments.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On February 22, 2010, the SEC approved the TRACE ABS filing, which amends the FINRA Rule 6700 Series to define Asset-Backed Securities as TRACE–Eligible Securities and to require members to report transactions in such securities to TRACE, and, concomitantly, FINRA Rule 7730, to establish reporting fees for transactions in such securities. The rule amendments in the TRACE ABS filing currently are anticipated to become effective on May 16, 2011.[5] In the proposed rule change, FINRA proposes additional amendments to the FINRA Rule 6700 Series and FINRA Rule 7730 to prepare for the reporting of Asset-Backed Securities transactions to TRACE.

As discussed in greater detail below, in FINRA Rule 6710, FINRA proposes minor amendments to five defined terms, an additional defined term, "Securitizer," and the deletion of two defined terms that are no longer necessary. In FINRA Rule 6730, FINRA proposes to: (A) Revise, renumber and conform the text of parallel reporting provisions in FINRA Rule 6730(a); (B) incorporate minor amendments regarding the duration and expiration of the Pilot Program for reporting Asset-Backed Securities transactions; (C) consolidate reporting requirements for transactions in Asset-Backed Securities that are executed other than during TRACE System Hours; (D) simplify how settlement is reported for Asset-Backed Securities transactions; and (E) add alternative reporting requirements for Asset-Backed Securities transactions that are pre-issuance CMO/REMIC transactions. FINRA also proposes to add new FINRA Rule 6730(a)(6) to clarify a member's obligation to provide information to FINRA Operations regarding a TRACE–Eligible Security when such security is not in the TRACE system, and to incorporate other minor technical or clarifying amendments to FINRA Rule 6730. In FINRA Rule 6760, FINRA proposes to incorporate requirements that apply to Securitizers of Asset-Backed Securities, alternative notification requirements for pre-issuance CMOs/REMICs, and minor technical, conforming or clarifying changes, and in FINRA Rule 7730, to add FIX as a method to report transactions to TRACE, establish a system-related fee for transactions reported to TRACE via FIX and make a technical amendment.

FINRA Rule 6710

FINRA proposes minor amendments to five defined terms in FINRA Rule 6710, a new defined term, and the deletion of two defined terms that are no longer necessary, as set forth below.

*TRACE-Eligible Security.* FINRA proposes minor technical amendments to the defined term "TRACE–Eligible Security" in FINRA Rule 6710(a), such as deleting unnecessary numbering.

*Asset-Backed Security.* FINRA proposes to amend the defined term "Asset-Backed Security" in FINRA Rule 6710(m) to incorporate, in pertinent part, Section 3(a)(77) of the Act,[6] a definition of asset-backed security added to the Act as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[7] As amended, FINRA Rule 6710(m) would provide:

"Asset-Backed Security" means a security collateralized by any type of financial asset, such as a loan, a lease, a mortgage, or a secured or unsecured receivable, and includes but is not limited to an asset-backed security as defined in Section 3(a)(77)(A) of the Exchange Act, a synthetic asset-backed security and any residual tranche or interest of any security specified above, which tranche or interest is a debt security for purposes of Rule 6710(a) and the Rule 6700 Series.

The proposed amendment to the term "Asset-Backed Security" clarifies, but does not broaden, the term.

*Securitizer.* The Dodd-Frank Act also added a definition of "securitizer" in Section 15G(a)(3) of the Act,[8] which FINRA proposes to incorporate in FINRA Rule 6710 as paragraph (s). In FINRA Rule 6710(s), "Securitizer" would have the same meaning it has in Section 15G(a)(3) of the Act.[9]

*Reportable TRACE Transaction; Agency Debt Security.* FINRA proposes to use the term "Securitizer," which is broad and includes sponsors and issuers, among others,[10] in lieu of the defined terms "Sponsor" and "Issuing Entity," in "Reportable TRACE Transaction" in FINRA Rule 6710(c) and "Agency Debt Security" in FINRA Rule

2010) (Notice of Filing and Immediate Effectiveness of SR–FINRA–2010–054 to Extend the Implementation Period for SR–FINRA–2009–065); *Regulatory Notice* 10–55 (October 2010) (establishing May 16, 2011 as the effective date).

[5] *See supra* note 4.

[6] 15 U.S.C. 78c(a)(77).

[7] Public Law 111–203, 124 Stat. 1376 (2010). "Asset-Backed Security" was added to the Act under Section 941(a) of Title IX of the Dodd-Frank Act. Under Section 3(a)(77)(A) of the Act, the term asset-backed security:

Means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including—

(i) A collateralized mortgage obligation;

(ii) A collateralized debt obligation;

(iii) A collateralized bond obligation;

(iv) A collateralized debt obligation of asset-backed securities;

(v) A collateralized debt obligation of collateralized debt obligations; and

(vi) A security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and * * *

The definition of "asset-backed security" in Section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) "is broader than the definition of 'asset-backed security' in Regulation AB and includes securities typically offered and sold in private transactions." *See* Securities Act Release No. 9150 (October 13, 2010), 75 FR 64182, 64183 (October 19, 2010) (File No. S7–26–10: Issuer Review of Assets in Offerings of Asset-Backed Securities); and SEC Regulation AB, Item 1101(c) (17 CFR 229.1101(c)).

[8] Section 941(b) of Title IX of the Dodd-Frank Act added the definition of "securitizer" to the Act as Section 15G(a)(3) (15 U.S.C. 78*o*–11(a)(3)).

[9] 15 U.S.C. 78*o*–11(a)(3). Section 15G(a)(3) of the Act provides that a securitizer is "(A) an issuer of an asset-backed security; or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer; and * * *"

[10] The Commission has stated that "[W]ith respect to registered transactions and the definitions of transaction parties in Regulation AB, sponsors and depositors both fall within the statutory definition of securitizer." Securities Exchange Act Release No. 63029 (October 4, 2010), 75 FR 62718, 62720 (October 13, 2010) (File No. S7–24–10: Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Proposed Rule). In addition, the term "securitizer" "is not specifically limited to entities that undertake transactions that are registered under the Securities Act or conducted in reliance upon any particular exemption. Consequently, * * * [securitizer] is intended to apply to any entity or person that issues or organizes an * * * [asset-backed security] as specified in Section 15G(a)(3) of the Exchange Act." *Id.* The SEC noted that entities included in the definition of securitizer included Government-Sponsored Enterprises (GSEs) such as Fannie Mae, Freddie Mac, and municipal entities. *Id.*

6710(l), and any other provisions in the FINRA Rule 6700 Series where Sponsor and/or Issuing Entity were used.[11]

*TRACE System Hours.* FINRA proposes to conform the time referenced in the defined term "TRACE System Hours" to times stated in the FINRA Rule 6700 Series generally (to include seconds) and also to relocate the defined term from FINRA Rule 6710(bb) to FINRA Rule 6710(t). FINRA Rule 6710(bb) would be deleted.

*Sponsor; Issuing Entity.* FINRA proposes to delete the defined terms "Sponsor" in FINRA Rule 6710(s) and "Issuing Entity" in FINRA Rule 6710(t), which are no longer necessary with the inclusion of the defined term Securitizer.

FINRA Rule 6730

As noted above, FINRA proposes certain amendments to FINRA Rule 6730 regarding the reporting of Asset-Backed Securities transactions to TRACE, and certain technical amendments, including restructuring and renumbering FINRA Rule 6730(a) and FINRA Rule 6730(a)(1) through (a)(8), to align parallel or similar reporting provisions. The proposed restructuring also includes minor technical amendments to conform the text of parallel or similar reporting provisions.[12]

*FINRA Rule 6730(a); Proposed Renumbered FINRA Rule 6730(a)(1): Generally Applicable Reporting Requirements.* FINRA Rule 6730(a) provides that TRACE-Eligible Securities transactions must be reported within 15 minutes. FINRA Rule 6730(a)(1) through (3) set forth reporting requirements for transactions executed, respectively, on a business day during, after, and before TRACE System Hours, and FINRA Rule 6730(a)(4) states such requirements for transactions executed on a weekend or a holiday.

To restructure FINRA Rule 6730(a) to align parallel or similar reporting provisions, FINRA first proposes minor technical amendments to FINRA Rule 6730(a),[13] and to reorganize the reporting requirements of general applicability (*i.e.,* applicable to corporate debt and Agency Debt Securities)[14] that are set forth in FINRA Rule 6730(a)(1) through (a)(4). Amended FINRA Rule 6730(a)(1) would be titled, "Reporting Requirements" and provide: "Except as otherwise specifically provided in paragraph (a)(2) and paragraph (a)(3), transactions in TRACE-Eligible Securities must be reported as provided in this paragraph (a)(1)." FINRA Rule 6730(a)(1) through FINRA Rule 6730(a)(4) would be renumbered as subparagraphs of FINRA Rule 6730(a)(1) and include minor technical and conforming amendments to conform the rule text to similar or parallel provisions in FINRA Rule 6730(a).[15]

*Proposed Renumbered FINRA Rule 6730(a)(2)—List or Fixed Offering Price Transactions and Takedown Transactions.* FINRA Rule 6730(a)(5), containing reporting requirements for List or Fixed Offering Price Transactions and Takedown Transactions, would be renumbered as FINRA Rule 6730(a)(2), and titled "Reporting Requirements—List or Fixed Offering Price Transactions and Takedown Transactions." FINRA also proposes minor technical and conforming amendments to conform the rule text to similar or parallel provisions in FINRA Rule 6730(a).[16]

*Proposed Renumbered FINRA Rule 6730(a)(3)—Asset-Backed Securities.* FINRA Rule 6730(a)(6), containing reporting requirements for Asset-Backed Securities, would be renumbered as proposed FINRA Rule 6730(a)(3), and titled "Reporting Requirements—Asset-Backed Securities Transactions."[17] FINRA also proposes minor technical and conforming amendments to conform the rule text of renumbered FINRA Rule 6730(a)(3) to similar or parallel provisions in FINRA Rule 6730(a). Finally, current FINRA Rule 6730(a)(7) and current FINRA Rule 6730(a)(8) would be renumbered, respectively, as FINRA Rule 6740(a)(4) and FINRA Rule 6730(a)(5).

*Pilot Program.* FINRA Rule 6730(a)(6)(A)(ii) (proposed renumbered FINRA Rule 6730(a)(3)(A)(i)) provides for a six-month Pilot Program for reporting transactions in Asset-Backed Securities, which extends the period for a member to timely report such transactions to no later than the next business day (T + 1) at any time during TRACE System Hours.[18] The Pilot Program provides additional time for members to prepare and submit accurate transaction reports for Asset-Backed Securities on a temporary basis.

FINRA proposes a technical amendment to the Pilot Program (proposed renumbered FINRA Rule 6730(a)(3)(A)(i)) providing that the Pilot Program shall expire 180 days (instead of six months) following the commencement of the reporting of Asset-Backed Securities transactions, provided that if the 180th day is not a Friday, the Pilot Program will expire on the Friday next occurring (that the TRACE system is open) after the 180th day. FINRA proposes that the Pilot Program expire on a Friday in response to comments requesting that members and vendors be given additional time to incorporate the system changes that must be implemented at the termination of the Pilot Program.[19]

*Asset-Backed Securities Transactions Executed on Non-Business Day.* Currently, trades that are executed on a weekend, holiday or other day when the TRACE system is closed must be reported the next business day (T + 1), designated "as/of," and are subject to two unique requirements. First, the date

[11] In FINRA Rule 6710(c) and FINRA Rule 6710(l), FINRA substitutes the single term, "Securitizer" for "Sponsor" and "Issuing Entity." *See also* minor proposed amendments to Rule 6760, discussed *infra.*

[12] As TRACE has expanded, FINRA Rule 6730 has been amended several times to incorporate additional reporting requirements. Before March 1, 2010, all TRACE-Eligible Securities transactions were subject to a single reporting standard (and three exceptions relating to transactions executed when the TRACE System was not open) (*see* FINRA Rule 6730(a)(1) and FINRA Rule 6730(a)(2) through (a)(4)). On March 1, 2010, a second set of requirements for reporting List or Fixed Offering Price Transactions and Takedown Transactions became effective (T+1 reporting requirement for most transactions) (*see* FINRA Rule 6730(a)(5)). *See* Securities Exchange Act Release No. 60726 (September 28, 2009), 74 FR 50991(October 2, 2009) (Order Approving File No. SR–FINRA–2009–010). *See also Regulatory Notice* 09–57 (September 2009).

[13] The current general requirements set forth in FINRA Rule 6730(a)—requiring all Parties to a Transaction to report the transaction and for reports to be made within 15 minutes of the Time of Execution (except as otherwise provided)—would be retained. FINRA proposes to delete the statement that, "Specific trade reporting obligations during a 24-hour cycle are set forth below."

[14] The reporting requirements in proposed renumbered FINRA Rule 6730(a)(1) and subparagraphs (A) through (D) also would apply to primary market transactions that do not qualify for T + 1 reporting, consistent with current FINRA Rule 6730(a)(1) through (4).

[15] FINRA Rule 6730(a)(1)–(4) would be renumbered as Rule 6730(a)(1)(A)–(D), respectively.

[16] The rule text would be set forth in two subparagraphs, proposed FINRA Rule 6730(a)(2)(A) and proposed FINRA Rule 6730(a)(2)(B).

[17] FINRA Rule 6730(a)(6) would be renumbered as follows: FINRA Rule 6730(a)(6)(A)(i) would be renumbered as FINRA Rule 6730(a)(3)(A)(ii); FINRA Rule 6730(a)(6)(A)(ii) (the Pilot Program) would be renumbered as FINRA Rule 6730(a)(3)(A)(i); and FINRA Rule 6730(a)(6)(B) and FINRA Rule 6730(a)(6)(B)(i)–(ii) would be renumbered as FINRA Rule 6730(a)(3)(B) and FINRA Rule 6730(a)(3)(B)(i)–(ii), respectively. As discussed *infra,* FINRA proposes to consolidate FINRA Rule 6730(a)(6)(B)(ii) and FINRA Rule 6730(a)(6)(B)(iii) in renumbered FINRA Rule 6730(a)(3)(B)(ii), and delete FINRA Rule 6730(a)(6)(B)(iii).

[18] After the Pilot Program expires, transactions in Asset-Backed Securities must be reported on the date of trade during TRACE System Hours, with certain exceptions. *See* FINRA Rule 6730(a)(6)(A)(i) (proposed renumbered FINRA Rule 6730(a)(3)(A)(ii)).

[19] As discussed *infra,* the Pilot Program is also incorporated in the proposed reporting requirements applicable to transactions in pre-issuance CMOs/REMICs (*see* proposed FINRA Rule 6730(a)(3)(C)). The expiration of the Pilot Program will also necessitate modifications of systems and procedures in place to report such transactions.

of execution reported to TRACE is not the actual date of execution; instead, a member reports the date of execution as the same day (T + 1) that the report must be timely submitted. In addition, the execution time reported must be "12:01:00 a.m. Eastern Time" ("00:01:00"), instead of the actual Time of Execution.[20] These adaptations were incorporated when TRACE began because the TRACE system does not recognize any day on which the TRACE system is closed as a valid date of execution, and the two unique requirements permit FINRA to distinguish such non-business day transactions from all other reported transactions.[21]

FINRA has improved the TRACE system, which, for transactions in Asset-Backed Securities, will recognize any calendar day, including days on which the TRACE system is not open, as a valid date of execution. Accordingly, FINRA proposes to streamline FINRA Rule 6730(a)(6) (proposed renumbered FINRA Rule 6730(a)(3)) regarding Asset-Backed Securities Transactions, combining the requirements of FINRA Rule 6730(a)(6)(B)(ii) and FINRA Rule 6730(a)(6)(B)(iii) in proposed renumbered FINRA Rule 6730(a)(3)(B)(ii) because, with this system enhancement, the standards for reporting under both provisions are the same, and separate provisions are no longer necessary.[22] FINRA Rule 6730(a)(6)(B)(iii) would be deleted.

*Settlement.* FINRA Rule 6730(d)(4)(B)(ii) currently requires a member to report two items regarding the terms of settlement of an Asset-Backed Securities transaction: (1) The actual date of settlement; and (2) an indicator that the transaction will settle "regular way" (*i.e.,* T + 3 or in conformity with the uniform practices established as "good delivery" for the specific Asset-Backed Security), or one indicating that the transaction will not be settled "regular way."

FINRA proposes to retain the requirement to report the actual date of settlement and delete the requirement to report the indicator, which will simplify the reporting of settlement in connection with Asset-Backed Securities transactions.

*Pre-Issuance CMO/REMIC Transactions.* FINRA proposes to supplement the rules requiring members to report Asset-Backed Securities in FINRA Rule 6730(a)(6) (proposed renumbered FINRA Rule 6730(a)(3)) to include alternative reporting requirements for pre-issuance CMO/REMIC transactions. Proposed FINRA Rule 6730(a)(3)(C)(i) provides that a pre-issuance CMO/REMIC transaction must be reported, during the Pilot Program, the earlier of: (i) the business day following the business day that the security is assigned a CUSIP, a similar numeric identifier or a FINRA symbol during TRACE System Hours, or (ii) the business day following the date of issuance of the security during TRACE System Hours. As provided in proposed FINRA Rule 6730(a)(3)(C)(ii), after the Pilot Program expires, such pre-issuance CMO/REMIC transactions must be reported the earlier of (i) the business day that the security is assigned a CUSIP, a similar numeric identifier or a FINRA symbol during TRACE System Hours (unless such identifier is assigned after 1:00:00 p.m. Eastern Time, and in such case, such transactions must be reported no later than the next business day during TRACE System Hours), or (ii) the date of issuance of the security during TRACE System Hours.[23]

The alternative reporting requirements in proposed FINRA Rule 6730(a)(3)(C) differ from current TRACE reporting requirements and those that will apply generally to Asset-Backed Securities transactions in that, for pre-issuance CMO/REMIC transactions, the reporting period begins (or is triggered) on the date of issuance of the security (or, if earlier, the date the security is assigned an appropriate identifier), instead of the date and time of the member's execution of the transaction. FINRA proposes this alternative approach because although pre-issuance CMO/REMIC transactions occur frequently, in many cases, a CUSIP or other identifier is not yet assigned or is difficult to assign (or cannot be assigned), because certain aspects of the collateral and structure of the CMO or REMIC are not finalized at the time of such transactions, and will not be finalized until shortly before the CMO or REMIC is actually issued. CMO and REMIC transactions that are not pre-issuance CMO/REMIC transactions—*i.e.,* those executed on or after the date of issuance of the security—must be reported in compliance with FINRA Rule 6730(a)(6)(A) and (B) (proposed renumbered FINRA Rules 6730(a)(3)(A) and (B)) and may not be reported under the alternative reporting provisions (proposed FINRA Rule 6730(a)(3)(C)(i) and proposed FINRA Rule 6730(a)(3)(C)(ii)).

*Other FINRA Rule 6730 Amendments.* FINRA proposes to amend FINRA Rule 6730 to state explicitly in new paragraph (a)(6) that when a member is a Party to a Transaction and makes a good faith determination that a transaction involves a TRACE–Eligible Security, if the TRACE–Eligible Security is not entered in the TRACE system, the member must promptly provide FINRA Operations the information required under FINRA Rule 6760(b) and thereafter report. The proposed amendment will incorporate in FINRA Rule 6730(a)(6) previous guidance regarding members' obligations to take all the steps necessary to report a transaction to TRACE, including providing notification to FINRA Operations when circumstances so require.

FINRA also proposes minor technical amendments to FINRA Rule 6730(a) regarding reporting transactions executed on weekends, Federal or religious holidays, or other days on which the TRACE system does not operate. FINRA Rule 6730(a) provisions would be amended to refer to transactions executed on "a Saturday, a Sunday, a Federal or religious holiday or other day on which the TRACE system is not open at any time during that day" (instead of transactions executed on "a Saturday, a Sunday or a Federal or religious holiday on which the TRACE system is closed").[24]

FINRA Rule 6760

FINRA Rule 6760 requires a member that is a managing underwriter in an initial offering of a TRACE–Eligible Security (or, if a managing underwriter is not appointed, members that are underwriters or initial purchasers) to notify FINRA Operations of a new TRACE–Eligible Security. For Asset-Backed Securities, a member Sponsor or

[20] Also, when the reporting method used includes a "special price memo" field, the member must enter the actual date of execution and Time of Execution in the field.

[21] *See, e.g.,* FINRA Rule 6730(a)(4) (proposed renumbered FINRA Rule 6730(a)(1)(D)), FINRA Rule 6730(a)(5) (proposed renumbered FINRA Rule 6730(a)(2)(B)), and FINRA Rule 6730(a)(6)(B)(iii).

[22] Proposed renumbered FINRA Rule 6730(a)(3)(B)(ii) would provide that any transaction in an Asset-Backed Security that is executed on a Saturday, Sunday, a Federal or religious holiday or other day on which the TRACE system is not open, or executed on a business day at or after 6:30:00 p.m. Eastern Time through 11:59:59 p.m. Eastern Time must be reported not later than the next business day during TRACE System Hours, designated "as/of" and include the date of execution.

[23] Under proposed FINRA Rule 6730(a)(3)(C)(i) and proposed FINRA Rule 6730(a)(3)(C)(ii), any transaction that is reported other than on the date of execution must be designated "as/of" and include the date of execution.

[24] *See* proposed amendments to FINRA Rule 6730(a)(4) (proposed renumbered Rule 6730(a)(1)(D)), FINRA Rule 6730(a)(5) (proposed renumbered Rule 6730(a)(2)(B)), FINRA Rule 6730(a)(6)(B)(ii) (proposed renumbered Rule 6730(a)(3)(B)(ii)) and FINRA Rule 6730(a)(8) (proposed renumbered Rule 6730(a)(5)).

a member Issuing Entity must provide notice. The notice must include certain information that clearly identifies the security, which FINRA uses to confirm information in the TRACE System or add the security to the TRACE system. Generally, the notice must be provided to FINRA Operations prior to the execution of the first transaction in the offering. FINRA proposes to amend FINRA Rule 6760 to incorporate requirements that apply to Securitizers of Asset-Backed Securities (and delete those applicable to Sponsors and Issuing Entities), to add alternative notification requirements for pre-issuance CMOs/REMICs and make other minor technical, conforming or clarifying changes.

In FINRA Rule 6760(a), FINRA Rule 6760(a)(1) would be amended such that, for Asset-Backed Securities, a member that is a Securitizer (instead of a member Sponsor or a member Issuing Entity) would be a managing underwriter for purposes of the Rule and required to provide notice under the Rule. References to Sponsors and Issuing Entities would be deleted. FINRA also proposes to amend FINRA Rule 6760(a)(2) to provide that FINRA will specify the method of communication or media that a member must use to provide the information to FINRA Operations under FINRA Rule 6760, and to delete the requirement to provide such information by facsimile or e-mail. The proposed amendment to FINRA Rule 6760(a)(2) will provide FINRA the flexibility, as technology advances and systems change, to change quickly the method or media a member may use to comply with FINRA Rule 6760.

In FINRA Rule 6760(b), FINRA proposes that when a Securitizer provides notice regarding an Asset-Backed Security, all Securitizers (instead of the Issuing Entity and the Sponsor) must be named in the notice.[25] Also, FINRA proposes to transfer the requirement that a member make a good faith determination of TRACE eligibility before providing notice about a security to FINRA Operations from FINRA Rule 6760(b) to FINRA Rule 6760(a)(1), and the deadline for providing timely notice, and the exceptions thereto, from FINRA Rule 6760(b) to proposed FINRA Rule 6760(c).

Proposed FINRA Rule 6760(c) would set forth the deadline for providing notice, and the exceptions thereto. The current provisions regarding the deadline for providing notice and the exceptions would be set forth in proposed FINRA Rule 6760(c)(1). In proposed FINRA Rule 6760(c)(2), FINRA would provide alternative notice requirements for Asset-Backed Securities that are CMOs or REMICs in which pre-issuance transactions will occur. As discussed above, proposed alternative reporting requirements for pre-issuance CMO/REMIC transactions provide that reporting deadlines will be calculated by reference to the earlier of the date of issuance (or, during the Pilot Program, the following day) or date of assignment of a CUSIP or another appropriate identifier (or, during the Pilot Program, the following day) due to the delays in the final structuring and issuance of such CMOs and REMICs.[26] For the same reasons, FINRA proposes alternative notification requirements regarding CMOs and REMICs in which pre-issuance transactions will occur. Under proposed FINRA Rule 6760(c)(2), a member that is required to provide notice to FINRA Operations of such CMOs or REMICs must do so promptly on the date of issuance or other event that establishes the reference date that determines when a reporting period begins under proposed FINRA Rule 6730(a)(3)(C)(i), which applies during the Pilot Program, or, after the expiration of the Pilot Program, under proposed FINRA Rule 6730(a)(3)(C)(ii).

FINRA also proposes to incorporate technical and clarifying amendments to FINRA Rule 6760, including changes related to the restructuring of FINRA Rule 6760(a) and (b) and the addition of proposed FINRA Rule 6760(c).

FINRA Rule 7730

FINRA Rule 7730 sets forth fees applicable to reporting transactions to TRACE and purchasing TRACE data. FINRA proposes minor amendments to two provisions. Under FINRA Rule 7730(a), members may report transactions in TRACE–Eligible Securities to TRACE using: (1) a TRACE Web browser; (2) a Computer-to-Computer Interface ("CTCI") (whether or not dedicated exclusively to TRACE); or (3) a third-party reporting intermediary, and incur system-related fees based upon the method selected. A member pays a system fee of $25 per month, per firm to report transactions in TRACE–Eligible Securities via CTCI as provided in FINRA Rule 7730(a)(2). FINRA proposes to amend FINRA Rule 7730(a), FINRA Rule 7730(a)(2) and the fee chart in Rule 7730 to add FIX as another method for reporting transactions in TRACE–Eligible Securities. FINRA proposes that the FIX line, like CTCI, would not be required to be dedicated exclusively to TRACE, and the system-related fee for reporting via FIX, like CTCI, would be $25 per month, per firm. FINRA also proposes minor, conforming, non-substantive amendments to FINRA Rule 7730(a).

In addition, FINRA proposes to correct a technical error regarding reporting fees in FINRA Rule 7730(b)(1) and the fee chart. FINRA Rule 7730(b)(1) and the fee chart set forth three tiers of reporting fees. Currently, both provide that the middle tier reporting fee applies to trades "between $200,001 and $999,999 par value" (which are charged a reporting fee of $0.000002375 times the par value of the transaction (*i.e.,* $0.002375/$1000)). FINRA proposes to correct the middle tier reporting fee to correctly state that such middle tier reporting fee is applicable to "trades over $200,000 and up to and including $999,999.99 par value."

Finally, FINRA has received questions regarding the Factor that will be used to calculate a reporting fee for a transaction in an Asset-Backed Security that will be assessed based on the Remaining Principal Balance of the security. The Remaining Principal Balance will be calculated using the Factor submitted by the member, if the member is required to report a Factor under FINRA Rule 6730(d)(2), and, in fact, does report such Factor, or if no Factor is reported, using the Factor that FINRA has adopted and incorporated in the TRACE system, which will be the Factor that FINRA has identified as the most current Factor publicly available for such Asset-Backed Security at the Time of Execution. Also, FINRA will not recalculate reporting fee amounts due to FINRA for Asset-Backed Securities transactions after FINRA has identified the appropriate Factor for the specified Asset-Backed Security and calculated the fee based on such Factor.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date of the proposed rule change will be the date that the proposed rule changes in the TRACE ABS filing become effective, which is currently anticipated to be May 16, 2011.[27]

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions

[25] FINRA notes that only a Securitizer that is also a FINRA member is required to provide notice under FINRA Rule 6760(a)(1), but all Securitizers, including non-member Securitizers, must be identified in the notice under FINRA Rule 6760(b).

[26] *See* proposed FINRA Rule 6730(a)(3)(C)(i) and proposed FINRA Rule 6730(a)(3)(C)(ii).

[27] *See supra* note 4.

of Section 15A(b)(6) of the Act,[28] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will facilitate more timely and accurate reporting of transactions in Asset-Backed Securities to TRACE, and enhance FINRA's surveillance of the debt market in connection with Asset-Backed Securities transactions for the protection of investors and in furtherance of the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2011–012 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–012. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–FINRA–2011–012 and should be submitted on or before April 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–6567 Filed 3–18–11; 8:45 am]

BILLING CODE 8011–01–P

[28] 15 U.S.C. 78*o*–3(b)(6).

[29] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Revocation of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration by the Wind-Up Order of the United States District Court of the Eastern District of New York, dated July 15, 2009, the United States Small Business Administration hereby revokes the license of Sterling/Carl Marks Capital, Inc., a New York corporation, to function as a small business investment company under the Small Business Investment Company License No. 02020517 issued to Sterling/Carl Marks Capital, Inc., on October 3, 1988 and said license is hereby declared null and void as of July 15, 2009.

Dated: March 4, 2011.

**Sean J. Greene,**

*Associate Administrator for Investment, United States Small Business Administration.*

[FR Doc. 2011–6475 Filed 3–18–11; 8:45 am]

BILLING CODE 8025–01–P

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12468 and #12469]**

### Utah Disaster #UT–00009

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Utah (FEMA–1955–DR), dated 02/11/2011.

*Incident:* Severe Winter Storms and Flooding.

*Incident Period:* 12/20/2010 through 12/24/2010.

*Effective Date:* 03/11/2011.

*Physical Loan Application Deadline Date:* 04/12/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 11/14/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Utah, dated 02/11/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Garfield.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–6552 Filed 3–18–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12486 and #12487]**

### Texas Disaster #TX–00371

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the State of Texas dated 03/14/2011.

*Incident:* Texas Panhandle Wildfires.

*Incident Period:* 02/27/2011 through 02/28/2011.

*Effective Date:* 03/14/2011.

*Physical Loan Application Deadline Date:* 05/13/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 12/14/2011.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Potter, Randall.

Contiguous Counties:

Texas: Armstrong, Carson, Castro, Deaf Smith, Moore, Oldham, Swisher.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Homeowners With Credit Available Elsewhere | 5.125 |
| Homeowners Without Credit Available Elsewhere | 2.563 |
| Businesses With Credit Available Elsewhere | 6.000 |
| Businesses Without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations With Credit Available Elsewhere | 3.250 |
| Non-Profit Organizations Without Credit Available Elsewhere | 3.000 |
| *For Economic Injury:* | |
| Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 3.000 |

The number assigned to this disaster for physical damage is 12486 5 and for economic injury is 12487 0.

The States which received an EIDL Declaration # are Texas.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: March 14, 2011.

**Karen G. Mills,**

*Administrator.*

[FR Doc. 2011–6551 Filed 3–18–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

### Revocation of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration by the Final Order of the United States District Court of the Northern District of Texas, Fort Worth dated April 1, 2009, the United States Small Business Administration hereby revokes the license of Trinity SBIC, L.P., a Delaware limited partnership, to function as a small business investment company under the Small Business Investment Company License No. 0373–0218 issued to Trinity SBIC, L.P. on April 4, 2000 and said license is hereby declared null and void as of April 1, 2009.

United States Small Business Administration

Dated: March 4, 2011.

**Sean J. Greene,**

*Associate Administrator for Investment, United States Small Business Administration.*

[FR Doc. 2011–6474 Filed 3–18–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

### Revocation of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration by the Wind-Up Order of the United States District Court for the District of Connecticut, dated June 16, 2009, the United States Small Business Administration hereby revokes the license of Fieldpoint Partners SBIC, L.P., a Delaware limited partnership, to function as a small business investment company under the Small Business Investment Company License No. 01710380 issued to Fieldpoint Partners SBIC, L.P. on May 8, 2000 and said license is hereby declared null and void as of June 16, 2009.

Dated: March 4, 2011.

**Sean J. Greene,**

*Associate Administrator for Investment, United States Small Business Administration.*

[FR Doc. 2011–6476 Filed 3–18–11; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF STATE

**[Public Notice: 7373]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Before the Pyramids: The Origins of Egyptian Civilization"

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Before the Pyramids: The Origins of Egyptian Civilization" imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at The Oriental Institute Museum of the University of Chicago, Chicago, IL, from on or about March 28, 2011, until on or about December 31, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: March 14, 2011.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2011–6549 Filed 3–18–11; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2003–14794]**

### Notice of Proposed Revision to Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of Proposed Revision to Guidance.

**SUMMARY:** On March 4, 2004, the Federal Motor Carrier Safety Administration (FMCSA) published its Guidance for the use of binding arbitration in Agency civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and the length of time in which to pay it. The Guidance provides that FMCSA use a form of arbitration known as "Night Baseball," under which each party gives to the Arbitrator its proposal for the civil penalty in a sealed envelope. After the Arbitrator makes a written determination as to what he or she believes the civil penalty should be, the envelopes are opened. The Arbitrator then selects the proposed civil penalty that is closer to his or her determination. FMCSA is proposing to revise the Guidance to eliminate the "Night Baseball" format, and to replace it with a format in which the Arbitrator determines the final civil penalty and the amount of time in which to pay it.

**DATES:** You may submit comments in response to this Notice. Send your comments on or before April 20, 2011.

**ADDRESSES:** You may submit comments identified by docket number FMCSA–2003–14794 using any one of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.*

- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Steven B. Farbman, Adjudications Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 385–2351. Office hours are from 8:30 a.m. until 5 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation and Request for Comments

FMCSA encourages you to participate in this Notice of Proposed Revision to Guidance by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you provide.

### *A. Submitting Comments*

If you submit a comment, please include the docket number for this proposal (FMCSA–2003–14794) and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu, select "Notices," insert "FMCSA–2003–14794" in the "Keyword" box, and click "Search." When the new screen appears, click on "Submit a Comment" in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may alter our proposed course of action based on the comments.

### *B. Viewing Comments and Documents*

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and click on the "read comments" box in the upper right hand side of the screen. Then, in the "Keyword" box insert "FMCSA–2003–14794" and click "Search." Next, click the "Open Docket Folder" in the "Actions" column. Finally, in the "Title" column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

### *C. Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316).

## II. Background

On March 4, 2004, FMCSA published in the **Federal Register** (69 FR 10288) its Guidance for the use of binding arbitration as an alternative dispute resolution technique in Agency civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and the length of time in which to pay it. Under the Guidance's "Night Baseball" format, each party presents to the Arbitrator evidence supporting the penalty it considers appropriate for the case as a whole without stating what that amount is. Following the hearing, each party provides the Arbitrator and the opposing party with a sealed envelope containing the amount of the total proposed civil penalty for the case and, if necessary, a proposed payment plan. Before opening the envelopes, the Arbitrator determines in writing the total civil penalty and, if necessary, a payment plan. The Arbitrator then opens the envelopes and selects the proposed civil penalty and payment plan that is closer to his or her determination.

FMCSA is proposing to eliminate the "Night Baseball" format from the Guidance. Several years of experience with this format have revealed that final civil penalties are rarely identical to the Arbitrator's determination, and occasionally not close at all. For example, in one case, the final civil penalty was $1,001 even though the Arbitrator determined that the civil penalty should be $2,700. That is because the $1,001 penalty proposed by the respondent was closer to the Arbitrator's determination than the claimant's proposal of $4,500. In

another case, the claimant proposed a $34,090 civil penalty while the respondent proposed a $6,630 civil penalty. Because the Arbitrator's decision was $28,000, the higher proposal was chosen. The format has, in fact, incentivized strategy over substance and merit—the very result it was designed to avoid. In addition, the "Night Baseball" format requires parties to persuade the Arbitrator to accept the wisdom of their positions without being able to reveal the actual civil penalty they propose. This is difficult to do, and the process prevents the Arbitrator from receiving all of the information that might be helpful in reaching a determination.

FMCSA believes that the fairest civil penalty will be the amount determined by the Arbitrator following a full hearing. This will allow the parties to try to persuade the Arbitrator why a certain proposed civil penalty will be just. The Arbitrator will then decide, on the merits, the civil penalty and, if necessary, the amount of time in which to pay it. The remainder of the 2004 Guidance would continue unchanged.

Issued on: March 14, 2011.

**Anne S. Ferro,**

*Administrator.*

[FR Doc. 2011–6468 Filed 3–18–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–1998–4334; FMCSA–2000–7006; FMCSA–2000–7918; FMCSA–2000–8398; FMCSA–2002–13411; FMCSA–2005–20027]**

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of renewal of exemptions; request for comments.

**SUMMARY:** FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 8 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**DATES:** This decision is effective April 5, 2011. Comments must be received on or before April 20, 2011.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–1998–4334; FMCSA–2000–7006; FMCSA–2000–7918; FMCSA–2000–8398; FMCSA–2002–13411; FMCSA–2005–2002, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

*Instructions:* Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

#### Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

#### Exemption Decision

This notice addresses 8 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 9 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Richard D. Carlson, David J. Collier, Robert P. Conrad, Sr., Donald P. Dodson, Jr., Stephanie D. Klang, Mark J. Koscinski, James A. Stoudt, Ralph A. Thompson.

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the

exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

**Basis for Renewing Exemptions**

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 8 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (63 FR 66226; 64 FR 16517; 65 FR 20245; 65 FR 57230; 65 FR 66286; 65 FR 78256; 66 FR 13825; 66 FR 16311; 66 FR 17994; 67 FR 57226; 67 FR 76439; 68 FR 10298; 68 FR 10300; 68 FR 13360; 68 FR 15037; 69 FR 52741; 70 FR 12265; 70 FR 14747; 70 FR 16887; 70 FR 2701; 70 FR 7545; 72 FR 12665; 74 FR 9329). Each of these 8 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

**Request for Comments**

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by April 20, 2011.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 8 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: March 10, 2011.

**Larry W. Minor,**

*Associate Administrator, Office of Policy.*

[FR Doc. 2011–6467 Filed 3–18–11; 8:45 am]

BILLING CODE 4910–EX–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2008–0398]**

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of renewal of exemptions; request for comments.

**SUMMARY:** FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 22 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**DATES:** This decision is effective April 6, 2011. Comments must be received on or before April 20, 2011.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–2008–0398, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

*Instructions:* Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

## Exemption Decision

This notice addresses 22 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 22 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Michael L. Ayers
Paul V. Daluisio
Tracy A. Doty
Matthew A. Ericson
Charles W. Hillyer
Stephen R. Jackson
Wesley J. Jenkins
Richard H. Johnson
Darrel R. Martin
James W. McGhee
James P. Mittlefehldt
Robert E. Morrison
Pahl M. Olson
Craig P. Osborn
Wayne Resch
James L. Rooney
James E. Russell
Robert C. Sellers, Jr.
Richard L. Sturk
Wayne A. Whitehead
Charles F. Wotring
Forrest L. Wright

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

## Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 22 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (74 FR 15884; 74 FR 7097). Each of these 22 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

## Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by April 20, 2011.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 22 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: March 10, 2011.

**Larry W. Minor,**

*Associate Administrator, Office of Policy.*

[FR Doc. 2011–6469 Filed 3–18–11; 8:45 am]

BILLING CODE 4910–EX–P

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## DEPARTMENT OF TRANSPORTATION

**[Docket No. FRA–2011–0001–N–3]**

## Federal Railroad Administration

## Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requirement (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The Federal Register notice with a 60-day comment period soliciting comments on the following collection of information was published on January 13, 2011 (76 FR 2441).

**DATES:** Comments must be submitted on or before April 20, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., 3rd Floor, Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., 3rd Floor, Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On January 13, 2011, FRA published a 60-day notice in the **Federal Register** soliciting comment on this ICR for which the agency was seeking OMB approval. 76 FR 2441. FRA received no comments in response to this notice.

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summary below describes the nature of the information collection requirement (ICR) and the expected burden for the ICR being submitted for clearance by OMB as required by the PRA.

*Title:* Reflectorization of Freight Rolling Stock.

*OMB Control Number:* 2130–0566.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Businesses.

*Abstract:* The Federal Railroad Administration (FRA) issued this regulation to mandate the reflectorization of freight rolling stock (freight cars and locomotives) to enhance the visibility of trains in order to reduce the number and severity of accidents at highway-rail grade crossings in which train visibility acted as a contributing factor. The information collected is used by FRA to ensure that railroads/car owners follow the schedule established by the regulation for placing retro-reflective material on the sides of freight rolling stock (freight cars and locomotives) in order to improve the visibility of trains. The information is also used by FRA to confirm that railroads/car owners meet the prescribed standards for the application, inspection, and maintenance of the required retro-reflective material.

*Form Number(s):* FRA F 6180.113.

*Annual Estimated Burden Hours:* 18,044 hours.

**ADDRESSES:** Send comments regarding this information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: *oira_submissions@omb.eop.gov.*

*Comments are invited on the following:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register.**

**Authority:** 44 U.S.C. 3501–3520.

Issued in Washington, DC, on March 15, 2011.

**Kimberly Coronel,**

*Director, Office of Financial Management, Federal Railroad Administration.*

[FR Doc. 2011–6480 Filed 3–18–11; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**American Short Line and Regional Railroad Association**

[Waiver Petition Docket Number FRA–2009–0078]

In response to the American Short Line and Regional Railroad Association's (ASLRRA) July 16, 2009, petition in this docket, FRA granted certain identified ASLRRA member railroads limited conditional relief from the Federal hours of service law (HSL; 49 U.S.C. chapter 211). Specifically, FRA granted the identified ASLRRA member railroads listed on ASLRRA's "Seconded Amended Exhibit A" in this docket relief from 49 U.S.C. 21103(a)(4)(A). (*See* FRA letter dated March 5, 2010; document number—0008.1 in docket). Section 21103(a)(4)(A) mandates that train employees have 48- or 72-hour off-duty periods following the initiation of on-duty periods on either 6 or 7 consecutive days.

By a letter dated November 29, 2010, ASLRRA notified FRA of an error in its "Second Amended Exhibit A" upon which FRA based its initial grant of relief. (See document number—0091.1 in docket). Specifically, ASLRRA notified FRA that one ASLRRA member railroad, the Brownsville & Rio Grande International Railroad (BRG), was inadvertently omitted from the amended exhibit. Noting that BRG had properly executed the application agreeing to participate in ASLRRA's petition and proposed pilot project, and had already filed evidence of its employee concurrence with the waiver in the docket as required by FRA's March 5, 2010, letter, ASLRRA requested that FRA add BRG to the list of railroads participating in the waiver. FRA has done so, subject to public comment on BRG's participation in the waiver.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate

scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2009–0078) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on March 16, 2011.

**John G. Leeds, Jr.,**

*Director, Office of Safety Analysis.*

[FR Doc. 2011–6529 Filed 3–18–11; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

### Reports, Forms and Recordkeeping Requirements Information Collection Activity Under OMB Review

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on December 15, 2010. No comments were received.

**DATES:** Comments must be submitted on or before April 20, 2011.

**FOR FURTHER INFORMATION CONTACT:** Christopher Moore, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: (202) 366–5005; or e-mail: *christopher.moore@dot.gov.* Copies of this collection also can be obtained from that office.

**SUPPLEMENTARY INFORMATION:** Maritime Administration (MARAD).

*Title of Collection:* Supplementary Training Course Application.

*OMB Control Number:* 2133–0030.

*Type of Request:* Extension of currently approved information collection.

*Affected Public:* U.S. Merchant Marine Seamen, both officers and unlicensed personnel, and other U.S. citizens employed in other areas of waterborne commerce.

*Form(s):* MA–823.

*Abstract:* Section 1305(a) of the Maritime Education and Training Act of 1980 indicates that the Secretary of Transportation may provide maritime-related training to merchant mariners of the United States and to individuals preparing for a career in the merchant marine of the United States. Also, the U.S. Coast Guard requires a firefighting certificate for U.S. merchant marine officers. This collection provides the information necessary for the maritime schools to plan their course offerings and for applicants to complete their certificate requirements.

*Expiration Date of Approval:* Three years from date of approval by the Office of Management and Budget.

*Annual Estimated Burden Hours:* 25.

*Addressee:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: MARAD Desk Officer.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

**Authority:** 49 CFR 1.66.

By order of the Maritime Administrator.

Dated: March 14, 2011.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–6526 Filed 3–18–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

**AGENCY:** National Highway Traffic Safety Administration, U.S. Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on January 3, 2011 (76 FR 210).

This document describes a collection of labeling information on five Federal motor vehicle safety standards for which the National Highway Traffic Safety Administration (NHTSA) seeks OMB approval. The labeling requirements include brake fluid warning, glazing labeling, safety belt

labeling, and vehicle certification labeling.

**DATES:** Comments must be submitted on or before April 20, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Lori Summers, U.S. Department of Transportation, NHTSA, Room W43–320, 1200 New Jersey Avenue, SE., Washington, DC 20590. Mrs. Summer's telephone number is (202) 366–4917 and fax number is (202) 366–7002.

**SUPPLEMENTARY INFORMATION:**

**National Highway Traffic Safety Administration**

*Title:* Consolidated Labeling Requirements for Motor Vehicles (except the VIN).

*OMB Control Number:* 2127–0512.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* In order to ensure that manufacturers are complying with the FMVSS and regulations, NHTSA requires a number of information collections in FMVSS Nos. 105, 135, 205, 209 and part 567.

FMVSS No. 105, "Hydraulic and electric brake systems" and FMVSS No. 135, "Light vehicle brake systems," require that each vehicle shall have a brake fluid warning statement in letters at least one-eighth of an inch high on the master cylinder reservoirs and located so as to be visible by direct view.

FMVSS No. 205, "Glazing materials," provides labeling requirements for glazing and motor vehicle manufacturers. In accordance with the standard, NHTSA requires each new motor vehicle glazing manufacturer to request and be assigned a unique mark or number. This number is then used by the manufacturer as their unique company identification on their self-certification label on each piece of motor vehicle glazing. As part of that certification label, the company must identify with the simple two or three digit number assigned by the agency and the model of the glazing. In addition to these requirements, which apply to all glazing, certain specialty glazing items, such as standee windows in buses, roof openings, and interior partitions made of plastic require that the manufacturer affix a removable label to each item. The label specifies cleaning instructions, which will minimize the loss of transparency. Other information may be provided by the manufacturer but is not required.

FMVSS No. 209, "Seat belt assemblies," requires safety belts to be labeled with the year of manufacture, the model, and the name or trademark of the manufacturer (S4.1(j)). Additionally replacement safety belts that are for use only in specifically stated motor vehicles must have labels or accompanying instruction sheets to specify the applicable vehicle models and seating positions (S4.1(k)). All other replacement belts are required to be accompanied by an installation instruction sheet (S4.1(k)).

Seat belt assemblies installed as original equipment in new motor vehicles need not be required to be labeled with position/model information. This information is only useful if the assembly is removed with the intention of using the assembly as a replacement in another vehicle; this is not a common practice.

Part 567, "Certification," requires each manufacturer or distributor of motor vehicles to furnish to the dealer, or distributor of the vehicle, a certification that the vehicle meets all applicable FMVSS. This certification is required by that provision to be in the form of a label permanently affixed to the vehicle. Under 49 U.S.C. 32504, vehicle manufacturers are directed to make a similar certification with regard to bumper standards. To implement this requirement, NHTSA issued 49 CFR part 567. The agency's regulations establish form and content requirements for the certification labels.

*Affected Public:* Businesses.

*Estimated Total Annual Burden:* 74,096 hours.

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A Comment to OMB is most effective if OMB receives it within 30 days of publication.

**Authority:** 44 U.S.C. 350(c); delegation of Authority at 49 CFR 1.50.

Issued on: March 11, 2011.

**Lori K. Summers,**

*Acting Associate Administrator for Rulemaking.*

[FR Doc. 2011–6478 Filed 3–18–11; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

March 16, 2011.

The Department of the Treasury will submit the following public information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. A copy of the submission may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury PRA Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

*Dates:* Written comments should be received on or before April 20, 2011 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–0197.

*Type of Review:* Revision of a currently approved collection.

*Title:* Form 5300, Application for Determination for Employee Benefit Plan, Schedule Q (Form 5300), Elective Determination Requests.

*Form:* 5300; Schedule Q (Form 5300).

*Abstract:* IRS needs certain information on the financing and operating of employee benefit and employee contribution plans set up by employers. IRS uses Form 5300 to obtain the information needed to determine whether the plans qualify under Code sections 401(a) and 501(a). Schedule Q provides information related to the manner in which a plan satisfies certain qualification requirements relating to minimum participation, coverage, and nondiscrimination.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 9,638,000 hours.

*OMB Number:* 1545–1119.

*Type of Review:* Revision of a currently approved collection.

*Title:* Form 8804—Annual Return for Partnership Withholding Tax (Section 1446); Schedule A (Form 8804) Penalty; Form 8805—Foreign Partner's Information Statement of Section 1446 Withholding Tax; Form 8813.

*Form:* 8804; Form 8804 Schedule A; 8805; 8813.

*Abstract:* 1446 Section requires partnerships that are engaged in the conduct of a trade or business in the United States to pay a withholding tax equal to the applicable percentage of the effectively connected taxable income allocable to their foreign partners. The partnerships use Form 8813 to make payments of withholding tax to the IRS. They use Forms 8804 and 8805 to make annual reports to provide the IRS and affected partners with information to assure proper withholding, crediting to partners' accounts and compliance. Partnerships that have effectively connected taxable income (ECTI) allocable to foreign partners use Schedule A (Form 8804) to determine whether they are subject to the penalty for underpayment of estimated tax, and, if so, the amount of the underpayment penalty.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 161,025 hours.

*OMB Number:* 1545–1756.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Revenue Procedure 2001–56, Demonstration Automobile Use.

*Abstract:* This revenue procedure provides optional simplified methods for determining the value of the use of demonstration automobiles provided to employees by automobile dealerships.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 100,000 hours.

*OMB Number:* 1545–2097.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Reg-111583–07(TD 9405) (Final)—Employment Tax Adjustments.

*Abstract:* This document contains proposed amendments to regulations relating to employment tax adjustments and employment tax refund claims. These proposed amendments modify the process for making interest-free adjustments for both underpayments and overpayments of Federal Insurance Contributions Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes and federal income tax withholding (ITW) under sections 6205(a) and 6413(a), respectively, of the Internal Revenue Code (Code).

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 15,000,000 hours.

*OMB Number:* 1545–1896.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Form 13551—Application to Participate in the IRS Acceptance Agent Program.

*Form:* 13551.

*Abstract:* Form 13551 is used to gather information to determine applicant's eligibility in the Acceptance Agent Program.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 6,413 hours.

*OMB Number:* 1545–1640.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* REG–104924–98 (NPRM) Mark to Market Accounting for Dealers in Commodities and Traders in Securities or Commodities.

*Abstract:* The collection of information in this proposed regulation is required by the Internal Revenue Service to determine whether an exemption from mark-to-market treatment is properly claimed. This information will be used to make that determination upon audit of taxpayers' books and records. The likely recordkeepers are businesses or other for-profit institution.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 1,000 hours.

*OMB Number:* 1545–2084.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Foreign Based Importers—Non-Filers.

*Abstract:* Foreign corporations are subject to tax on income that is effectively connected with a U.S. trade or business and are required to file form 1120, 1120-f or 1065 reporting taxable income. The respondents will be foreign corporations. The information gathered will be used to determine if the foreign corporation has a U.S. trade or business and is required to file a U.S. Income Tax return.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 30 hours.

*OMB Number:* 1545–1931.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* REG–152354–04 (Final) Designated Roth Contributions to Cash or Deferred Arrangements Under Section 401(k).

*Abstract:* The final regulations provide guidance concerning the requirements for designated Roth contributions to qualified cash or deferred arrangements under section 401(k). The IRS need this information to insure compliance with section 401(k) and (m) and section 402A.

*Respondents:* Private sector: Businesses or other for-profits.

*Estimated Total Burden Hours:* 157,500 hours.

*OMB Number:* 1545–2024.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Form 13818—Limited Payability Claim against the United States for Proceeds of the Internal Revenue Refund Check

*Form:* 13818.

*Abstract:* This form is used by taxpayers for completing a claim against the United States for the proceeds of an Internal Revenue refund check.

*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 4,000 hours.

*Bureau Clearance Officer:* Yvette Lawrence, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224; (202) 927–4374.

*OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

**Celina Elphage,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2011–6501 Filed 3–18–11; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designation of Entities Pursuant to Executive Order 13382

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of 26 newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters."

**DATES:** The designation by the Director of OFAC of the 26 entities identified in this notice pursuant to Executive Order 13382 is effective on January 13, 2011.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance

Outreach & Implementation Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

**Electronic and Facsimile Availability**

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

*Background*

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA"), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the "Order"), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in the Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On January 13, 2011, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated 26 entities whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

*Entities*

*Advance Novel Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1342245 (Hong Kong) issued 1 Jun 2009 [NPWMD]

*Alpha Effort Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1338849 (Hong Kong) issued 18 May 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Best Precise Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Valley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document # 1342234 (Hong Kong) issued 1 Jun 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Concept Giant Limited,* 15th Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1342237 (Hong Kong) issued 1 Jun 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Great Method Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Valley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1328889 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Ideal Success Investments Limited,* RM B, 12th Floor Chinachem Plaza, 135 Des Voeux Road C, Central District, Hong Kong Island, Hong Kong; Business Registration Document #1209837 (Hong Kong) issued 5 Feb 2008; Telephone: 85228682398; Fax: 85225372603 [NPWMD]

*Logistic Smart Limited,* c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; Business Registration Document #1342241 (Hong Kong) issued 1 Jun 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Loweswater Limited,* Manning House, 21 Bucks Road, Douglas IM1 3DA, Man, Isle of; Business Registration Document # 003648V (Man, Isle of) issued 2 Mar 2009 [NPWMD]

*Mill Dene Limited,* Manning House, 21 Bucks Road, Douglas IM1 3DA, Man, Isle of; Business Registration Document #003645V (Man, Isle of) issued 2 Mar 2009 [NPWMD]

*Neuman Limited,* 15th Floor, Tower Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Valley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1338887 (Hong Kong) issued 18 May 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*New Desire Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1329111 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;*

Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Partner Century Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Valley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1342247 (Hong Kong) issued 1 Jun 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Sackville Holdings Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Valley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1328844 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Sandford Group Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1328859 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Shallon Limited,* Manning House, 21 Bucks Road, Douglas IM1 3DA, Man, Isle of; RIF #003646V (Man, Isle of) issued 2 Mar 2009 [NPWMD]

*Sino Access Holdings Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1328924 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Smart Day Holdings Group Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #325234 (Hong Kong) issued 26 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Springthorpe Limited,* Manning House, 21 Bucks Road, Douglas IM1 3DA, Man, Isle of; Business Registration Document #003647 (Man, Isle of) issued 2 Mar 2009 [NPWMD]

*Starry Shine International Limited,* RM B, 12th Floor Two Chinachem Plaza, 135 Des Voeux Road C, Central District, Hong Kong Island, Hong Kong; Business Registration Document #1213306 (Hong Kong) issued 26 Feb 2008; Telephone: 85228682398; Fax: 85225372603 [NPWMD]

*System Wise Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1328944 (Hong Kong) issued 30 Mar 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

*Top Glacier Company Limited,* RM B, 12th Floor Chinachem Plaza, 135 Des Voeux Road C, Central District, Hong Kong Island, Hong Kong; Business Registration Document #1209891 (Hong Kong) issued 5 Feb 2008; Telephone: 85228682398; Fax: 85225372603 [NPWMD]

*Top Prestige Trading Limited,* RM B, 12th Floor Chinachem Plaza, 135 Des Voeux Road C, Central District, Hong Kong Island, Hong Kong; Business Registration Document #1204518 (Hong Kong) issued 17 Jan 2008; Telephone: 85228682398; Fax: 85225372603 [NPWMD]

*Trade Treasure Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1338904 (Hong Kong) issued 18 May 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

24. *True Honour Holdings Limited,* 15th Floor, Tower One Lippo Center, 89 Queensway, Hong Kong; c/o Soroush Sarzamin Asatir (SSA) Ship Management Co, Shabnam Alley Golriz St, Vafa Alley Fajr St, Shahid Motahari Avenue, 1589675951, Tehran, Iran; Business Registration Document #1338908 issued 18 May 2009; E-mail Address *info@ssa-smc.net;* Web site *http://www.ssa-smc.net;* Telephone: 982126100191; Fax: 982126100192 [NPWMD]

25. *M. Babaie Industries* (a.k.a. SHAHID BABAIE INDUSTRIES; a.k.a. SHAHID BABAIE INDUSTRIES COMPLEX; a.k.a. SHAHID BABAII INDUSTRIES CO.), P.O. Box 16535–176, Tehran 16548, Iran [NPWMD]

26. *Shahid Ahmad Kazemi Industries Group,* Pasdaran Avenue, Tehran, Iran [NPWMD]

Dated: March 8, 2011.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2011–6238 Filed 3–18–11; 8:45 am]

**BILLING CODE 4810–AL–P**

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Minimum Security Devices and Procedures

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

**DATES:** Submit written comments on or before May 20, 2011.

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a

facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information about this proposed information collection from Josephine Battle on (202) 906–6870, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

*Title of Proposal:* Minimum Security Devices and Procedures.

*OMB Number:* 1550–0062.

*Form Number:* N/A.

*Description:* The requirement that savings associations establish a written security program is necessitated by the Bank Protection Act (12 U.S.C. 1881–1884), which requires the Federal supervisory agencies to promulgate rules establishing minimum standards with which each financial institution must comply with respect to the installation, maintenance, and operation of security devices and procedures to discourage robberies, burglaries, and larcenies, and to assist in the identification and apprehension of persons who commit such acts.

Pursuant to the statutory mandate, OTS adopted its regulations in 1969 (12 CFR part 568). These regulations were revised in 1991 and in 2001. In accordance with Part 568, a savings association must adopt a written security program, the association's board of directors must approve the program, and each association's security officer must report annually to the board on the effectiveness of the program. Section 568.5 requires that savings associations and their subsidiaries comply with the Interagency Guidelines Establishing Information Security Standards, set forth in Appendix B to part 570. The other Federal supervisory agencies, Office of the Comptroller of the Currency, Board of the Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation, adopted virtually identical regulations in 1969, and likewise revised them in 1991 and 2001.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 741.

*Estimated Frequency of Response:* Annually.

*Estimated Total Burden:* 1,482 hours.

Dated: March 15, 2011.

**Ira L. Mills,**

*Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.*

[FR Doc. 2011–6477 Filed 3–18–11; 8:45 am]

BILLING CODE 6720–01–P

# FEDERAL REGISTER

Vol. 76 Monday,

No. 54 March 21, 2011


Part II

## Environmental Protection Agency

40 CFR Part 60

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

**[EPA–HQ–OAR–2009–0559; FRL–9272–9]**

**RIN 2060–AP90**

## Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This action promulgates EPA's new source performance standards and emission guidelines for sewage sludge incineration units located at wastewater treatment facilities designed to treat domestic sewage sludge. This final rule sets limits for nine pollutants under section 129 of the Clean Air Act: Cadmium, carbon monoxide, hydrogen chloride, lead, mercury, nitrogen oxides, particulate matter, polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, and sulfur dioxide.

**DATES:** The final rule is effective on May 20, 2011. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of May 20, 2011.

**ADDRESSES:** EPA established a single docket under Docket ID No. EPA–HQ–OAR–2009–0559 for this action. This docket includes previous actions including the standards proposed on October 14, 2010 (75 FR 63260) and a supplemental notice issued on November 5, 2010 (75 FR 68296). All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information 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 through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Hambrick, Natural Resource and Commerce Group, Sector Policies and Programs Division (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0964; fax number: (919) 541–3470; e-mail address: *hambrick.amy@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

*Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

7-PAH 7-Polycyclic Aromatic Hydrocarbons
ANSI American National Standards Institute
As Arsenic
ASME American Society of Mechanical Engineers
ASTM American Society of Testing and Materials
CAA Clean Air Act
CASS Continuous Automated Sampling System
CBI Confidential Business Information
Cd Cadmium
CDX Central Data Exchange
CEMS Continuous Emissions Monitoring Systems
COMS Continuous Opacity Monitoring System
The Court U.S. Court of Appeals for the District of Columbia Circuit
CPMS Continuous Parametric Monitoring System
CFR Code of Federal Regulations
CISWI Commercial and Industrial Solid Waste Incineration
CO Carbon Monoxide
Cr Chromium
CWA Clean Water Act
EG Emission Guidelines
EJ Environmental Justice
ERT Electronic Reporting Tool
ESP Electrostatic Precipitators
FF Fabric Filter
FB Fluidized Bed
FGR Flue Gas Recirculation
HAP Hazardous Air Pollutants
HCl Hydrogen Chloride
Hg Mercury
HMIWI Hospital, Medical and Infectious Waste Incineration
ICR Information Collection Request
ISTDMS Integrated Sorbent Trap Dioxin Monitoring System
ISTMMS Integrated Sorbent Trap Mercury Monitoring System
LML Lowest Measured Level
MACT Maximum Achievable Control Technology
Mg/dscm Milligrams per Dry Standard Cubic Meter
MH Multiple Hearth
Mn Manganese
MWC Municipal Waste Combustion
NAAQS National Ambient Air Quality Standards
NAICS North American Industrial Classification System
Ng/dscm Nanograms per Dry Standard Cubic Meter
Ni Nickel
$NO_X$ Nitrogen Oxides
NPRM Notice of Proposed Rulemaking
NSPS New Source Performance Standards
NTAA National Tribal Air Association
NTTAA National Technology Transfer and Advancement Act of 1995
OAQPS Office of Air Quality Planning and Standards
O&M Operation and Maintenance
OMB Office of Management and Budget
OP Office of Policy
OSWI Other Solid Waste Incineration
OTM Other Test Method
OW Office of Water
Pb Lead
PCB Polychlorinated Biphenyls
PCDD/PCDF Polychlorinated Dibenzo-P-Dioxins and Polychlorinated Dibenzofurans
PM Particulate Matter
POM Polycyclic Organic Matter
POTW Publicly Owned Treatment Works
PPM Parts per Million
PPMV Parts per Million by Volume
PPMVD Parts per Million of Dry Volume
PRA Paperwork Reduction Act
PS Performance Specifications
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RTO Regenerative Thermal Oxidizer
SBA Small Business Administration
SCR Selective Catalytic Reduction
SNCR Selective Non-Catalytic Reduction
$SO_2$ Sulfur Dioxide
SSI Sewage Sludge Incineration
SSM Startup, Shutdown, and Malfunction
TEF Toxic Equivalency Factor
TEQ Toxic Equivalency
THC Total Hydrocarbons
TMB Total Mass Basis
TPD Tons per Day
TPY Tons per Year
TTN Technology Transfer Network
UL Upper Limit
UMRA Unfunded Mandates Reform Act of 1995
UPL Upper Prediction Limit
VCS Voluntary Consensus Standards
WWW Worldwide Web

*Organization of This Document.* The following outline is provided to aid in locating information in this preamble.

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B. Where can I get a copy of this document?
C. Judicial Review
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B. What are the primary sources of emissions and what are the emissions?
C. What is the relationship of the final standards to other standards for the use or disposal of sewage sludge and associated air emissions?
III. Summary of the Final Standards
A. What units are affected by the final standards?
B. What are the emission limits in the emission guidelines for existing sources?
C. What are the emission limits in the new source performance standards for new sources?

D. What are the testing and monitoring requirements?
E. What are the other requirements for new and existing SSI units?
F. What are the recordkeeping and reporting requirements?
G. What are the SSM provisions?
H. What are the Title V permit requirements?
I. What are the applicability dates of the standards?
J. What are the requirements for submission of emissions test results to EPA?
IV. Summary of Significant Changes Following Proposal
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B. Subcategories
C. MACT Floor UPL Calculation and EG and NSPS Emission Limits
D. Baseline Emissions, Costs, and Impacts Estimation
E. Compliance Requirements
F. Definitions
V. Significant Public Comments and Rationale for Changes to the Proposed Rule
A. Legal and Applicability Issues Regulating SSI Under Section 112 vs. Section 129
B. Subcategories
C. MACT Floor Analysis
D. Baseline Emissions
E. Beyond-the-Floor Analysis
F. Cost and Economic Impacts
G. Startup, Shutdown, and Malfunction
H. Compliance Requirements
VI. Impacts of the Final Action
A. Impacts of the Final Action for Existing Units
B. Impacts of the Final Action for New Units
VII. Statutory and Executive Order Reviews
A. Executive Order 12866 and 13563: 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 and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

## I. General Information

### *A. Does this action apply to me?*

Categories and entities potentially affected by the final action are those that operate sewage sludge incinerators (SSI). Although there is no specific NAICS code for SSI, these units may be operated by wastewater treatment facilities designed to treat domestic sewage sludge. The following NAICS codes could apply:

| Category | NAICS code | Examples of potentially regulated entities |
|---|---|---|
| Solid waste combustors and incinerators | 562213 | Municipalities with SSI units. |
| Sewage treatment facilities | 221320 | |

This table is not intended to be exhaustive, but rather provides a general guide for identifying entities likely to be affected by the final action. To determine whether your facility would be affected by the final action, you should examine the applicability criteria in 40 CFR 60.4770 of subpart LLLL and proposed 40 CFR 60.5005 of subpart MMMM. If you have any questions regarding the applicability of the final action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### *B. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of the final action will also be available on the WWW through the TTN. Following signature, a copy of the final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

### *C. Judicial Review*

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the Court by May 20, 2011. Section 307(d)(7)(B) of the CAA further provides that "only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review." This section also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule." Any person seeking to make such a demonstration to EPA should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to both of the contacts listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

## II. Background

### *A. What is the statutory background for this final rule?*

Section 129 of the CAA, entitled, "Solid Waste Combustion," requires EPA to develop and adopt standards for solid waste incineration units pursuant to CAA sections 111 and 129. Section 129(a)(1)(A) of the CAA requires EPA to establish performance standards, including emission limitations, for "solid waste incineration units." Section 129 of the CAA defines "solid waste incineration unit" as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public" (section 129(g)(1)). Section 129 of the CAA also provides that "solid waste" shall have the meaning established by EPA pursuant to its authority under the RCRA (section 129(g)(6)). Sections 111(b) and 129(a) of the CAA address emissions from new units (*i.e.,* NSPS), and CAA sections 111(d) and 129(b) address emissions from existing units (*i.e.,* EG). The NSPS are directly enforceable Federal regulations, and under CAA section 129(f)(1), become effective 6 months after promulgation. Unlike the NSPS, the EG are not themselves directly enforceable. Rather, the EG are implemented and enforced through either an EPA-approved state plan or a promulgated Federal plan.

States are required to submit a plan to implement and enforce the EG to EPA for approval not later than 1 year after EPA promulgates the EG (CAA section 129(b)(2)). The state plan must be "at least as protective as" the EG and must ensure compliance with all applicable requirements not later than 3 years after the state plan is approved by EPA, or 5 years after promulgation of the relevant EG, whichever is sooner. EPA's procedures for submitting and approving state plans are set forth in 40 CFR part 60, subpart B. When a state plan is approved by EPA, the plan requirements become federally enforceable, but the state has primary responsibility for implementing and enforcing the plan. However, EPA is required to develop, implement, and enforce a Federal plan for solid waste incineration units located in any state which has not submitted an approvable state plan within 2o years after the date of promulgation of the relevant EG (CAA section 129(b)(3)). The Federal plan must assure that each solid waste incineration unit subject to the Federal plan is in compliance with all provisions of the EG not later than 5 years after the date the relevant guidelines are promulgated. EPA views the Federal plan as a "place-holder" that remains in effect only until such time as a state without an approved plan submits and receives EPA approval of its state plan. Once an applicable state plan has been approved, the requirements of the Federal plan no longer apply to solid waste incineration units covered by that state plan.

The CAA sets forth a two-stage approach to regulating emissions from solid waste incinerator units. The statute also provides EPA with substantial discretion to distinguish among classes, types, and sizes of incineration units within a category while setting standards. In the first stage of setting standards, CAA section 129(a)(2) requires EPA to establish technology-based emission standards that reflect levels of control EPA determines are achievable for new and existing units, after considering costs, nonair quality health and environmental impacts and energy requirements associated with the implementation of the standards. Section 129(a)(5) of the CAA then directs EPA to review those standards and revise them as necessary every 5 years. In the second stage, CAA section 129(h)(3) requires EPA to determine whether further revisions of the standards are necessary in order to provide an ample margin of safety to protect public health.

In setting forth the methodology EPA must use to establish the first-stage technology-based standards for the standards, CAA section 129(a)(2) provides that standards "applicable to solid waste incineration units promulgated under section 111 and this section shall reflect the maximum degree of reduction in emissions of [certain listed air pollutants] that the Administrator, taking into consideration the cost of achieving such emission reduction and any nonair quality health and environmental impacts and energy requirements, determines is achievable for new and existing units in each category." This level of control is referred to as a MACT standard.

In promulgating a MACT standard, EPA must first calculate the minimum stringency levels for new and existing solid waste incineration units in a category, generally based on levels of emissions control achieved or required to be achieved by the subject units. The minimum level of stringency is called the MACT "floor," and CAA section 129(a)(2) sets forth differing levels of minimum stringency that EPA's standards must achieve, based on whether they regulate new and reconstructed sources, or existing sources. For new and reconstructed sources, CAA section 129(a)(2) provides that the "degree of reduction in emissions that is deemed achievable * * * shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator." Emissions standards for existing units may be less stringent than standards for new units, but "shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category."

Maximum Achievable Control Technology analyses involve an assessment of the emissions from the best performing unit or units in a source category. The assessment can be based on actual emissions data, knowledge of the air pollution control in place in combination with actual emissions data, state regulatory requirements that may enable EPA to estimate the actual performance of the regulated units, or other emissions information. For each source category, the assessment involves a review of actual emissions data with an appropriate accounting for emissions variability. Other methods of estimating emissions can also be used, if the methods can be shown to provide reasonable estimates of the actual emissions performance of a source or sources. In addition to the MACT floor limit, EPA must examine whether more stringent "beyond-the-floor" standards should be adopted. In considering whether such standards are appropriate, EPA must consider the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements. The CAA requires that the MACT floor for new sources be no less stringent than the emissions control achieved in practice by the best-controlled similar unit. EPA is also required to consider beyond-the-floor standards for new sources, consistent with the factors described above. Clean Air Act section 129(a)(1) identifies five categories of solid waste incineration units:

- Units that combust municipal waste at a capacity greater than 250 tpd.
- Units that combust municipal waste at a capacity equal to or less than 250 tpd.
- Units that combust hospital, medical, and infectious waste.
- Units that combust commercial or industrial waste.
- Units that combust waste and which are not specifically identified in section 129(a)(1)(A) through (D) are referred to in section 129(a)(1)(E) as "other categories" of solid waste incineration units.

A SSI unit is an incinerator located at a wastewater treatment facility designed to treat domestic sewage sludge that combusts sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incinerators, by virtue of having not been specifically identified in section 129(a)(1)(A) through (D), have been interpreted to be part of the broader category of "other categories" of solid waste. EPA has issued emission standards for large and small MWC, HMIWI, CISWI, and OSWI units; however, as explained further below, none of those emission standards apply to SSI units.

EPA issued emission standards for OSWI units on December 16, 2005 (70 FR 74870). Based on EPA's interpretation of the CAA at that time, the OSWI standards did not include emission standards for SSI units. EPA received a petition for reconsideration of the OSWI standards on February 14, 2006, regarding the exclusion of certain categories, including SSI.[1] While EPA granted the petition for reconsideration on June 28, 2006, EPA's final review, which became effective January 22, 2007, concluded that no additional changes were necessary to the 2005 OSWI rule (71 FR 36726). That litigation is currently being held in abeyance. EPA currently intends to revise the emission standards for OSWI units in the future,

[1] *Sierra Club* v. *EPA;* DC Cir. Nos. 06–1066, 07–1063.

and that rulemaking will address all OSWI units except SSI units.

In the OSWI rule issued on December 16, 2005, EPA stated that it had decided not to regulate SSI units under CAA section 129 (70 FR 74870), but rather to regulate SSI units under CAA section 112, pointing to a statement in EPA's 2000 Unified Regulatory Agenda stating that sewage sludge incinerators do not combust waste from a commercial or industrial establishment or the general public. We declined to revise that decision to regulate SSI units under 112 in the response to the petition for reconsideration on this issue for five reasons, including our position that section 129(a)(1)(E) did not require regulation of all "other" solid waste incineration units and that section 129(g)(1)'s enumerated exemptions to the definition of "solid waste incineration unit" were not exclusive, and that section 129(h)(2) gave EPA the discretion to choose whether to regulate incinerators under section 112 or section 129 of the Act. (72 FR 2620). In June 2007, in a separate decision related to EPA's December 1, 2000, emission standards for CISWI units, the Court held that any unit combusting any solid waste must be regulated under section 129 of the CAA. The impact of this decision on EPA's regulation of SSI is explained in detail in the NPRM.[2]

EPA considers SSI units to be "other solid waste incineration units," since that category is intended to encompass all solid waste incineration units that are not included in the first four categories identified in CAA section 129(a) through (d). EPA plans to re-issue emission standards for the remaining OSWI units at a later time. EPA is taking final action on emission standards for SSI units at this time because these emission standards are needed as part of EPA's fulfillment of its obligations under CAA sections 112(c)(3) and (k)(3)(B)(ii) and section 112(c)(6). Clean Air Act section 112(k)(3)(B)(ii) calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA must then ensure that sources representing 90 percent of the aggregate area source emissions of each of the 30 identified HAP are subject to standards pursuant to section 112(d).[3] Sewage sludge incineration units are one of the source categories identified for regulation to meet the 90 percent requirement for Cd, Cr, Pb, Mn, Hg, Ni and PCB. EPA is ordered by the Court to satisfy its obligation under CAA section 112(c)(3) and (k)(3)(B)(ii) by January 16, 2011.[4]

In a notice on April 10, 1998, EPA provided a list of source categories for regulation under CAA section 112(d)(2) or 112(d)(4). Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources counting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4) (63 FR 17838). Sewage sludge incineration units are one of the identified source categories for regulation to meet the 90 percent requirement for Hg. Further information can be found in the Memorandum titled, "Emission Standards for Meeting the Ninety Percent Requirement under Section 112(c)(6) of the Clean Air Act" in the SSI docket (EPA–HQ–OAR–2009–0559).Therefore, EPA is finalizing the SSI standards prior to taking action on the remaining source categories that will be regulated under CAA section 129(a)(1)(E) as OSWI units.

*B. What are the primary sources of emissions and what are the emissions?*

Sewage sludge incineration units may be operated by municipalities or other entities. Incineration continues to be used to dispose of sewage sludge. Combustion of solid waste, and specifically sewage sludge, causes the release of a wide array of air pollutants, some of which exist in the waste feed material and are released unchanged during combustion, and some of which are generated as a result of the combustion process itself. The pollutants for which numerical limits must be established, as specified in section 129 of the CAA, include Cd, CO, HCl, Hg, $NO_X$, PCDD/PCDF, PM, Pb, and $SO_2$; and, where appropriate, numerical limits for opacity must also be established. These emissions come from the SSI unit's stack and fugitive PM emissions, as indicated by the associated visible emissions, also occur from ash handling.

*C. What is the relationship of the final standards to other standards for the use or disposal of sewage sludge and associated air emissions?*

Under authority of section 405(d) and (e) of the CWA, as amended 33 U.S.C.A. 1251, (*et seq.*), EPA promulgated regulations on February 19, 1993, at 40 CFR part 503 designed to protect public health and the environment from any reasonably anticipated adverse effects of certain pollutants that may be present in sewage sludge. The part 503 regulations establish requirements for the final use and disposal of sewage sludge when: (1) The sludge is applied to the land for a beneficial use (*e.g.,* for use in home gardens); (2) the sludge is disposed on land by placing it on surface disposal sites; and (3) the sewage sludge is incinerated. The standards apply to POTW that generate or treat domestic sewage sludge, as well as to any person who uses or disposes of sewage sludge from such treatment works.

The part 503 requirements for firing sewage sludge in a SSI are in subpart E of the regulations. Subpart E includes general requirements; pollutant limits; operational standards; management practices; and monitoring, recordkeeping, and reporting requirements.

These part 503 regulations require that SSI meet the National Emission Standards for Beryllium and Hg in subparts C and E, respectively, of 40 CFR part 61. The regulations also require that the allowable concentration of five other inorganic pollutants be calculated using equations in the regulation. The inorganic pollutants included are Pb, As, Cd, Cr, and Ni. The terms in the equations must be determined on a case-by-case basis, except for the risk-specific concentration for the inhalation exposure pathway to protect individuals when these pollutants are inhaled. The site-specific variables for the equations (incinerator type, dispersion factor, control efficiency, feed rate, and stack height) must be used to calculate allowable daily concentrations of As, Cd, Cr, Pb and Ni in the sewage sludge fed to the incinerator.

Also included in subpart E of part 503 is an operational standard for THC. The value for THC in the final part 503 regulation cannot be exceeded in the exit gas from the SSI stack. Management practices and frequency of monitoring, recordkeeping, and reporting requirements are also included in this subpart.

Under today's final standards, EPA is establishing limits for three of the inorganic pollutants covered by the current part 503 regulations (Cd, Pb and Hg) and the following six additional pollutants: HCl, CO, $NO_X$, $SO_2$, PM, and total PCDD/PCDF. Besides the pollutants covered here, there are other differences between the part 503 regulations and these final standards. The emission limits for inorganic pollutants under part 503 are risk-based numbers rather than technology-based. Also, part 503 does not distinguish between new and existing units or between incinerator types (*i.e.,* MH or

[2] *NRDC* v. *EPA;* 489 F. 3d. at 1257–8.

[3] CAA section 112(c)(3) and section 112(k)(3)(B)(ii).

[4] *Sierra Club* v. *Jackson;* D.DC No. 1:01CV01537.

FB incinerator) for setting emission limits since emission limits are based on risks to a highly exposed individual.

Because both part 503 and these final standards cover the same universe of facilities, there are certain issues that arise in terms of potential impacts to current SSI facilities. First, the regulation of sewage sludge under CAA section 129 will result in stricter emission standards than under the current CWA rule. Additional pollution controls will increase costs for facilities that continue to use the incineration disposal method. If the additional costs are high enough, many entities may choose to adopt alternative disposal methods (*e.g.,* surface disposal in landfills or other beneficial land applications). Consequently, a potential impact of this rule is that some of the estimated 110 facilities that operate SSI as the primary means of disposal could discontinue this practice and would instead landfill or land apply their sewage sludge. Second, one must consider the available capacity of surface disposal sites to receive additional sewage sludge and the potential for added costs if the use of SSI is discontinued. Third, SSI will be subject to two different sets of requirements (numeric standards, operational standards, monitoring, recordkeeping, and reporting) under the two different statutes, creating an additional burden to these facilities unless alternative regulatory approaches are implemented. EPA plans to evaluate the requirements under both statutes to determine what changes, if any, should be made to the part 503 regulations.

## III. Summary of the Final Standards

This preamble discusses the final standards as they apply to the owner or operator of a new or existing SSI unit. This preamble also describes the major requirements of the SSI regulations. For a full description of the final requirements and compliance times, see the SSI standards in subparts LLLL and MMMM.

### *A. What units are affected by the final standards?*

The final standards and guidelines apply to owners or operators of SSI units (as defined in 40 CFR 60.4780 and 40 CFR 60.5065) located at wastewater treatment facilities designed to treat domestic sewage sludge. A SSI unit is an enclosed device or devices using controlled flame combustion that burns sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. A SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack. The affected facility is each individual SSI unit. The SSI standards in subparts LLLL and MMMM apply to new and existing SSI units that burn sewage sludge as defined in the subparts. The final standards define two subcategories for new and existing SSI units: MH incinerators and FB incinerators.

The combustion of sewage sludge that is not burned in a SSI unit located at a wastewater treatment facility designed to treat domestic sewage sludge is subject to other section 129 standards, such as the CISWI standards (40 CFR part 60, subparts CCCC and DDDD of this part), the OSWI standards (40 CFR part 60, subparts EEEE and FFFF), the MWC standards (40 CFR part 60, subparts Ea, Eb, Cb, AAAA, and BBBB of this part) or the Hazardous Waste Combustor rule (40 CFR part 63 subpart EEE).

### *B. What are the emission limits in the emission guidelines for existing sources?*

The final emission limits for existing sources in the MH incinerator subcategory and FB incinerator subcategory are presented in Table 1 of this preamble. Existing sources may comply with either the PCDD/PCDF TEQ or TMB emission limits.

These standards apply at all times.

TABLE 1—EMISSION LIMITS FOR EXISTING SSI UNITS

| Pollutant | Units | Emission limit for MH incinerators | Emission limit for FB incinerators |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.095 | 0.0016 |
| CO | ppmvd @ 7% $O_2$ | 3,800 | 64 |
| HCl | ppmvd @ 7% $O_2$ | 1.2 | 0.51 |
| Hg | mg/dscm @ 7% $O_2$ | 0.28 | 0.037 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 220 | 150 |
| Pb | mg/dscm @ 7% $O_2$ | 0.30 | 0.0074 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.32 | 0.10 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 5.0 | 1.2 |
| PM | mg/dscm @ 7% $O_2$ | 80 | 18 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 26 | 15 |

### *C. What are the emission limits in the new source performance standards for new sources?*

The final emission limits for new sources in the MH incinerator subcategory and FB incinerator subcategory are presented in Table 2 of this preamble. Existing sources may comply with either the PCDD/PCDF TEQ or TMB emission limits.

These standards apply at all times.

TABLE 2—EMISSION LIMITS FOR NEW SSI UNITS

| Pollutant | Units | Emission limit for MH incinerators | Emission limit for FB incinerators |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.0024 | 0.0011 |
| CO | ppmvd @ 7% $O_2$ | 52 | 27 |
| HCl | ppmvd @ 7% $O_2$ | 1.2 | 0.24 |

TABLE 2—EMISSION LIMITS FOR NEW SSI UNITS—Continued

| Pollutant | Units | Emission limit for MH incinerators | Emission limit for FB incinerators |
|---|---|---|---|
| Hg | mg/dscm @ 7% $O_2$ | 0.15 | 0.0010 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 210 | 30 |
| Pb | mg/dscm @ 7% $O_2$ | 0.0035 | 0.00062 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 0.045 | 0.013 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.0022 | 0.0044 |
| PM | mg/dscm @ 7% $O_2$ | 60 | 9.6 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 26 | 5.3 |

*D. What are the testing and monitoring requirements?*

These final standards require all new and existing SSI units to demonstrate initial and annual compliance with the emission limits using EPA-approved emission test methods. The final standards also provide an option for less frequent testing if sources demonstrate that their emissions of regulated pollutants are below thresholds of the emission limits.

For existing SSI units, the EG requires initial and annual emissions performance tests (or continuous emissions monitoring or continuous sampling as an alternative), bag leak detection systems for FF controlled units, continuous parameter monitoring, and annual inspections of air pollution control devices, if they are used to meet the emission limits. Additionally, existing units are required to conduct Method 22 (*see* 40 CFR part 60, appendix A–7) visible emissions test of the ash handling operations during each compliance test.

For new SSI units, the NSPS requires initial and annual emissions performance tests (or continuous emissions monitoring or continuous sampling as an alternative), bag leak detection systems for FF controlled units, as well as continuous parameter monitoring and annual inspections of air pollution control devices that may be used to meet the emission limits. The final rule requires all new SSI units to install a CO CEMS. Operators of new units are also required to conduct Method 22 visible emissions testing of the ash handling operations during each compliance test.

For existing SSI units, use of Cd, CO, HCl, $NO_X$, PM, Pb or $SO_2$ CEMS; ISTMMS; and ISTDMS (continuous sampling with periodic sample analysis) are approved alternatives to parametric monitoring and annual compliance testing. For new SSI units, CO CEMS are required, and use of Cd, HCl, $NO_X$, PM, Pb or $SO_2$ CEMS; ISTMMS; and ISTDMS (continuous sampling, with periodic sample analysis) are approved alternatives to parametric monitoring and annual compliance testing.

*E. What are the other requirements for new and existing SSI units?*

Owners or operators of new or existing SSI units are required to meet operator training and qualification requirements, which include: Ensuring that at least one operator or supervisor per facility complete the operator training course, that qualified operator(s) or supervisor(s) complete an annual review or refresher course specified in the regulation, and that they maintain plant-specific information, updated annually, regarding training.

Owners or operators of new SSI units are required to conduct a siting analysis, which includes submitting a report that evaluates site-specific air pollution control alternatives that minimize potential risks to public health or the environment, considering costs, energy impacts, non-air environmental impacts and any other factors related to the practicability of the alternatives.

Owners or operators of new or existing SSI units are required to submit a monitoring plan for any continuous monitoring system or bag leak detection system used to comply with the rule. They must also submit a monitoring plan for their ash handling system that specifies the operating procedures they will follow to ensure that they meet the fugitive emission limit.

*F. What are the recordkeeping and reporting requirements?*

Records of the initial and all subsequent stack or PS tests, deviation reports, operating parameter data, continuous monitoring data, maintenance and inspections of the air pollution control devices, the siting analysis (for new units only), monitoring plan and operator training and qualification must be maintained for 5 years. The results of the stack tests and PS tests and values for operating parameters are required to be included in initial and subsequent compliance reports.

*G. What are the SSM provisions?*

The Court vacated portions of two provisions in EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), cert. denied, 130 S. Ct. 1735 (U.S. 2010). Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), (the "General Provisions Rule,") that EPA promulgated under section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

While the Court's ruling in *Sierra Club* v. *EPA* directly affects only the subset of CAA section 112(d) rules that incorporate 40 CFR 63.6(f)(1) and (h)(1) by reference and that contain no other regulatory text exempting or excusing compliance during SSM events, the legality of source category-specific SSM provisions is questionable.

Consistent with *Sierra Club* v. *EPA,* EPA is requiring that emission limitations in these final standards apply at all times the unit is operating. In establishing these standards, EPA has taken into account startup and shutdown periods and, for the reasons explained below, has not established different standards for those periods.

We are not promulgating a separate emission standard for the source category that applies during periods of startup and shutdown. Based on the information available at this time, we believe that SSI units will be able to meet the emission limits during periods of startup. Units we have information on use natural gas, landfill gas, or distillate oil to start the unit and add waste once the unit has reached combustion temperatures. Emissions from burning natural gas, landfill gas or distillate fuel oil are expected to generally be lower than from burning solid wastes. Emissions during periods of shutdown are also generally lower than emissions during normal operations because the

materials in the incinerator would be almost fully combusted before shutdown occurs. Furthermore, the approach for establishing MACT floors for SSI units ranked individual SSI units based on actual performance for each pollutant and subcategory, with an appropriate accounting of emissions variability. Because we accounted for emissions variability, we believe we have adequately addressed any minor variability that may potentially occur during startup or shutdown.

Periods of startup, normal operations, and shutdown are predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * * " (40 CFR 60.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 129 standards, which, once promulgated, apply at all times. Nothing in CAA section 129 or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards.[5]

Further, it is reasonable to interpret CAA section 129 as not requiring EPA to account for malfunctions in setting emissions standards. For example, we note that CAA section 129 uses the concept of "best controlled" or "best performing" sources in defining MACT, the level of stringency that major source standards must meet. Applying the concept of "best controlled" or "best performing" to a source that is malfunctioning presents significant difficulties. The goal of best controlled or best performing sources is to operate in such a way as to avoid malfunctions of their units.

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 129 standards for SSI. As noted above, by definition, malfunctions are sudden and unexpected events, and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

For the SSI standards, malfunctions are required to be reported in deviation reports. We will then review the deviation reports to determine if the deviation is a violation of the standards.

In the event that a source fails to comply with the applicable CAA section 129 standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 129 standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation."[6]

Finally, EPA recognizes that even equipment that is properly designed and maintained can fail and that such failure can sometimes cause an exceedance of the relevant emission standard.[7] EPA is therefore finalizing the proposed affirmative defense to civil penalties for exceedances of emissions limits that are caused by malfunctions, with some revisions to the proposed regulatory provision.[8] Under this provision, the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 60.4860 and in 40 CFR 60.5180. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 60.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *." The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with 40 CFR part 60, subpart LLLL and 40 CFR part 60, subpart MMMM and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that "[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *" and that "[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *." In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA (*see* also 40 CFR 22.77).

*H. What are the Title V permit requirements?*

All new and existing SSI units regulated by the final SSI rule are required to apply for and obtain a Title V permit. These Title V operating permits assure compliance with all applicable requirements for regulated SSI units, including all applicable CAA section 129 requirements.[9]

The permit application deadline for a CAA section 129 source applying for a Title V operating permit depends on when the source first becomes subject to the relevant Title V permits program. If a regulated SSI unit is a new unit and is not subject to an earlier permit application deadline, a complete Title V permit application must be submitted on or before the relevant date below.

- For a SSI unit that commenced operation as a new source on or before the promulgation date of 40 CFR part 60, subpart LLLL, the source must submit a complete Title V permit application no later than 12 months after the promulgation date of 40 CFR part 60, subpart LLLL; or
- For a SSI unit that commences operation as a new source after the promulgation of 40 CFR part 60, subpart LLLL, the source must submit a complete Title V permit application no

[5] *See, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (DC Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.").

[6] 40 CFR 60.2 (definition of malfunction).

[7] *See, e.g.,* State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983).

[8] *See* proposed definition 40 CFR 60.4930 and 40 CFR 60.5250 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding).

[9] 40 CFR 70.6(a)(1), 70.2, 71.6(a)(1) and 71.2.

later than 12 months after the date the SSI unit commences operation as a new source.[10]

If the SSI unit is an existing unit and is not subject to an earlier permit application deadline, then the source must submit a complete Title V permit application by the earlier of the following dates:

- Twelve months after the effective date of any applicable EPA-approved CAA section 111(d)/129 plan (*i.e.,* an EPA approved state or tribal plan that implements the SSI EG); or
- Twelve months after the effective date of any applicable Federal plan; or
- Thirty-six months after promulgation of 40 CFR part 60, subpart MMMM.

For any existing SSI unit not subject to an earlier permit application deadline, the application deadline of 36 months after the promulgation of 40 CFR part 60, subpart MMMM, applies regardless of whether or when any applicable Federal plan is effective, or whether or when any applicable state or tribal CAA section 111(d)/129 plan is approved by EPA and becomes effective. (*See* CAA sections 129(e), 503(c), 503(d), and 502(a) and 40 CFR 70.5(a)(1)(i) and 71.5(a)(1)(i).)

If the SSI unit is subject to Title V as a result of some triggering requirement(s) other than those mentioned above, for example, a SSI unit may be a major source (or part of a major source), then you may be required to apply for a Title V permit prior to the deadlines specified above. If more than one requirement triggers a source's obligation to apply for a Title V permit, the 12-month time frame for filing a Title V permit application is triggered by the requirement which first causes the source to be subject to Title V.[11]

For additional background information on the interface between CAA section 129 and Title V, including EPA's interpretation of section 129(e), information on updating existing Title V permit applications and reopening existing Title V permits, see the final "Federal Plan for Commercial and Industrial Solid Waste Incineration," October 3, 2003 (68 FR 57518), as well as the "Summary of Public Comments and Responses" document in the OSWI docket (EPA–HQ–OAR–2003–0156).

*I. What are the applicability dates of the standards?*

New SSI units that commence construction after October 14, 2010, or that are modified 6 months or more after the date of promulgation, must meet the NSPS emission limits of 40 CFR part 60, subpart LLLL within 6 months after the promulgation date of the standards or upon startup, whichever is later.

Under the final EG, and consistent with CAA section 129 (b)(2) and 40 CFR 60, subpart B, states are required to submit state plans containing the existing source emission limits of subpart MMMM of this part, and other requirements to implement and enforce the EG within 1 year after promulgation of the EG. States must submit state plans to EPA by March 21, 2012. State plans apply to existing SSI in the state (including SSI that are modified prior to and including the date 6 months after promulgation) and must be at least as protective as the EG.

The final EG requires existing SSI to demonstrate compliance with the standards as expeditiously as practicable after approval of a state plan, but no later than 3 years from the date of approval of a state plan or 5 years after promulgation of the EG, whichever is earlier. Consistent with CAA section 129, EPA expects states to require compliance as expeditiously as practicable. However, because we believe that many SSI units will find it necessary to retrofit existing emissions control equipment and/or install additional emissions control equipment in order to meet the final limits, EPA anticipates that states may choose to provide the 3-year compliance period allowed by CAA section 129(f)(2). If EPA does not approve a state plan or issue a Federal plan, then the compliance date is 5 years from the date of the final rule.

EPA intends to develop a Federal plan that will apply to existing SSI units in any state that has not submitted an approved state plan within 2 years after promulgation of the EG. The final EG allows existing SSI units subject to the Federal plan up to 5 years after promulgation of the EG to demonstrate compliance with the standards, as allowed by CAA section 129(b)(3).

*J. What are the requirements for submission of emissions test results to EPA?*

EPA must have performance test data to conduct effective reviews of CAA sections 112 and 129 standards, as well as for many other purposes including compliance determinations, emission factor development, and annual emission rate determinations. In conducting these required reviews, EPA has found it ineffective and time consuming, not only for us, but also for regulatory agencies and source owners and operators to locate, collect, and submit emissions test data because of varied locations for data storage and varied data storage methods. One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for cumbersome paper copies.

In this final rule, EPA is taking a step to improve data accessibility and increase the ease and efficiency of reporting for sources. Owners and operators of SSI facilities are required to submit, to EPA's ERT database, electronic copies of reports of certain performance tests required under the SSI EG and NSPS. Data entry will be through an electronic emissions test report structure called the Emissions Reporting Tool (ERT) whenever conducting performance tests. The ERT was developed with input from stack testing companies who generally collect and compile performance test data electronically and offices within state and local agencies that perform field test assessments. The ERT is currently available at *http://www.epa.gov/ttn/chief/ert/ert_tool.html,* and access to direct data submittal to EPA's electronic emissions database (WebFIRE) will become available by December 31, 2011.

The requirement to submit source test data electronically to EPA would not require any additional performance testing and would apply to those performance tests conducted using test methods that are supported by the ERT. The ERT contains a specific electronic data entry form for most of the commonly used EPA reference methods. The Web site listed below contains a listing of the pollutants and test methods supported by the ERT. In addition, when a facility submits performance test data to WebFIRE, there will be no additional requirements for emissions test data compilation. Moreover, we believe industry will benefit from development of improved emission factors, fewer follow-up information requests, and better regulation development as discussed below. The information to be reported is already required for the existing test methods and is necessary to evaluate the conformance to the test method.

One major advantage of submitting source test data through the ERT is a standardized method to compile and store much of the documentation required to be reported by this rule that also clearly states what testing information would be required. Another important benefit of submitting these data to EPA at the time the source test is conducted is that it should substantially reduce the effort involved

[10] CAA section 503(c) and 40 CFR 70.5(a)(1)(i) and 71.5(a)(1)(i).

[11] CAA section 503(c) and 40 CFR 70.3(a) and (b), 70.5(a)(1)(i), 71.3(a) and (b) and 71.5(a)(1)(i).

in data collection activities in the future. When EPA has source category performance test data in hand, there will likely be fewer or less substantial data collection requests in conjunction with prospective required residual risk assessments or technology reviews. This results in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests and assessing the results).

State/local/tribal agencies may also benefit in that their review may be more streamlined and accurate because they would not have to re-enter the data to assess the calculations and verify the data entry. Finally, another benefit of submitting these data to WebFIRE electronically is that these data will greatly improve the overall quality of the existing and new emission factors by supplementing the pool of emissions test data upon which the emission factor is based and by ensuring that data are more representative of current industry operational procedures. A common complaint heard from industry and regulators is that emissions factors are outdated or not representative of a particular source category. Receiving and incorporating data for most performance tests will ensure that emissions factors, when updated, represent accurately the most current range of operational practices. In summary, in addition to supporting regulation development, control strategy development, and other air pollution control activities, receiving test data already collected and using them in the emissions factors development program will save industry, state/local/tribal agencies, and EPA significant time, money, and effort while improving the quality of emission inventories and related regulatory decisions.

As mentioned earlier, the electronic database that will be used is EPA's WebFIRE, which is a Web site accessible through EPA's TTN Web. The WebFIRE Web site was constructed to store emissions test data for use in developing emission factors. A description of the WebFIRE database can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*. The ERT will be able to transmit the electronic report through EPA's CDX network for storage in the WebFIRE database. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html.*

## IV. Summary of Significant Changes Following Proposal

EPA received over 90 public comments on the proposed rulemaking. Furthermore, we conducted one public hearing to allow the public to comment on the proposed rulemaking. After consideration of public comments received, EPA is making several changes to the standards. Following are the major changes to the standards since the proposal. The rationale for these and any other significant changes can be found in section V of this preamble or in the "Sewage Sludge Incineration (SSI) Rule: Summary of Public Comments and Responses" in the SSI docket (EPA–HQ–OAR–2009–0559).

### *A. Applicability*

The final rule clarifies that, if any amount of sewage sludge is burned in an incinerator at a wastewater treatment facility designed to treat domestic sewage sludge, the incinerator is subject to the SSI standards in subparts LLLL and MMMM of this part while burning sewage sludge. The final rule also clarifies that sewage sludge that is not burned in a SSI located at a wastewater treatment facility designed to treat domestic sewage sludge is subject to other section 129 standards, such as the CISWI standards (40 CFR part 60, subparts CCCC and DDDD of this part), the OSWI standards (40 CFR part 60, subparts EEEE and FFFF), the MWC standards (40 CFR part 60, subparts Ea, Eb, Cb, AAAA, and BBBB of this part) or the Hazardous Waste Combustor rule (40 CFR part 63 subpart EEE).

### *B. Subcategories*

The proposed NSPS did not subcategorize new sources. In the final NSPS, SSI units at new sources are subcategorized into two subcategories: MH and FB.

### *C. MACT Floor UPL Calculation and EG and NSPS Emission Limits*

At proposal, we used a 99 percent UPL calculation to determine variability. For the final rule, for existing FB units, we are using a weighted 99 percent UPL calculation to account for the biasing of emissions data from one facility. The weighted UPL was not used for MH units.

In the proposed rule, two statistical measures, skewness and kurtosis, were examined to determine if the data used to calculate the MACT floor were normally or log-normally distributed. If both the reported values and the natural-log transformed reported values had skewness and kurtosis statistics that indicated neither were normally distributed, the reported dataset was selected as the basis of the floor to be conservative. If the results of the skewness and kurtosis hypothesis tests were mixed for the reported values and the natural log-transformed reported values, the analysis done on the reported data values was chosen to be conservative. We have modified our assumptions when results of the skewness and kurtosis tests do not clearly show whether a normal or log-normal distribution better represents the data, or when there are not enough data to complete the skewness and kurtosis tests. In these cases, we have chosen to use the log-normal results for the final MACT floor calculation.

In the proposed rule, we proposed setting beyond-the-floor emission standards for Hg emissions from existing MH units. In the final rule, we are establishing MACT floor emission limits but are not setting beyond-the-floor standards. Also, we are not finalizing the proposed opacity limits. At proposal, we set emission limits for both PCDD/PCDF TMB and PCDD/PCDF TEQ and required SSI units to meet both limits. In the final standards, we are allowing affected sources to comply with either the PCDD/PCDF TMB or TEQ emission limits.

In the proposed rule, we did not compare the CO span of the test to the measured CO values to determine if the values were consistent. For the final rule, we reviewed the CO values obtained from emission test reports to determine whether the span of the test used was capable of accurately reading the reported value. If the span was inconsistent with the reported value, the CO levels were adjusted to provide a value that was more consistent with the span. We revised the CO limits based on the results of this analysis.

The final emission limits resulting from the revised MACT floor calculations are presented in Tables 3 through 6 of this preamble, and compared to the proposed emission limits.

TABLE 3—FINAL AND PROPOSED EMISSION LIMITS FOR EXISTING FB SSI UNITS

| Pollutant | Units | Proposed emission limit | Final emission limit |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.0019 | 0.0016 |
| CO | ppmvd @ 7% $O_2$ | 56 | 64 |
| HCl | ppmvd @ 7% $O_2$ | 0.49 | 0.51 |
| Hg | mg/dscm @ 7% $O_2$ | 0.0033 | 0.037 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 63 | 150 |
| Pb | mg/dscm @ 7% $O_2$ | 0.0098 | 0.0074 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.056 | 0.10 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 0.61 | 1.2 |
| PM | mg/dscm @ 7% $O_2$ | 12 | 18 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 22 | 15 |

TABLE 4—FINAL AND PROPOSED EMISSION LIMITS FOR EXISTING MH SSI UNITS

| Pollutant | Units | Proposed emission limit | Final emission limit |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.095 | 0.095 |
| CO | ppmvd @ 7% $O_2$ | 3,900 | 3,800 |
| HCl | ppmvd @ 7% $O_2$ | 1.0 | 1.2 |
| Hg | mg/dscm @ 7% $O_2$ | 0.02 | 0.28 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 210 | 220 |
| Pb | mg/dscm @ 7% $O_2$ | 0.30 | 0.30 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.32 | 0.32 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 5.0 | 5.0 |
| PM | mg/dscm @ 7% $O_2$ | 80 | 80 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 26 | 26 |

TABLE 5—FINAL AND PROPOSED EMISSION LIMITS FOR NEW FB SSI UNITS

| Pollutant | Units | Proposed emission limit | Final emission limit |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.00051 | 0.0011 |
| CO | ppmvd @ 7% $O_2$ | 7.4 | 27 |
| HCl | ppmvd @ 7% $O_2$ | 0.12 | 0.24 |
| Hg | mg/dscm @ 7% $O_2$ | 0.0010 | 0.0010 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 26 | 30 |
| Pb | mg/dscm @ 7% $O_2$ | 0.00053 | 0.00062 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.0022 | 0.0044 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 0.024 | 0.013 |
| PM | mg/dscm @ 7% $O_2$ | 4.1 | 9.6 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 2.0 | 5.3 |

TABLE 6—FINAL AND PROPOSED EMISSION LIMITS FOR NEW MH SSI UNITS

| Pollutant | Units | Proposed emission limit | Final emission limit |
|---|---|---|---|
| Cd | mg/dscm @ 7% $O_2$ | 0.00051 | 0.0024 |
| CO | ppmvd @ 7% $O_2$ | 7.4 | 52 |
| HCl | ppmvd @ 7% $O_2$ | 0.12 | 1.2 |
| Hg | mg/dscm @ 7% $O_2$ | 0.0010 | 0.15 |
| $NO_X$ | ppmvd @ 7% $O_2$ | 26 | 210 |
| Pb | mg/dscm @ 7% $O_2$ | 0.00053 | 0.0035 |
| PCDD/PCDF, TEQ | ng/dscm @ 7% $O_2$ | 0.0022 | 0.0022 |
| PCDD/PCDF, TMB | ng/dscm @ 7% $O_2$ | 0.024 | 0.045 |
| PM | mg/dscm @ 7% $O_2$ | 4.1 | 60 |
| $SO_2$ | ppmvd @ 7% $O_2$ | 2.0 | 26 |

*D. Baseline Emissions, Costs and Impacts Estimation*

For the final rule, we have revised the baseline emissions, costs, and impacts to incorporate information provided by commenters. A discussion of the changes is presented in section V of this preamble. The results of these analyses are summarized in section VI of this preamble.

*E. Compliance Requirements*

For both the standards, the following changes have been made:

• SSI units must submit (at least 60 days before their initial compliance test date) a monitoring plan to establish that

their ash handling system will meet the visible emissions limit on a continuous basis.

- The alternative to test less frequently (every third year) is being revised to be the following:
  - If SSI units demonstrate emissions below a specified threshold during two consecutive performance tests, they may test every 3 years instead of annually. Any year that the emission threshold is not met, the SSI must test annually until the threshold is met over a consecutive 2 year period. The alternative in the standards no longer requires that SSI units establish that they meet the lower thresholds for three consecutive years.
  - For all pollutants, less frequent testing is allowed if emissions are no greater than an emissions threshold of 75 percent of the emission limit.
  - For fugitive emissions from ash handling, less frequent testing is allowed as long as visible emissions of combustion ash occur less than or equal to two percent of each hourly observation period (the standard is five percent of each of three hourly observation periods).
- The final rule removes the requirements in the standards to maintain sludge feed rate and moisture content within specified parameters. However, sludge feed rate and sludge moisture content are still required to be monitored during performance test runs, and daily records of sludge feed rate and sludge moisture content are required to be kept.
- At proposal, operating limits were calculated based on a specified percentage of the average parameter value recorded during pollutant performance tests. In the final standards, operating parameter limits are determined on a site-specific basis as the minimum or maximum operating parameter value for the parameter, as applicable, recorded during pollutant performance tests.
- The proposed standards schedule for conducting annual performance tests was each 10–12 months. This has been changed to specify that performance tests must be conducted on a calendar year basis (no less than nine calendar months and no more than 15 calendar months following the previous performance test); and you must complete five performance tests for each such pollutant in each 5-year calendar period.
- The averaging time for demonstrating compliance with the CO CEMS operating parameters has been changed from a 4-hour rolling averaging period to a 24-hr block averaging period. The averaging times for all other operating parameters, except scrubber liquid pH, has been changed from a 4-hour rolling averaging period to a 12-hour block averaging period.
- During each compliance test run, SSI units must be operated at a minimum of 85 percent of their maximum permitted capacity.

*F. Definitions*

The following definitions have been revised:

- Process change means a significant permit revision, but only with respect to those pollutant-specific emission units for which the proposed permit revision is applicable, including but not limited to:

(1) A change in the process employed at the wastewater treatment facility associated with the affected SSI unit (*e.g.,* the addition of tertiary treatment at the facility, which changes the method used for disposing of process solids and processing of the sludge prior to incineration).

(2) A change in the air pollution control devices used to comply with the emission limits for the affected SSI unit (*e.g.,* change in the sorbent used for activated carbon injection).

- Sewage sludge incineration (SSI) unit means an incineration unit combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incineration unit designs include fluidized bed and multiple hearth. A SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack.

## V. Significant Public Comments and Rationale for Changes to the Proposed Rule

This section contains a brief summary of major comments and responses. EPA received many comments on this subpart covering numerous topics. EPA's responses to all comments, including those below, can be found in the comment response document for SSI units in the docket.

*A. Legal and Applicability Issues Regulating SSI Under Section 112 vs. Section 129*

*Comment:* Many commenters contended that SSI are within the CWA definition of POTW; therefore, according to CAA section 112(e)(5), EPA must regulate SSI units under CAA section 112(d), and not CAA section 129. The commenters emphasized that SSI units are located within each respective POTW and are wholly integrated into the solids handling and treatment processes at each POTW.

Other commenters stated that SSI units cannot be regulated under CAA section 129 because they are combusting material that is generated by the POTW, which is neither a commercial or industrial establishment nor the general public as required in CAA section 129(g)(1). The commenters added that, based on the proposed definition of solid waste, even if they had a new point of generation within the POTW where they were generating solid waste, the POTW sewage sludge is from a municipal source and does not pass the broad applicability for solid waste incineration under CAA section 129. Another commenter added that CAA section 129(a)(1)(B)–(C) also directs EPA to set standards for solid waste incineration units combusting municipal waste, but to qualify as a unit combusting municipal waste, the unit must first be a solid waste incineration unit. The commenters concluded that this would not include SSI units.

Several commenters stated that EPA's determination to regulate SSI units under CAA section 129 contradicts previous decisions where EPA has stated that regulations were being developed for SSI under CAA section 112. Another commenter stated that EPA's revision to the list of source categories under CAA section 112 to delete SSI units was because there were no major sources in the source category. One commenter added that EPA's decision to regulate SSI units under CAA section 129 is based on an overly broad reading of the NRDC case. The commenter also claimed that SSI units are not within the scope of the definition of "solid waste incineration unit" in section 129 because sewage sludge is not generated by a commercial or industrial establishment or by the general public.

*Response:* EPA disagrees with the commenter's assertion that regulation of SSI units under section 129 is inconsistent with past EPA statements. As explained in the NPRM, EPA issued emissions standards for POTW in 1999 pursuant to section 112(d), and those emissions standards did not include standards for SSI units. In the proposed POTW emissions standards, EPA stated that "[s]ewage sludge incineration will be regulated under section 129 of the CAA[.]" *See* 63 FR 66087 (December 1,

1998). EPA also explained in the NPRM for today's action that the EPA's statements regarding SSI units during its promulgation of emissions standards for OSWI units are squarely in conflict with the Court's decision in *NRDC* v. *EPA,* 489 F.3d 1250 (D.C. Cir. 2007), which states in pertinent part that any unit that combusts any solid waste at all is subject to CAA section 129. The commenter does not appear to disagree with that conclusion, but instead simply argues that EPA cannot regulate SSI units under section 129 because it previously stated that it would regulate them under section 112. However, the NRDC decision precludes EPA from doing so. Additionally, section 112(c)(6) requires that EPA promulgate emission standards assuring that sources accounting for not less than 90 percent of the aggregate emissions of each of the HAP identified in section 112(c)(6) are subject to emission standards. EPA has determined that section 129 source categories can be included to meet our 90 percent obligations. Therefore, EPA has included SSI units in the section 112(c)(6) list of sources because SSI units are need to meet our 90 percent requirement for mercury. This decision is documented in the memorandum "Emission Standards for Meeting the Ninety Percent Requirement under Section 112(c)(6) of the Clean Air Act" in the SSI docket (EPA–HQ–OAR–2009–0559)

Moreover, section 112(e)(5) does not require EPA to issue emissions standards for SSI units under section 112(d). Rather, it simply governs the schedule for the issuance of section 112(d) emissions standards for POTW. Section 112(e), titled "Schedule for Standards and Review," generally requires EPA to establish emissions standards for initially listed source categories as expeditiously as practicable, with certain specific deadlines in section 112(e)(1). Section 112(e) further describes how EPA shall prioritize source categories for regulation, and requires EPA to establish a schedule for issuance of emissions standards for section 112 listed source categories. Finally, Congress specified a different schedule for POTW in section 112(e)(5), stating that emissions standards shall be issued no later than November 15, 1995. Thus, section 112(e)(5) does not require EPA to regulate SSI units under section 112(d), but rather simply identifies the date by which EPA must issue emissions standards for POTW.

Additionally, the commenter's interpretation of section 112(e)(5) would conflict with section 129(g) and with the DC Circuit's interpretation of section 129(g) as explained in *NRDC* v. *EPA.* Section 129(g) defines "solid waste incineration unit" to include any unit combusting any solid waste, and the Court in *NRDC* v. *EPA* rejected EPA's position that it could choose to regulate certain units, combusting solid waste, under section 112 instead of under section 129. Since SSI units do combust solid waste, EPA does not have the discretion under section 129 to create an exemption for SSI units from the statutory definition of solid waste. The court noted that section 129(g) itself specifies certain units that combust solid waste but are exempt from the definition, and noted that where Congress created such enumerated exemptions, the EPA lacks discretion to create additional ones.

EPA also disagrees with the commenter that SSI units do not combust waste from the general public. Sewage sludge clearly originates from the general public, including residential and commercial facilities. Simply because the waste is treated at a POTW prior to combustion does not change the original source of the sewage sludge. The commenter refers to a statement in EPA's 2000 Unified Regulatory Agenda to support its argument. However, the Regulatory Agenda did not represent an Agency interpretation following a notice and comment process. Moreover, as explained above, EPA's position regarding the section of the Act under which SSI units must be regulated has changed since 2000, in light of the DC Circuit's decision in *NRDC* v. *EPA.* Finally, EPA notes that its final action on reconsideration of the OSWI rule did not refer to the source of sewage sludge as a basis for concluding that regulation under section 129 was not required. Instead, as explained above, it referred to discretion the Agency believed it had at the time to choose to regulate certain solid waste incinerators under section 112—discretion the Agency no longer believes it has.

The commenter's reference to statements made in other **Federal Register** notices that pre-date the *NRDC* decision similarly fail to support its argument that EPA must regulate SSI units under section 112. Specifically, commenters refer to EPA's inclusion of SSI on the list of area source categories listed under section 112(c)(3) and (k)(3)(B)(ii) of the Act. *See* 67 FR 70427 (Nov. 22, 2002). However, that listing does not lead to the conclusion that SSI must be regulated under section 112. First, as explained above, EPA's interpretation of its authority to regulate SSI has changed following the issuance of the DC Circuit's decision in *NRDC* v. *EPA,* which occurred after the 2002 listing referred to by the commenter. Additionally, that listing included source categories that would clearly be regulated under section 129, such as medical waste incinerators and municipal waste combustors, Id. at 70428, because EPA's regulation of incinerator source categories under section 129 serves towards meeting its statutory obligations under section 112(c)(3) and (k)(3)(B)(ii). Therefore, the inclusion of SSI on that list does not indicate that such units must be regulated under section 112.

EPA further disagrees that regulation of SSI units under section 129 is unnecessary because SSI units are already regulated under section 405 of the CWA and that section 129 regulation will therefore provide no public health or environmental benefit. As explained in section VI of this preamble, today's action will benefit public health and the environment by achieving reductions of the section 129 pollutants from SSI units beyond those required by regulations issued pursuant to the CWA. Today's action must be undertaken to comply with the Clean Air Act and the court decision in *NRDC* v. *EPA.* EPA further notes that section 405 of the CWA expressly provides that nothing in that section is intended to waive more stringent requirements of any other law. Therefore, Congress clearly did not intend for regulation of SSI units under the CWA to preclude any other regulations, including regulation under CAA section 129. *Overlap with Other Standards*

*Comment:* Several commenters expressed concern that other types of solid waste incineration units could be considered SSI units and subject to the SSI standards if they combust any amount of sewage sludge. Some commenters added that the definition of a SSI does not have a *de minimis* level of sewage sludge burned. Other commenters requested clarification on whether SSI units burning non-sludge industrial waste would be subject to both SSI and CISWI. Some commenters suggested that SSI units be consistent with the MWC standards and provide an exemption for co-fired combustors firing 30 percent or less by weight of sewage sludge.

Commenters suggested that the SSI standards provide exclusions for all solid waste incineration units that meet the applicability requirements of other CAA section 129 standards, including MWCs regulated under Subparts Ea, Eb, Cb, AAAA, and BBBB. The commenters noted that the CISWI standards specifically exempted MWC units and other units subject to CAA section 129 standards.

Several commenters contended that EPA should exempt incineration units subject to hazardous waste combustor regulations and/or hazardous waste management permits under the Solid Waste Disposal Act. The commenters added that CAA section 129(g)(1) states that a solid waste incineration unit does not include incinerators or other units required to have a permit under section 3005 of the SWDA. Other commenters requested EPA include an exemption for hazardous waste combustion units that are affected sources under 40 CFR part 63 subpart EEE.

*Response:* Section 129 defines solid waste incineration unit to include any unit combusting any solid waste. Therefore, EPA is not setting *de minimus* levels for solid waste burned in incinerators. An incinerator located at a wastewater treatment facility designed to treat domestic sewage sludge that combusts any amount of sewage sludge is subject to the final SSI standards. We have clarified that the final standards and guidelines do not apply to sewage sludge that is not burned in a SSI located at a wastewater treatment facility designed to treat domestic sewage sludge. Sewage sludge that is not burned in a SSI located at a wastewater treatment facility designed to treat domestic sewage sludge is subject to other section 129 standards, such as the CISWI standards (40 CFR part 60, subparts CCCC and DDDD of this part), the OSWI standards (40 CFR part 60, subparts EEEE and FFFF), the MWC standards (40 CFR part 60, subparts Ea, Eb, Cb, AAAA, and BBBB of this part) or the Hazardous Waste Combustor rule (40 CFR part 63 subpart EEE).

Hazardous waste combustion units that are required to have a permit under CAA section 3005 or the Solid Waste Disposal Act are exempt from CAA section 129 standards per CAA section 129(g)(1), therefore we do not believe an exemption is needed for this rule.

*Comment:* Several commenters objected to EPA issuing the proposed SSI standards prior to making determinations regarding the definition of non-hazardous solid waste.

*Response:* EPA is not making determination in this rule about the definition of non-hazardous solid waste. Section 129 of the CAA states that "solid waste" shall have meaning promulgated by the Administrator under RCRA. Therefore, today's action is consistent with using the defintion of non-hazardous secondary materials promulagted RCRA rule, elsewhere in today's **Federal Register.**

*Comment:* Several commenters contended that sewage sludge is not a solid waste, as the CAA defines solid waste by referencing the definition of solid waste under RCRA. The commenters added that RCRA excludes sewage sludge in what is commonly referred to as the domestic sewage exclusion (DSE). The exclusion explicitly states that solid waste does not include solid or dissolved material in domestic sewage.

*Response:* This comment is not relevant to EPA's establishment of emissions standards for SSI units. Rather, it is relevant to EPA's proposed Identification of Non-Hazardous Secondary Materials That Are Solid Waste rule, and is addressed in EPA's final action on that proposed rule.

*B. Subcategories*

*Comment:* Many commenters agreed with the development of separate EG for existing MH and FB units. The commenters also requested adding the same subcategories for the NSPS. The commenters added that it was inappropriate to consider the best performing FB SSI as the best performing similar source for the MH SSI new source category. They also stated that, as proposed, the NSPS standards would discourage a POTW's ability to modify existing MH units, including modifications to improve combustion efficiency or boost steam output for electricity generation. Some commenters stated that, by using the best performing FB unit as the basis for the NSPS for MH units, EPA was effectively setting a beyond-the-floor MACT limit for SSI units without considering any criteria that the statute requires. Other commenters agreed with the decision to use the best-performing FB unit as the best similar source for the MH SSI source category.

Other commenters requested further subcategorization based on size of the SSI unit, type of sewage sludge incinerated, limited use units, and distance over which the SSI would need to transport its sludge for disposal.

*Response:* We have considered the commenters' concerns and are setting separate standards for FB and MH units at new sources in the final rule. As discussed in the NPRM, there are two types of incinerators currently used to combust sewage sludge: MH and FB incinerators. The differences between the two combustor designs result in significant differences in emissions, size of the flue gas stream, ability to handle variability in the feeds, control of temperature and other process variables, auxiliary fuel use and other characteristics. To reflect the differences in their combustion mechanisms, two subcategories, FB and MH, were developed in the NPRM for new and existing SSI sources.

At proposal for the MH new source subcategory, we considered the best-performing FB incinerator to be the best-performing similar source because we were not aware of any new MH sources that have been constructed in the last 20 years, and information provided by the industry indicates that future units that will be constructed are likely to be FB incinerators.

We have re-evaluated our decision. Although few MH units have been constructed over the last 20 years, there is no technical reason that would preclude a source from constructing a MH unit. The same design differences that distinguish existing FB and MH units also apply to new units, and provide a similar basis for subcategorizing between the two types of units. Therefore, we are setting separate standards for MH units at new and reconstructed sources. Such subcategorization is appropriate based on the differences between FB and MH units described above, and will also serve to ensure that MH units do not avoid making modifications that may require them to meet standards based on FB units. We are not subcategorizing SSI units on any other basis because we do not have data to support distinguishing units based on class, type, or size. Without such information, we do not have a basis for concluding that these types of units should be placed in a different subcategory.

*C. MACT Floor Analysis*

Pollutant-by-Pollutant Approach

*Comment:* Many commenters objected to setting the MACT floors using a pollutant by pollutant approach because none of the facilities in EPA's database can simultaneously meet all the proposed standards. One commenter stated that EPA's MACT Floor methodology is supposed to involve "review of actual emissions data with an appropriate accounting for emissions variability". However, the commenter contended that EPA fails to follow this guidance in a practical manner in establishing MACT Floors for SSI units and that this results is unrealistically stringent limits that are not achievable for any SSI. Several commenters noted that this was especially true for the new source standards. Several commenters added that EPA's pollutant-by-pollutant basis violates the statute and its own views of the statute. One commenter stated that if EPA cannot demonstrate that the top performers can simultaneously meet all standards, EPA has improperly circumvented the

section 129 for establishing "beyond-the-floor" standards because the "floor standards would force industry-wide technological upgrades without consideration of the factors (cost and energy in particular) which Congress mandated for consideration when establishing beyond-the-floor standards."

Many commenters specifically mentioned that EPA's pollutant-by-pollutant, lowest emission methodology for setting the CO and $NO_X$ standards is flawed because EPA did not take into account the inherent conflict in complying with two standards. The commenters noted that CO and $NO_X$ emissions are inversely proportional. The commenters explained that decreases in CO tend to elevate $NO_X$ and vice versa. The commenters added that high temperature combustion with long residence times and high oxygen concentration results in very low CO emissions, and that those same operating conditions favor high $NO_X$ emissions. The commenters added that the conditions used to minimize CO (*i.e.,* high temperature afterburners) consume more fuel and produce more $CO_2$ emissions.

One commenter noted that the SSI unit with the most advanced control technologies, and those EPA indicated were costed in the impacts analysis, would not meet the emission limits for all of the pollutants all of the time. The commenter provided an example showing that of 11 of 30 test data points from the SSI unit in EPA's database would not comply with the Cd standard, 28 of 30 data points would not comply with the Pb standard, 22 of 30 would not comply with the HCl standard, six of six data points would not comply with the PCDD/PCDF TMB or TEQ, 86 of 105 would not comply with the CO standard, and eight of 15 would not comply with the $NO_X$ standard. The commenter concluded that data variability has not been appropriately accounted for and that EPA's method of establishing the MACT floor based on the best performing unit for each pollutant is not reasonable.

*Response:* We disagree with the commenters who object to setting MACT floors on a pollutant-by pollutant basis. EPA previously has explained that although CAA section 129 does not unambiguously declare that MACT floors must be established on a pollutant-by-pollutant basis, applying the requirement to set MACT floors based on what has been achieved by the best-performing sources for each of the pollutants covered by CAA section 129 is a reasonable interpretation of EPA's obligation under that provision (62 FR 48363–64).

EPA interprets the provision in CAA section 129(a)(2) to support establishing emissions standards based on the actual emissions of "the best controlled similar unit" or "best-performing 12 percent of units in the category" for each covered pollutant. Even if we were to conclude that the commenters' interpretation is equally reasonable under the statute, which we do not, the commenters' interpretation is certainly not compelled by the statute. We maintain that our interpretation is reasonable under the statute and appropriate given the problems associated with implementing the commenters' approach.

The rest of CAA section 129 requires EPA to "establish performance standards and other requirements pursuant to section [111] of this title and this section [129] for each category of solid waste incineration units." Pursuant to CAA section 129(a)(2), those standards "shall reflect the *maximum degree of reduction* in emissions of air pollutants listed under section (a)(4)* * *." (emphasis added). Subsection (a)(4) then states: "The performance standards promulgated under section [111] of this title and this section [129] and applicable to solid waste incineration units shall specify numerical emissions limitations for the following substances or mixtures: PM (total and fine), opacity (as appropriate), sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, Cd, mercury, and dioxins and dibenzofurans." Thus, the statute requires EPA to set individual numeric performance standards based on the maximum degree of reduction in emissions actually achieved for each of nine listed pollutants. Based on this, EPA believes—and has long believed—the statute supports, if not requires, that MACT floors be derived for each pollutant based on the emission levels achieved for each pollutant. Moreover, although the provisions do not state whether there is to be a separate floor for each pollutant, the fact that Congress singled out these pollutants suggests that the floor level of control need not be limited by the performance of devices that only control some of these pollutants well.

Looking at the statute as a whole, EPA declared in the 1997 rulemaking for medical waste incinerators "The EPA does not agree that the MACT floors are to be based upon one overall unit" (62 FR 48364). Pointing for instance to subsection 129(a)(4), EPA explained:

> This provision certainly appears to direct maximum reduction of each specified pollutant. Moreover, although the provisions do not state whether there is to be a separate floor for each pollutant, the fact that Congress singled out these pollutants suggests that the floor level of control need not be limited by the performance of devices that only control some of these pollutants well.

*Id.*

Since 1997, the courts have consistently repeated that EPA must set emission standards based on the best-performing source for each pollutant. *See, e.g., Cement Kiln,* 255 F.3d 855, 858 (DC Cir.) ("[T]he Agency first sets emission floors for each pollutant and source category * * *."). Accordingly, EPA's pollutant-by-pollutant approach has, as outlined above, been in place since 1997 for medical waste incinerators, and even earlier for other types of incinerators regulated under section 129. *See, e.g.,* 59 FR 48198 (September 20, 1994) (municipal waste combustors). In addition, such an approach has been upheld in other contexts. *See, e.g., Chemical Mfrs. Ass'n* v. *EPA,* 870 F.2d 177, 239 (5th Cir. 1989) (concluding that basing CWA best available technology standards on a pollutant-by-pollutant basis was a rational interpretation of EPA's obligations under that similar statute). We note that the CAA MACT provisions were fashioned on that CWA program. S. Rep. No. 228, 101st Cong. 2d sess. 133–34.

Further, utilizing the single-unit theory would likely result in EPA setting the standards at levels that could, for some pollutants, actually be based on emissions limitations achieved by the worst-performing unit, rather than the *best*-performing unit, as required by the statute. See 61 FR 173687 (April 19, 1996); 62 FR 48363–64 (September 15, 1997). For example, if the best performing 12 percent of facilities for metals did not control CDD/CDF as well as a different 12 percent of facilities, the floor for PCDD/PCDF and metals would end up not reflecting best performance. Moreover, a single-unit approach would require EPA to make value judgments as to which pollutant reductions are most critical in working to identify the single unit that reduces emissions of the nine pollutants on an overall best-performing basis. Such value judgments are antithetical to the command of the statute at the MACT floor stage. It would essentially require EPA to prioritize the nine pollutants based on the relative risk to human health of each pollutant, a criterion that has no place in the establishment of MACT floors. *Sierra Club* v. *EPA (Copper Smelters),* 353 F.3d 976, 979–80 (DC Cir. 2004).

The fact that the statute does not contain the phrase "for each pollutant" does not compel any inference that Congress was *sub silentio* mandating a different result when it left the provision ambiguous on this issue. The argument that MACT floors set pollutant-by-pollutant are based on the performance of a hypothetical facility, so that the limitations are not based on those achieved in practice, just re-begs the question of whether CAA section 129(a)(2) refers to whole facilities or individual pollutants. All of the emission limitations in this rule reflect actual performance and are achieved in practice.

An interpretation that the floor level of control must be limited by the performance of devices that only control some of these pollutants effectively "guts the standards" by including worse performers in the averaging process, whereas EPA's interpretation promotes the evident Congressional objective of having the floor reflect the average performance of best performing sources. Since Congress has not spoken to the precise question at issue, and EPA's interpretation effectuates statutory goals and policies in a reasonable manner, its interpretation must be upheld. See *Chevron* v. *NRDC,* 467 U.S. 837 (1984).

Commenters made much of the fact that no single facility is presently achieving all of the nine pollutant limits proposed. However, the available information compared to the final standards disputes this assertion. For the final standards, based on the data we have, our estimate of baseline emissions, and the revised emission limits, we are estimating that 155 of 204 existing SSI units can meet standards for all nine pollutants, without installing additional pollution control. We cannot make this assessment for new sources, because none have been constructed. However, we are not aware of any technical reason that new units could not install the most advanced pollution control techniques or reduce the pollutant concentrations in the sludge to meet the new source standards.

We recognize that the pollutant-by-pollutant approach for determining the MACT floor can, as it does in this case, increase the overall cost of the regulation compared to what would result under a unit-based methodology. We interpret CAA section 129 to require that the MACT floor be determined in this manner, and we believe that Congress did, in fact, intend that sources subject to regulations developed under CAA section 129 meet emissions limits that are achieved by the best controlled unit for each pollutant, as long as the control systems are compatible with each other. To our knowledge, there is no technical reason why these air pollution control systems cannot be combined.

Regarding the inverse relationship between CO and $NO_X$ with regard to combustion control, it is incumbent upon the SSI facility to determine whether combustion conditions can be adjusted to meet both standards and, if not, install $NO_X$ controls as necessary (*e.g.,* SNCR systems, SCR systems, FGR, or low $NO_X$ burners). In the proposed rule, we conjectured reasons why SCR and SNCR were not used or may not be able to be used at SSI units. While we are not aware of any SSI unit that currently uses SNCR or SCR, we also do not know of technical reason why they could not be used. Given the limited data available on SSI units with FGR, we could not definitely determine how effective the technology was on SSI units. However, we also do not know of a technical reason why they could not be used, if necessary, to meet $NO_X$ limits, and commenters did not provide any reasons they could not be used.

Dataset for the MACT Floor Analysis

*Comment:* Many commenters urged EPA to collect more information to set the standards. Many commenters contended that EPA does not have sufficient actual emission data from enough SSI units to properly set the MACT floor. Some commenters contended that the floor-setting provision in section 129 requires them to set the existing floor standards "based on the best performing 12 percent of sources in the category" and not just based on the sources for which they have information. The commenters contended that EPA did not have emissions data from the best-performing 12 percent of sources or even from 12 percent of sources. Additionally, the commenters stated that there is no evidence that the sources for which EPA collected data are among the top 12%. One commenter added that EPA is using actual data from as little as 4.3 percent of a subcategory (7 of 163 MH units for HCl) to determine how the top 12 percent perform.

Some commenters contended that EPA chose to limit its ICR to just nine entities because collecting information from ten or more entities would have triggered the PRA obligations and a more rigorous OMB review. The commenters concluded that EPA's plan to circumvent the PRA and OMB review resulted in an inadequate dataset for this rulemaking that leaves EPA unable to reliably take the first necessary step in a section 129 rulemaking: To determine which of the SSI units are the best performing sources.

Some commenters also contended that EPA targeted its ICR to the nine POTW expected to have the lowest emissions based on the type of unit and the installed air pollution controls. The commenters contended that EPA's targeted approach to collecting data from expected top performers undermines its ability to presume the data is a random sample representative of the entire source category or subcategory. The commenters stated that if the data gathered are not representative at the outset, then the data cannot reliably be used in a statistical equation to predict the emissions data across the source category or subcategory.

Some commenters noted that in the past, EPA has used permit or other regulatory limits, emission levels, feed rate control, and other information to establish MACT standards. Despite this flexibility, the commenters stated that EPA is proposing to use an "actual emissions" method in the SSI rule, even though it does not have actual emissions for each of the regulated pollutants from at least 12% of the units.

Another commenter stated that EPA used emission data from state databases for an additional nine MHs. The commenter stated that EPA was instructed by the Court to collect data from the best-performing 12% of existing sources, and EPA needs to justify that the emissions data from the state databases for the additional nine MHs were the 12% best performing MHs.

*Response:* As explained in the preamble to the proposed rule, EPA requested several SSI to conduct emissions testing and provide the results to EPA for purposes of this rulemaking. Specifically, EPA collected information on the best-performing sources to establish MACT floor standards for SSI. Therefore, EPA sent emissions tests requests under section 114 of the CAA to nine entities that own and operate SSI units. EPA identified SSI units that were expected to be the best-controlled sources and the best performers for further emissions testing. The Agency acknowledges that this selection methodology targets identifying the best-performing sources rather than selecting a representative sample of sources. However, given the court-ordered deadline for EPA to issue the final SSI rule, it was not possible to undertake the time-consuming process of sending an ICR to all the affected SSI units consistent with the requirements of the PRA.

To select the surveyed owners, EPA reviewed the inventory of SSI units for the control devices being operated, and identified a subset of units expected to have the lowest emissions based on the type of unit and the installed air pollution controls. These controls generally achieve the most reductions possible for the CAA section 129 pollutants, and thereby allow EPA to identify for each pollutant the units with the lowest emissions. For example, units were selected that operated more than one of the following technologies: Activated carbon injection to reduce Hg and dioxins/furans; RTOs or afterburners to reduce CO and organics; wet ESP to reduce fine particulate; high efficiency scrubbers such as packed bed scrubbers and impingement tray scrubbers to reduce PM, Cd, Pb, particulate Hg, and acid gases such as HCl and $SO_2$; and units with multiple control devices that could reduce PM, Cd, Pb, particulate Hg, such as venturi scrubber in combination with impingement scrubbers and wet ESPs or with another particulate control device. The 9 owners or operators selected were from different states in different regions of the country, providing a wide spectrum of sources for sludge generated.

Six of the nine ICR recipients operate MH units, resulting in 13 MH units surveyed. Three of the nine operate FB units, resulting in 7 FB units surveyed. Some owners of multiple units at a facility provided information for less than the total number they operated, *e.g.* 1 unit instead of 2, because not all units were in operation during the test period. Of those 20 units from the nine surveyed municipalities, EPA collected data from 17 units that were in operation (11 MH units and 6 FB units). While testing was being undertaken, the EPA also collected emission test information for 9 MH SSI units collected from state environmental agencies public databases. For some pollutants, the emissions from these supplemental test reports were lower than those from the nine ICR sources. The EPA concluded that it was appropriate to use all the emissions information from these test reports in the MACT floor analysis. The EPA also collected many test reports that were older than 15 years. The older reports were determined to not be appropriate for this rulemaking because they were unlikely to represent current emissions performance, due to their age and because they pre-dated required compliance with the CWA part 503 standard. In total, emissions information were collected from 6 FB units and 20 MH units from facilities responding to the ICR and additional test reports provided by state environmental agencies.

As discussed in the NPRM and background documentation, the EPA conducted a statistical analysis to verify the minimum number of observations needed to accurately characterize the distribution of the best-performing 12 percent of units in each subcategory. The results showed that the data utilized by EPA meets or exceeds the number of observations necessary to provide an accurate representation of that data distributed from the best-performing 12 percent of the source population. The EPA maintains that the emissions information that we have collected is adequate to determine the MACT floor for the best-performing sources. The EPA disagrees with the commenters' recommendation to use other types of data, such as permits, other regulatory limits, or feed rate controls with the emissions information to calculate the MACT floor. The other types of data mentioned do not represent the actual emissions or operation of the unit but are potential values in their permits or limits. Most units are typically operating at lower than permitted levels or emission limits.

Additionally, it would be difficult to incorporate such data into the EPA's UPL calculation because the UPL calculation is based on emission test runs of actual data, rather than limits based on permits. The permit or emission limits would be on a different basis and potentially skew the MACT floor UPL calculation.

The EPA has also updated the inventory of sources based on additional data provided in the comment letters. The inventory now contains 204 SSI units, 60 FB units and 144 MH units. Given this change in population, 12 percent of each subcategory are equal to 8 FB units and 18 MH units. Although we do not have any more emissions information than at proposal, the change in inventory results in more than 12 percent of MH units with data for PM and Hg. For these pollutants, we determined the MACT floor based on the best-performing 12 percent of emissions data, as documented in the memorandum "Revised MACT Floor Analysis for the Sewage Sludge Incinerator Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559). EPA solicited additional emission test reports in the NPRM. Although many commenters summarized the results of their most recent emission tests when comparing their site-specific emissions to EPA's baseline emissions, none of the commenters actually provided the emissions test reports. The emission test reports are necessary for the EPA to review the test methods and procedures to ensure consistency with other emissions data, and to verify the tests represent a valid test result that can be used in the MACT floor analysis. Additionally, the test reports provide information necessary to correct the emissions measured into the units used for the MACT floor analysis. Therefore, these additional test result summaries, without background documentation, could not be used in the MACT floor UPL calculation.

*Comment:* One commenter stated that, to fill the data gap caused by the lack of actual emissions data from the required number of units in each subcategory, EPA applied statistical analysis to single test run results. Several commenters contended that, in order to enhance the data available for MACT development, EPA counted each test run as a separate data point.

Some commenters stated that basing a MACT Analysis on test runs, instead of tests, is improper. The commenters noted that CAA section 129 states that MACT standards for existing sources must be as stringent as the "emissions limitation achieved by the best performing 12 percent of units in, the category." The commenters added that, assuming that EPA equates the term "emissions limitation" with the concept of emission level (as often stated by EPA), this clause means that EPA must use the emission levels that have been achieved to set the MACT floors. The commenters contended that, under the MACT program, it takes a "minimum" of three test runs to make up a valid emissions level test. The commenter stated that a test run is not an accurate measure of the performance of the unit and should not be used as if it were. Commenters added that EPA should use the results of the test for each unit (comprised of at least three test runs) to represent what is being achieved by a unit.

Several commenters contended that EPA must go back and reset the process based on 12% of MH and 12% of FBI sources (not individual incinerators). The commenters added that it is important that individual sources, not units, be utilized because the composition of the sludge varies greatly from source to source and utilizing multiple units at one source skews the data development process and ultimately provides the basis for a flawed MACT standard at best.

*Response:* We disagree with the commenters. The 99 percent UPL values were calculated for each pollutant and for each subcategory using the test run

data for those units in the best-performing 12 percent. Consistent with EPA's procedures on other MACT standards, such as HMIWI, CISWI, and boilers, the MACT floor emission limits were calculated on a run basis since compliance is based on the average of a 3-run test. The 99 percent UPL represents the value which one can expect the mean of future 3-run performance tests form the best-performing 12 percent of sources to fall below, with 99 percent confidence, based upon the results of the independent sample observations from the same best-performing sources.

Variability Calculation

For the final rule, as in the NPRM, we are incorporating variability in the MACT floor calculation for this source category using the 99 percent UPL. We are also following the same procedures for establishing limits and incorporating non-detect values as discussed in the NPRM. We have made three revisions to the variability calculation for the final rule. First, we revised the MACT floor variability calculation to incorporate weighted UPL's for existing FB units. Second, we selected log-normal results when it is not clear that data are normally distributed. Lastly, we revised the CO limits based on an analysis of the span of the test. The weighted UPL's and log-normal results are discussed in responses to comments. The revision to the CO limits based on reviewing the CO span was done to correct errors in the CO values provided in test reports and to be consistent with the calculation methods used in the CISWI and boilers rules.

Carbon monoxide values obtained from emission test reports were reviewed to determine whether the span of the test used was capable of accurately reading the reported value. If the span was inconsistent with the reported value, the CO levels were adjusted to provide a value that was more consistent with the span. EPA Method 10 is structured such that measurement data quality relative to the calibration span of the instrument can be assessed. For a measurement made using an instrumental test method, the equivalent of the method detection level can be assessed using: a square root formula, the reported calibration span value, and the allowable data quality criteria (*i.e.* the allowable calibration error, bias, and drift values). The estimated CO measurement error resulting from the square root formula was adjusted by a factor of three to be consistent with the methodology EPA applied for non-detect data (where limits no less than three times the method detection level were established).

In order to develop a basis for measurement error, instrument calibration spans in available test reports were reviewed. Where no span values could be found, it was assumed that if the test was conducted on or before May, 2008, the associated CO span would be 1000 ppm, and tests conducted after May 2008 would have a CO span of 100 ppm. This assumption was made because, before revisions were made to Method 10 in May of 2008, it was common that units were using the prescriptive span guidance that was listed in the old method. The current version of EPA Method 10 does not include these span requirements but instead requires the tester to choose calibration ranges that reflect the range of expected emission concentrations at the unit. In cases where the reported emission concentrations were lower than their corresponding measurement errors, the default measurement errors were used in lieu of the reported concentration.

These revisions are further documented in the memorandum "Revised MACT Floor Analysis for the Sewage Sludge Incinerator Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559). Table 7 of this preamble shows the revised results of the MACT floor analysis for existing sources, and Table 8 of this preamble shows the results for new sources.

TABLE 7—SUMMARY OF MACT FLOOR ANALYSIS FOR EXISTING SSI UNITS

| Pollutant | Units | MACT floor emission limit for FB incinerators [a] | MACT floor emission limit for MH incinerators [a] |
|---|---|---|---|
| Cd | mg/dscm@7% $O_2$ | 0.0016 | 0.095 |
| CO | ppmvd@7% $O_2$ | 64 | 3,800 |
| HCl | ppmvd@7% $O_2$ | [b] 0.51 | 1.2 |
| Hg | mg/dscm@7% $O_2$ | 0.037 | [b] 0.28 |
| $NO_X$ | ppmvd@7% $O_2$ | 150 | 220 |
| Pb | mg/dscm@7% $O_2$ | 0.0074 | 0.30 |
| PCDD/PCDF TEQ | ng/dscm@7% $O_2$ | 0.1 | 0.32 |
| PCDD/PCDF TMB | ng/dscm@7% $O_2$ | 1.2 | 5.0 |
| PM | mg/dscm@7% $O_2$ | 18 | 80 |
| $SO_2$ | ppmvd@7% $O_2$ | 15 | 26 |

[a] Limits were rounded up to two significant figures.
[b] Limits represent three times the detection level.

TABLE 8—SUMMARY OF MACT FLOOR ANALYSIS FOR NEW SSI UNITS

| Pollutant | Units | MACT floor emission limit for FB incinerators [a] | MACT floor emission limit for MH incinerators [a] |
|---|---|---|---|
| Cd | mg/dscm@7% $O_2$ | 0.0011 | 0.0024 |
| CO | ppmvd@7% $O_2$ | 27 | 52 |
| HCl | ppmvd@7% $O_2$ | 0.24 | [c] 1.2 |
| Hg | mg/dscm@7% $O_2$ | 0.0010 | [b] 0.15 |
| $NO_X$ | ppmvd@7% $O_2$ | 30 | 210 |
| Pb | mg/dscm@7% $O_2$ | 0.00062 | 0.0035 |
| CDD/CDF TEQ | ng/dscm@7% $O_2$ | 0.0044 | 0.0022 |
| CDD/CDF TMB | ng/dscm@7% $O_2$ | 0.013 | 0.045 |

TABLE 8—SUMMARY OF MACT FLOOR ANALYSIS FOR NEW SSI UNITS—Continued

| Pollutant | Units | MACT floor emission limit for FB incinerators [a] | MACT floor emission limit for MH incinerators [a] |
|---|---|---|---|
| PM | mg/dscm@7% $O_2$ | 9.6 | 60 |
| $SO_2$ | ppmvd@7% $O_2$ | 5.3 | 26[c] |

[a] Limits were rounded up to two significant figures.
[b] Limits represent three times the detection level.
[c] Limits defaulted to EG limits since NSPS limits were less stringent than EG.

*Comment:* One commenter contended that because CAA section 129 unambiguously requires EPA to set floors reflecting the "average" emission level achieved by the best sources, setting floors that instead reflect a UPL for those sources is unlawful. The commenter, added that by claiming that it can use the UPL for all sources in the top twelve percent, EPA misreads its authority to consider variability under the CAA and relevant case law. The commenter explained that, although EPA may consider variability in estimating an individual source's actual performance over time, nothing in the CAA or the case law even suggests that EPA may account for differences in performance between sources except as section 129 provides, by averaging the emission levels achieved by the sources in the top twelve percent.

*Response:* In assessing sources' performance, EPA may consider variability both in identifying which performers are "best" and in assessing their level of performance. *Sierra Club* v. *EPA (Brick MACT),* 479 F. 3d 875, 881–82 (D.C. Cir. 2007); see also *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (D.C. Cir 2004) (EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that has been achieved by the best performing sources considering these sources' operating variability). The *Brick MACT* decision indicated that floors for existing sources must reflect the average emission limitation achieved by the best-performing 12 percent of existing sources. The *Brick MACT* decision also reiterated that EPA may account for variability in setting floors; however, the Court found that EPA erred in assessing variability because it relied on data from the worst performers to estimate best performers' variability. The Court held that "EPA may not use emission levels of the worst performers to estimate variability of the best performers without a demonstrated relationship between the two." 479 F. 3d at 882.

In determining the MACT floor limits, we first determine the floor, which, for existing sources, is the emissions limitation achieved in practice by the average of the top 12 percent of existing sources, or the level achieved in practice by the best controlled similar source for new sources. In this rule, EPA is using lowest emissions limitation as the measure of best performance. We then assess variability of the best performers by using a statistical formula designed to estimate a MACT floor level based on the average of the best performing sources using the expected distribution of future compliance tests. We used the UPL to perform this calculation, as explained below.

Variability can be accounted for using different statistical methods. For example, recent standards have used the UL or the UPL to determine the MACT floor emission limits. A UL is based on the distribution of the available emission observations (*e.g.,* test runs), and does not embody a predictive aspect that a UPL does. A prediction interval (*e.g.,* a UPL) for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what future values will be, based on present or past background samples taken. Given this definition, the UPL represents the value the mean of three future test run observations (three-run average) can be expected to fall below, based on the results of the independent sample of size (n) from the same population. Therefore, should a future test condition be selected randomly from any of these sources (*i.e.,* average of three runs), we can be 99 percent confident that the reported level will fall below a MACT floor emission limit calculated using a UPL. The UPL is an appropriate statistical tool to use in determining variability in the SSI data. For this source category, where there is a limited sampling of the source category and we do not have test data from all of the SSI units in the best performing 12% for each subcategory, the predictive aspect of the UPL calculation is especially important.

Because the UPL represents the value which we can expect the mean (*i.e.,* average) of three future observations (3-run average) to fall below, based upon the results of the independent sample size from the same population, the UPL reflects average emissions. The UPL is also consistent with other recent rulemakings.

*Comment:* Several commenters asserted that, in setting MACT standards for existing units, EPA pooled and utilized data from all available test runs for the best performing units without regard to the number of data points available for each unit. The commenters added that, for all pollutants, the number of test runs varies from unit to unit. One commenter stated that using data this way biases the statistical results, and ultimately, the standards by over-weighting the performance of the units that have more data. The commenter suggested that EPA should employ an alternate methodology which determines the emissions limitation achieved for each best performing unit first, and then averages these limitations to determine the least stringent standard, or MACT floor.

*Response:* The SSI emissions database for fluidized bed units contains data from six units at four facilities. The entities surveyed were requested to provide recent (within the previous 5 years) emissions test reports. Most survey recipients provided only the most recent report. One facility, with three units, provided results of emissions test conducted for compliance reports spanning a 10-year period. This facility also uses the most advanced pollution controls on their fluidized bed units in the subcategory. This facility constitutes 70 percent of the Cd and Pb data, 90 percent of the CO and Hg data, and 75 percent of the HCl data and PM data. As a result, the existing source MACT floors calculated using the UPL methodology, and all the test run data from the one facility, effectively result in calculating more stringent limits more akin to a new source MACT floor than an existing

source MACT floor, because it is based primarily on only the emissions performance of the best-performing single source, rather than the average of the best-performing 12 percent of sources. In order to adequately incorporate the emissions from the best-performing SSI units in the fluidized bed subcategory, a weighted UPL was used for calculating the existing source MACT floors for the final rule. The weighted UPL is calculated from a weighted mean and weighted variance as described below.

There are many different types of weighting procedures. We have chosen the most straightforward methodology, to base it on the number of data points (*i.e.,* test runs) from each SSI unit.[12] This weighting scheme ensures that no facility in the MACT best performers pool is over-represented in the computation of the MACT floor. The first step in weighting procedure is to assign a weighting factor to each test run by multiplying each observation for source *i* and run *j* with a weight term, $w_{ij}$, as shown in Equation 1 of this preamble:

$$w_{ij} = \left(\frac{1}{M_i}\right) \times \left(\frac{1}{N}\right) \qquad \text{(Eq. 1)}$$

Where:

$M_i$= Number of observations (*i.e.,* runs) for source i and

$N$= Number of best performing sources in the MACT pool.

The second step is to calculate the mean and total variance for the weighted data from the weight terms using Equations 2 and 3 of this preamble:

$$\text{Weighted Mean:} \quad \bar{x}^{weighted} = \frac{\sum_{i=1}^{N}\sum_{j=1}^{M_i} w_{ij} x_{ij}}{\sum_{i=1}^{N}\sum_{j=1}^{M_i} w_{ij}} \qquad \text{Equation 2}$$

$$\text{Weighted Variance:} \quad v^{weighted} = \frac{\sum_{i=1}^{N}\sum_{j=1}^{M_i} w_{ij}\left(x_{ij} - \bar{x}_U^{weighted}\right)^2}{\frac{(K-1)\sum_{i=1}^{N}\sum_{j=1}^{M_i} w_{ij}}{K}} \qquad \text{Equation 3}$$

Where:

$$K = \sum_{i=1}^{N} M_i$$

is the total number of observations in the MACT best performers pool.

When the weights are equal to one, the above equations reduce to those for un-weighted data, as expected. As shown in Equation 4 of this preamble, the weighted mean and weighted variance are then used in the UPL calculation (discussed in the NPRM) instead of the simple (*i.e.,* un-weighted) mean and variance.

$$UPL = \bar{x}^{weighted} + t(0.99, n_i - 1) \times \sqrt{\left(v^{weighted}\right) \times \left(\frac{1}{n_i} + \frac{1}{m_i}\right)} \qquad \text{Equation 4}$$

For multiple hearth units, there are more emissions data from a larger number of facilities/units. For example, we have data on Cd and Pb from 11 facilities with 14 units, Hg from 11 facilities with 18 units. The MACT floor calculations are not skewed by one or two units or facilities. Consequently, the MACT floor for existing multiple hearth units does not need to be calculated using a weighted UPL.

The revisions to the MACT floor methodology are discussed in detail in the memorandum "Revised MACT Floor Analysis for the Sewage Sludge Incinerator Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

*Comment:* One commenter contended that EPA should determine the MACT floor emission limits to be consistent with EPA's Guidance for Data Quality Assessment Manual, which holds that it is more likely that environmental data are distributed log-normally. The commenter considered it reasonable to believe that environmental emission distributions are non-normal, since frequency plots typically show many readings approaching zero and fewer large readings forming an elongated tail to the right. The commenter concluded that normal distributions may exist for certain pollutants where the entire dataset is many standard deviations away from zero, and values are controlled by an air pollution control process with set points and feedback and control loops.

*Response:* We have reviewed the document referenced and agree with the commenter that the referenced document shows that environmental data are more likely to be log-normally distributed than normally distributed. In the proposed rule, two statistical measures, skewness and kurtosis, were examined to determine if the data used

[12] Heckert, N. A. and Filliben, James J.(2003). "NIST Handbook 148: DATAPLOT Reference Manual, Volume I: Commands", National Institute of Standards and Technology Handbook Series, June 2003. [Available at *http://www.itl.nist.gov/div898/software/dataplot/document.html*]

to calculate the MACT floor were normally or log-normally distributed. If both the reported values and the natural-log transformed reported values had skewness and kurtosis statistics that indicated neither were normally distributed, the reported dataset was selected as the basis of the floor to be conservative. If the results of the skewness and kurtosis hypothesis tests were mixed for the reported values and the natural log-transformed reported values, the analysis done on the reported data values was chosen to be conservative.

Based on "Guidance for Data Quality Assessment: Practical Methods for Data Analysis" EPA/600/R–96/084, July 2000, we have modified our assumptions when results of the skewness and kurtosis tests do not clearly show whether a normal or log-normal distribution better represents the data, or when there are not enough data to complete the skewness and kurtosis tests. In these cases, we have chosen to use the log-normal results for the final MACT floor calculation.

*Comment:* Some commenters contended that EPA incorrectly presumes that stack test results account for the full variability of a SSI's performance. Several commenters stated that emissions from SSI units are affected not just by control technology but also by other factors including the contents of the sludge that a unit is burning. Many commenters urged EPA to determine the MACT floor limits by incorporating the variability of the sludge contents. The commenters added that the methodology in developing the proposed standards does not take into account that Hg, Cd, Pb, HC1 and $SO_2$ emissions are a function of the sludge content of Hg, Cd, Pb, chlorine and sulfur. The commenters expressed concern that the limits were based on test results obtained with sludge containing very low concentration of metals, chlorides, and sulfur. The commenter explained that if the sludge burned during an emissions test was not at or near the maximum constituent concentration level (*e.g.,* due to seasonal variability), a new source emission limit based on these data could not be achieved over the full range of expected normal operating conditions confronted by the best performing source.

The commenters contended that EPA must consider all available data (including Part 503 data) for the best performing source and use that to establish a variability factor applied to the stack test data. The commenters added that EPA's request for metals data during the stack test is insufficient to account for the full intra-source variability. The commenters added that variability for the compounds not regulated by Part 503 must also be accounted for as well before setting the new source limit.

The commenters explained that POTW, and their SSI units, are statutorily obligated to manage all of the sewage that enters into the sanitary sewer system, resulting in highly variable and often unpredictable spikes in concentrations. The commenters continued that POTW inlet concentrations also vary based on the nature and type of dischargers. The commenters explained that POTW treat wastewater from residential, commercial and industrial dischargers in varying degrees, and pretreatment opportunities also vary because POTW authority to control discharges into the sewer system is limited and the way that authority is exercised varies. The commenters also noted that the nature of sewage entering the POTW changes over time as the character of a community changes, the age of the population changes, and commercial and industrial dischargers come and go. The commenters added that without the use of long-term data to support the level of emission standards, this variability makes numeric technology-based limits impractical and infeasible. The commenters also explained that POTW also face significant regional and seasonal variability that is not captured by EPA's dataset. The commenters stated that initial high flow periods in the spring often scour the sewers and dislodge heavier material that has settled in the sewer system during low-flow periods, which often results in a spike in metals concentrations (*e.g.,* Hg, Cd, Pb) in the sewage sludge. The commenters noted that the ICR stack tests in January and February that were used for the EPA database would not have captured these events. The commenter also noted that northern cities that use salt for de-icing roadways experience significant increases in chlorides during the winter months, and high chloride concentrations are known to improve the effectiveness of Hg control at existing wet scrubbers.

*Response:* The variability analysis is based on emissions information gathered from nine different facilities located in nine different states. The facilities we collected emissions information from are located in a mix of northern, southern, eastern, and western states. Each facility has its own unique sludge characteristics from different residential and commercial populations. We agree that the emissions data represents a "point in time". However, combined together, they represent sufficient variation in regions, climates and populations that adequately incorporates variability in wastewater treatment systems across the U.S. We have also incorporated variability using the UPL. The variability analysis based on the emissions data collected adequately characterizes the potential differences in sludge contents and regional differences. Because we have a mixture of southern and northern states in the emissions database, we believe that it also adequately considers differences between cold and warm weather climates. Additionally, we did not have sufficient information at proposal to consider if it were appropriate to incorporate variability based on sludge content. We requested additional information in the NPRM, but did not receive adequate sampling data from the best-performing sources.

*Comment:* Some commenters claimed that EPA's identification of the relevant best performing units for both existing and new unit standards is both unlawful and arbitrary, and EPA may not use sources' control technology as a proxy for their actual performance unless "pollution control technology is the only factor determining emission levels." *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855. 863 (DC Cir. 2001). The commenters stated that, in *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855 (DC Cir 2001) ("CKRC"), the Court considered Sierra Club's challenge that EPA could not set the floors based solely on the performance of one method: Add-on technology. The commenters added that the Court remanded the rule because EPA did not consider all of the ways facilities control emissions. The commenters stated that this requirement is consistent with doing a more complete study as required by section 111 and is antithetical to a methodology based solely on emission levels since setting the floor in this fashion does not require EPA to examine all methods of control. The commenters concluded that EPA's performance data approach in this rule may violate CKRC because EPA did not check for all methods that sources use to reduce pollution.

*Response:* EPA disagrees with the commenter who alleges that EPA has not properly identified the best performing SSI units for purposes of calculating MACT floor limits. As explained above, EPA targeted its emissions testing requests to units it believed had the lowest emissions, while accounting for factors such as sludge content and seasonal variation by selecting units in different geographic areas of the country.

EPA further notes that SSI units currently employ non-technology measures (pollution prevention) to reduce emissions to comply with CWA regulations at 40 CFR part 503. These regulations establish daily average concentration limits for Pb, Cd, and other metals in sewage sludge that is disposed of by incineration. Part 503 also requires that SSI meet the National Emission Standards for Beryllium and Hg in subparts C and E, respectively, of 40 CFR part 61. In order to meet the 40 CFR part 503 standards, facilities are already incorporating management practices and measures to reduce waste and limit the concentration of pollutants in the sludge sent to SSI units, such as segregating contaminated and uncontaminated wastes and establishing discharge limits or pre-treatment standards for non-domestic users discharging wastewater to POTW. Thus, the facilities from which EPA received emissions test results are already applying non-technology measures to reduce emissions.

*Comment:* One commenter suggested that if EPA employs the statistical limit to set MACT floor emission limits, it should use the 99.9 percent limit. The commenter stated that the 99.9 percent UPL represents a 0.1 percent probability of a failure for individual tests, or a one percent per unit non-compliance probability per annual performance test program. The commenter concluded that this value better encompasses unit emissions variability and represents a manageable risk to the responsible facility operator.

*Response:* We disagree with the commenters. For the final standards, we maintain the use of 99 percent UPL is appropriate and sufficiently addresses variability in the emissions information. Our analysis of variability is explained in detail in the memorandum "Revised MACT Floor Analysis for the Sewage Sludge Incinerator Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

*Comment:* Several commenters opposed an opacity limit of zero percent because opacity is a subjective measurement and no unit can meet opacity limits of zero at all times. Another commenter suggested that control and monitoring of PM is sufficient.

*Response:* We agree that a no visible emissions (zero opacity) limit for combustion processes is impractical for both compliance and enforcement purposes. We also believe that a measurable opacity may or may not be indicative of compliance with a PM emissions limit when applied to multiple sources within the category. That is, an opacity limit applied to one facility could very readily correspond to a PM emissions level different than that same opacity limit applied to another facility and one or both may be emitting above the PM limit. That opacity limits do not apply very well when wet control devices are used further confounds the benefit of such regulatory limits. We also agree that there are both CEMS and site-specific parametric monitoring approaches applicable to various control devices that can be more closely aligned with PM control and compliance with the PM emissions limit than would an opacity limit and opacity monitoring. Instead of establishing opacity limits that may or may not assure compliance with PM emissions limits, the final rules include rigorous requirements for establishing site-specific operating limits derived from the results of performance testing. The rules also include a requirement that sources update those enforceable operating limits with each repeated performance test. Re-establishing operating limits periodically will assure that the monitoring will continue to indicate compliance with the PM emissions limits. The rules also provide the source the option of apply CEMS to monitor directly the pollutant of interest in lieu of parametric monitoring. We believe that continuous compliance with operating limits and periodic stack testing to verify the operating limits plus the CEMS option will ensure that sources demonstrate continuous compliance with the PM emission limits more effectively than would periodic or continuous monitoring of a broadly applicable opacity limit.

Format of the Standards

*Comment:* Several commenters requested that EPA develop emission limits for some pollutants in different units or to provide a control efficiency alternative. The commenters expressed concern that the use of concentration limits would not reflect the variability of the unique sludge characteristics of each SSI unit, and may unfairly penalize units with very low or very high feed concentrations of certain pollutants, such as Hg, Cd, or Pb. Some commenters suggested establishing limits similar to the EPA 503 regulations, which provided emission limits based on control efficiencies coupled with feed concentration limits.

*Response:* We did not have sufficient data to set alternative control efficiency standards or standards in other units at proposal. We requested additional information in the proposal. However, sufficient data were not provided in response to our request for alternative formats to be developed.

*D. Baseline Emissions*

*Comment:* Commenters stated that EPA overestimated baseline emissions because EPA used incorrect air flow rate parameters, pollution control device efficiencies, sludge feed rates, and operating hours. Many commenters provided stack test data, emission estimates, and corrections to the EPA's SSI inventory database. Other commenters noted that EPA used uncorrected flue gas flow rates and flow rate factors in combination with pollutant concentrations corrected to seven percent oxygen.

*Response:* We have incorporated corrections to the inventory and calculation inputs provided by the commenters where applicable. In some cases, commenters did not provide information sufficient for us to revise the inventory or calculation inputs for the commenter's facility. For example, commenters may have provided an average concentration for a pollutant, but did not provide run-specific information that would allow us to convert the concentration information provided to standardized units (7 percent oxygen). Other commenters may have provided emission rates in pounds per hour, but did not provide vent gas flow rate, oxygen content, or moisture content to convert to concentration units. None of the commenters provided test reports that would have include this information.

We have also revised the calculation of baseline emissions by revising the defaults assigned to SSI units where information was not available. Defaults were necessary to be assigned because, even after new data were received in comments, a significant number of units did not have data on sludge capacity, flue gas flow rates, *etc.* A detailed discussion of the methodology used to estimate baseline emissions for the final standards is presented in the memorandum "Revised Estimation of Baseline Emissions from Existing Sewage Sludge Incineration Units"(EPA–HQ–OAR–2009–0559). The revisions to the inventory and other corrections resulted in the final rule baseline emissions shown in Table 9 of this preamble. The table shows a range of emissions for each pollutant. The lower bound represents an estimation of actual emissions based on the actual dry sludge feed rates commenters indicated their units were running. The upper bound represents an estimation of potential emissions if the sludge feed rate was at the dry sludge capacity of each unit. We estimated the potential

emissions because the amount of wastewater treated (and sludge produced) may vary significantly based on changes in population or sources of wastewater. Facilities have the potential to burn up to their units permitted capacity although they may not be doing so currently.

TABLE 9—ESTIMATED BASELINE EMISSIONS FOR EXISTING SSI UNITS

| Pollutant | Range of baseline emissions by subcategory (TPY) | | Range of total baseline emissions (TPY) |
|---|---|---|---|
| | FB | MH | |
| Cd | 0.0022–0.0015 | 0.91–1.2 | 0.91–1.2 |
| CO | 73–100 | 8,400–11,500 | 8,500–11,600 |
| HCl | 1.6–2.2 | 26–41 | 28–43 |
| Hg | 0.040–0.058 | 0.85–1.15 | 0.9–1.2 |
| $NO_X$ | 320–480 | 2,100–2,800 | 2,400–3,300 |
| Pb | 0.0056–0.0077 | 2.4–3.1 | 2.4–3.1 |
| PCDD/PCDF TEQ [a] | 0.00012–0.00016 | 0.00076–0.0010 | 0.0009–0.0012 |
| PCDD/PCDF TMB [a] | 0.0014–0.0020 | 0.011–0.015 | 0.013–0.017 |
| PM | 25–37 | 310–410 | 330–450 |
| $SO_2$ | 43–57 | 660–1,020 | 700–1,100 |

[a] Baseline emissions are in pounds per year for PCDD/PCDF.

*E. Beyond-the-Floor Analysis*

*Comment:* Several commenters requested that EPA reconsider the beyond-the-floor Hg limit for MH units because baseline Hg emissions were overstated and costs for Hg control were understated. Many of the commenters contended that carbon injection is an unproven technology for SSI units, and is currently used at only one facility with FB units. The commenters added that the facility is undergoing significant issues with the technology.

Commenters also contended that Hg removal using carbon injection cannot be accomplished with existing PM controls, such as venturi scrubbers, and that FFs would be necessary. The commenters added that the high moisture content in the form of liquid droplets from the incinerator will plug FFs, and additional equipment may be necessary to keep the temperature above the dew point, such as an afterburner.

*Response:* We have revised the beyond-the-floor analysis to incorporate changes made to the baseline emissions, new facility specific data and inputs provided by commenters, and revised control options. We analyzed several beyond-the-floor controls for the final rule. First, we evaluated the use of an afterburner for control of CO at MH units. We then evaluated whether additional control of Hg should be required at MH units. We have reviewed the commenters concerns regarding Hg control technologies and agree that applying carbon injection to existing scrubbers has not been demonstrated to be effective at removing Hg. For combustion sources that are not SSI, such as boilers, carbon injection in combination with a FF has proven to be highly effective in removing Hg. However, for high moisture flue gas streams, such as emitted from SSI units, the use of FFs is problematic due to plugging/fouling. In order to use carbon injection with a FF with high moisture streams, a waste heat boiler, RTO, or afterburner is necessary to maintain a high enough temperature to keep the stream above the dew point prior to sending the stream to the FF.

Therefore, we next evaluated the combination of using an afterburner, carbon injection, and FF for additional control of Hg at MH units. Additional equipment may also be necessary to reduce the temperature of the flue gas to prevent damage to the fabric filter bags. Sufficient information was not collected to estimate this cost. Table 10 of this preamble summarizes the cost for existing SSI units to apply different controls that were analyzed.

TABLE 10—COSTS EXPECTED FOR EXISTING SSI UNITS TO APPLY MACT CONTROLS ANALYZED

[2008$]

| Control analyzed | Total capital costs (million $) | Total annualized costs (million ($/yr) [a] |
|---|---|---|
| 1—MACT Floor | 55 | 18 |
| 2—MACT Floor + Afterburner for MH units | 155 | 46 |
| 3—MACT Floor + Afterburner and Activated carbon injection and FF for MH units | 490 | 138 |

[a] Calculated using a seven percent discount factor.

Table 11 of this preamble summarizes the emission reductions of each pollutant for various controls analyzed.

TABLE 11—SUMMARY OF EMISSION REDUCTIONS FOR EXISTING UNITS TO APPLY THE MACT CONTROLS ANALYZED

| Pollutant | Emission Reductions for MACT Controls Analyzed (TPY) | | |
|---|---|---|---|
| | MACT floor | MACT floor + after-burner for MH units | MACT floor + after-burner + ACI and FF for MH units |
| Cd | 0.5–0.6 | 0.5–0.6 | 0.87–1.1 |
| CO | 0 | 6,900–9,300 | 6,900–9,300 |
| HCl | 19–30 | 19–30 | 19–30 |
| Hg | 0.0022–0.0025 | 0.0022–0.0025 | 0.67–0.89 |
| $NO_X$ | 6.8–16 | 6.8–16 | 6.8–16 |
| Pb | 1.2–1.5 | 1.2–1.5 | 2.3–2.9 |
| PCDD/PCDF TEQ | 0 | 0 | 0.0000003–0.0000004 |
| PCDD/PCDF TMB | 0 | 0 | 0.000005–0.000007 |
| PM | 58–70 | 58–70 | 300–400 |
| $SO_2$ | 430–700 | 430–700 | 430–700 |

The results provided in Tables 10 and 11 of this preamble were calculated using data gathered for each source (*e.g.,* emissions, vent gas flow rates, controls currently used), as well as default values for emissions, sludge capacity, and vent gas flow rate for sources where data were unavailable. We estimate that requiring the use of an afterburner for MH units not already having an afterburner could require as much as 1,010 million cubic feet of natural gas a year to be burned, resulting in $NO_X$ and CO emissions of 51 and 43 TPY, respectively. We estimate that applying activated carbon injection with a FF and an afterburner or RTO to all MH units to control Hg and PCDD/PCDF would result in total annualized costs of $138 million dollars (using a discount rate of seven percent) and would achieve Hg reductions of 0.67–0.89 TPY. The incremental cost-effectiveness of adding afterburners/RTO, activated carbon injection, and FFs to all MH units is estimated to be $80,000 to $100,000 per pound of Hg removed. Costs would increase if equipment necessary to cool the flue gas is also necessary. Therefore, given these factors, we are not finalizing any beyond-the-floor requirements for SSI units.

We also analyzed going beyond-the-floor to require packed bed scrubbers for additional HCl and $SO_2$ reduction, a wet ESP for additional PM, Cd and Pb reduction, and SNCR for additional $NO_X$ reduction. We determined that it was not appropriate to go beyond-the-floor to achieve greater reduction of HCl, $SO_2$, PM, Cd, Pb, and $NO_X$ considering the cost and secondary impacts incurred. Our beyond-the-floor analyses for the final standards are documented in the memorandum "Revised Analysis of Beyond the Maximum Achievable Control Technology (MACT) Floor Controls for Existing SSI Units" (EPA–HQ–OAR–2009–0559).

*F. Cost and Economic Impacts*

*Comment:* Commenters contended that EPA had underestimated the cost of the proposed rule for the beyond-the-floor option of Hg control as well as for the MACT floor for other pollutants because it only has information for less than 12 percent of the SSI units. The commenters added that EPA used information from these limited sources and applied it to remaining sources for which they did not have. The commenters contended that this results inaccurate determinations of which units could meet the proposed emission limits and which could not. The commenters contended that EPA overestimated the number of sources that could meet the proposed standards resulting in a significant underestimation of controls.

Some commenters also contended that EPAs choices of controls to cost for compliance with the proposed standards were inappropriate for SSI units. Many commenters stated that the high moisture content of flue gas streams in some applications may mean that FFs would not be an appropriate control for PM, Cd, or Pb.

*Response:* EPA is not prescribing a specific control technology or method. A source is required to meet the final emissions limits in these standards, and has the flexibility to use the control method or technology that is best suited for their individual facility. EPA's costs are estimated based on technologies we believe may be appropriate for the sources to meet the emissions limits.

At proposal, and for the final standards, we estimated costs and emissions reductions based on the best available information to us. We acknowledge that the inventory database did not have complete information for all 204 SSI units. Consequently, we developed defaults for flue gas flow rate, hours of operation, sludge capacity, and other inputs for the proposed rule. We have updated our analyses using data provided by the commenters as summarized in section IV. Summary of Significant Changes Following Proposal and the memorandum titled, "Post-Proposal SSI Database Revisions and Data Gap Filling Methodology" in the docket (EPA–HQ–OAR–2009–0559). However, for a number of inputs, we are still assigning default values where data were not available for each SSI. For the final rule, we have correlated some of the defaults to populations served by the facilities in order to better estimate costs and emission reductions more specifically to each facility. Sources will have the best idea of the costs of controls for their site specific conditions. For some sources, the costs and emission reductions estimated by EPA may be higher than what the source estimates, and for others they will be less. EPA's estimates are estimates based on the best information available to us. We also note that the MACT floor costs and emission reductions, and determination of the number of sources estimated to require control, estimated for the final rule are also based on the revised MACT floor limits.

For the final standards we have also revised the types of controls costed to meet the MACT floor limits. For SSI that we estimate will need further control of PM, Cd, or Pb to meet the MACT floor, we have costed out wet ESP as a more appropriate PM control for high moisture streams. We have also costed out SNCR for SSI that we estimate will need further control of $NO_X$ to meet the MACT floor limits. As at proposal, we have costed out packed scrubbers for SSI that we estimate will need further control of HCl or $SO_2$. At the MACT floor level, we do not estimate that any SSI will need to add control for Hg, PCDD/PCDF, or CO. A detailed discussion of the costs and emissions reductions estimates for the final

standards is provided in the memorandum "Revised Cost and Emission Reduction of the MACT Floor Level of Control" in the SSI docket (EPA–HQ–OAR–2009–0559).

*Comment:* Commenters contended that EPA had incorrectly calculated the costs of the landfilling alternative because it used dry tons of sewage sludge instead of wet tons. The commenters added that wet tons is the appropriate basis of the sludge because even after the dewatering process, the sludge contains 70 to 80 percent moisture. Many of the commenters provided estimates for landfilling sludge from their specific unit. The commenters added that because of the error, EPA has significantly underestimated the impacts from transporting sludge by truck. Other commenters added that EPA had not evaluated the negative social impact of hauling sludge to a landfill. Some commenters added that EPA did not consider the additional costs for specific state landfilling regulations.

Several commenters contended that EPA incorrectly estimated the on-site sludge storage requirements because calculations were not done on a wet basis. Commenters added that the cost of the storage units would be significant and would need to include odor control as well as a settling basin.

Other commenters expressed concern regarding the availability of landfills to POTW needing disposal sites. The commenters contended there was insufficient landfill capacity to handle the influx of sewage sludge.

*Response:* We have revised our costs and impacts of the landfill alternative based on comments received on the proposal and corrections made to the analysis. Table 14 of this preamble summarizes the revised costs and impacts of this alternative if small entities choose to landfill rather than incinerate sewage sludge. A detailed discussion of the landfilling alternative analysis is provided in the memorandum "Revised Cost and Emission Reduction of the MACT Floor Level of Control" in the SSI docket (EPA–HQ–OAR–2009–0559).

Based on the revised impacts, it is unlikely that many sources will find landfilling an appropriate alternative. The selection of a management option for sewage sludge is often a local decision that is based on environmental protection concerns, community needs, geographic constraints, and economic conditions. Given a full evaluation of these factors, for some sources, landfilling or land treatment may be a better management option than incineration.

*G. Startup, Shutdown, and Malfunction*

*Comment:* Numerous commenters disagreed with EPA's proposed language requiring facilities to meet the proposed SSI standards "at all times" because it would be difficult to comply with certain proposed emission limits during startup and shutdown. Many of these commenters were specifically concerned about not being able to meet the proposed CO concentration limit upon startup of a SSI because when a heat up burner system is fired into a cold vessel, the flame tip is quenched before the combustion is completed creating a small flow of CO. One commenter contended that EPA is proposing a new source CO standard without any evidence that it can be achieved during startup, shutdown, or malfunction. This commenter provided an example of CO data from one hazardous waste combustor that averaged 2.2 ppmv during normal operations but averaged 48.6 ppmv during startup, 40.5 ppmv during shutdown, and 815.5 during malfunctions. The commenters stated that absolute pollutant levels tend to increase during startup and shutdown due to incomplete combustion that is unavoidable at lower temperatures, and noted that the influence of unstable combustion may be more pronounced during shutdowns as the incinerator combusts the remaining sewage sludge for 30 minutes or more. The commenters recommended that EPA account for situations where higher emissions occur during the time it takes to bring control equipment from startup to steady-state operations.

*Response:* At this time, we are not promulgating a separate emission standard for the source category that applies during periods of startup and shutdown. We do not have data that would allow us to set a separate standard during periods of startup and shutdown. We requested information in the NPRM. However, no data were provided. Based on the information available at this time, we believe that SSI units will be able to meet the emission limits during periods of startup. Units we have information on use natural gas, landfill gas, or distillate oil to start the unit and add waste once the unit has reached combustion temperatures. Emissions from burning natural gas, landfill gas or distillate fuel oil are expected to generally be lower than from burning solid wastes. Emissions during periods of shutdown are also generally lower than emissions during normal operations because the materials in the incinerator would be almost fully combusted before shutdown occurs. Furthermore, the approach for establishing MACT floors for SSI units ranked individual SSI units based on actual performance for each pollutant and subcategory, with an appropriate accounting of emissions variability. Because we accounted for emissions variability, we believe we have adequately addressed any minor variability that may potentially occur during startup or shutdown.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times were not needed to be factored into development of CAA section 129 standards, which, once promulgated, apply at all times. We note that continuous compliance is demonstrated using continuous parametric monitoring, except for CO from new sources. CO CEMS are required for new source using a 24-hour block average.

*Comment:* Some commenters argued that EPA incorrectly claims that its authority to prescribe unique standards for SSM periods is constrained by *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008). These commenters stated that EPA has failed to account adequately for emissions that occur during SSM periods. One commenter contended that the Sierra Club decision interpreted CAA section 112, not CAA section 129 (which incorporates, by reference, CAA section 111), and pointed out that this interpretation is not merely a technical distinction. The commenter pointed out that since 1977, EPA has exempted emissions during SSM events from compliance with NSPS under CAA section 111 (referenced 40 CFR 60.8(c)). The commenter argued that Congress enacted the continuous basis language in section 302(k) knowing that EPA's emissions standards under section 111 exempted SSM periods, and pointed out that there is nothing in the legislative history of the 1977 amendments to the CAA that suggests congress intended to overturn that practice.

*Response:* As explained above, EPA believes the reasoning in the DC Circuit's decision in *Sierra Club* v. *EPA* applies equally to section 129. Additionally, EPA explains above the reasons it is not establishing different emissions standards for periods of startup, shutdown, and malfunction.

*H. Compliance Requirements*

*Comment:* Several commenters indicated that the proposed operating parameter ranges for minimum pressure

drop across a wet scrubber, minimum scrubber liquid flow rate, minimum scrubber liquid pH, and minimum combustion temperature (or minimum afterburner temperature) would not be achievable. They explained that these ranges are too narrow and that they will be inconsistent with the operating standards already required by 40 CFR part 60 subpart O, 40 CFR part 503, and state permits. Two commenters agreed with the proposed operating parameter ranges.

*Response:* The EPA reviewed the information provided by the commenters and determined that proposed procedure for establishing the operating ranges (*i.e.,* calculated as the average of three test runs and as 90 percent of the minimum value recorded during the applicable performance tests) may be too restrictive on control device operations in terms of energy or other operating needs. We determined that the operating limits should be more appropriately based on values recorded during the performance test runs. The final rule requires that operating limits be established on a site-specific basis as the minimum (or maximum, as appropriate) operating parameter value measured during the performance test. This approach has been incorporated into the final rule for all operating parameters and will result in achievable operating ranges that will ensure that the control devices used for compliance will be operated to achieve continuous compliance with the emissions limits.

*Comment:* Many commenters argued that the proposed operating range for sludge feed rate would not be achievable, that it results in the EPA changing the current state-permitted maximum sludge feed rate, and that it could force SSI units to conduct performance tests at maximum rated capacity. They explained that the proposed approach fails to take into account the normal feed condition and rate variation that occur on a daily and seasonal basis. A few commenters suggested that charging a SSI at 75 percent to 90 percent of its rated capacity results in a steadier state of control and more efficient combustion of the sludge.

Many commenters indicated that the proposed operating range for sludge moisture content would not be achievable and that EPA does not need sludge moisture content to determine whether SSI units are in compliance with their emission limits. They explained that sludge moisture is very sensitive to the type of dewatering equipment used, seasonal changes in the sewage or sludge received by a SSI, temperature changes, the biological systems that treat the sewage, and to operational changes, and that these changes cannot always be anticipated and are not always immediately correctable.

*Response:* The EPA reviewed its decision at proposal to require that SSI units maintain the sludge feed rate and sludge moisture content of the incinerated sludge within specified ranges. We determined that the operating limit for temperature of the combustion chamber (or afterburner temperature) is sufficient to ensure good combustion practice, and that moisture content is not needed to establish that SSI units are in compliance with their emission limits. If a SSI has a higher moisture content, the SSI will need to use more fuel to comply with their operating limit for temperature of the combustion chamber. We are no longer requiring that SSI units maintain sludge moisture content within specified ranges. We are also no longer requiring SSI units to maintain sludge feed rates within specified ranges due to the seasonal variability at wastewater treatment plants. Sludge feed rate information is necessary during performance test runs to establish that SSI units are in compliance with the new requirement that they conduct performance tests at 85 percent capacity. We are retaining the requirement to keep daily records of sludge feed rates and moisture contents, as SSI units should already be keeping records of these parameters, and this information will be useful in establishing representative operating limitations for a SSI unit.

EPA added a requirement that performance tests be conducted at 85 percent of the permitted maximum capacity. This level has been selected based on the performance test operating information provided by the commenters and previous EPA standards.

*Comment:* A few commenters indicated that the 4-hour rolling averaging period selected in the proposed rule for determining compliance with the operating parameters and CO limit was more burdensome and difficult to achieve. They explained that the recordkeeping and compliance burden is less if the averaging period for CEMS and CPMS are both based on a 24-hour block average. They also explained that the proposed CO limit on a 4-hour rolling average basis would be unachievable with MH incinerators and difficult to achieve with FB incinerators.

*Response:* The EPA has determined that a 24-hour block averaging period for compliance with the CO CEMS requirement for new sources will provide a sufficient indication of compliance and will allow more flexibility for facilities. Additionally, the proposed CO emission guidelines limit of 7.4 ppm for existing fluidized bed SSI units has changed in the final guidelines to 27 ppm, and this change is discussed in Section IV of this preamble. We have also revised the averaging periods for all other operating parameters, except scrubber liquid pH, to be on a 12-hour block average instead of a 4-hour rolling average basis in order to relate the averaging time for operating limits to the duration of the performance tests (*e.g.,* a three run test of 4 hour test runs would equal a 12-hour averaging time). For scrubber liquid pH, we chose 3-hour averages to be consistent with the performance test duration for acid gas scrubbers.

In the final rule, we are also not incorporating the alternative THC compliance requirement. Section 129 requires that limits be set for each of the 9 regulated pollutants. Surrogates, such as THC, cannot be used in place of the regulated pollutants.

*Comment:* Many commenters disagreed with the requirement in the proposed rule for annual testing, and argued that annual testing of each SSI is not needed to demonstrate compliance, too costly, and inconsistent with current Title V permits. They also argued that Method 22 compliance testing for fugitive ash emissions is not feasible or difficult to conduct due to space constraints, and that many FB incinerators utilize wet ash removal systems that do not require annual testing. They explained that the cost for emissions testing may be significantly higher than the proposed cost of $61,000 per unit. They further explained that Title V permits require facilities to test each of its SSI units once per 5 years. They pointed out that current management practices and strict health-based sludge content limits under the CWA section 405 and the CAA 40 CFR part 503 regulations will help ensure that SSI units are in compliance with their emission limits. One commenter pointed out that the proposed compliance schedule of every 10 to 12 months will essentially shorten the testing year by one month each year.

*Response:* The proposed standards included provisions for less frequent testing. In the final standards, EPA has revised these provisions, making it easier for facilities to qualify for less frequent testing, allowing less frequent testing for more pollutants, and ensuring that facilities that do less frequent testing are well below their emission limits. In the final standards,

owners or operators are required to establish that emissions of a given pollutant are under a specified threshold for two consecutive years, rather than 3 years as proposed, to qualify for less frequent testing for that pollutant. We have also extended the option to do less frequent testing to PCDD/PCDF and fugitive ash emissions testing. The threshold is 75 percent of the emission limit for each of the nine regulated pollutants. In order to allow a decrease in testing frequency, EPA must have assurance that SSI units can meet a more stringent threshold than the limits. This is particularly necessary because of the variability in sludge that may occur at wastewater treatment facilities. Additionally, in the final standards we are also providing assurance that the SSI unit is being operated properly and emission limits are being met continuously by requiring stringent parametric monitoring requirements. Specifically, exceedances of the minimum or maximum values established during the performance tests are considered deviations. For fugitive emissions from ash handling, owners or operators must demonstrate that visible emissions occur no more than 2 percent of the time during each Method 22 1-hour observation period. This allowance for fugitive ash emissions has been included in the final standards with a new requirement that all facilities must submit a monitoring plan at least 60 days before their initial compliance test to establish that their ash handling system will continuously meet the visible emissions limit.

Additionally, to allow facilities more flexibility regarding their test dates, to ensure that facilities are not forced to test at intervals less than 12 months, and to ensure that facilities are testing once per year, we have revised the testing schedule provisions. In the final standards, performance tests (except for pollutants that qualify for less frequent testing) must be conducted on a calendar year basis (no less than nine calendar months and no more than 15 calendar months following the previous performance test); and facilities must complete five performance tests per pollutant in each 5-year calendar period.

*Comment:* Many commenters requested that the definition of "process change" be revised to exclude the provision that a process change include an increase in the allowable wastewater received from an industrial source. They pointed out that any such increase would trigger a performance test, as required by the proposed standards, and that such increases did not warrant a re-test. They explained that industrial discharges often constitute only a small percentage of total influent flow (*e.g.,* 3.5 percent, four to eight percent), that such discharges are sometimes from sources that do not discharge the pollutants regulated by the proposed NSPS and guidelines (*e.g.,* food processing facilities), that some merchant SSI facilities regularly receive variable amounts of sludge from other regional wastewater treatment plants and POTW, and that it is difficult for impossible to anticipate some industrial load changes ahead of time. Several commenters argued that this proposed requirement would be redundant to the National Pretreatment Regulations at 40 CFR part 403, which are incorporated into their SSI's National Pollutant Discharge Elimination System (NPDES) permit, which require them to establish local limits on industrial discharges to prevent interference with sludge processes, use, and disposal. The commenters anticipate that they would establish similar limits to prevent noncompliance with the final emission limits. A few commenters suggested that the proposed provision for industrial discharges is vague and open to interpretation.

*Response:* The EPA reviewed the definition of "process change" and agrees with the commenters that there are some situations where an increase in the allowable wastewater received from an industrial source should not trigger a performance test. We have revised the definition of "process change" to more specifically and clearly identify the type of process change that will trigger a performance test. The revised definition identifies a "process change" as pollutant-specific and as including only situations where the SSI has undergone a significant permit revision. This revision will ensure that facilities retest whenever they have a significant change in the process that could trigger higher emissions of a given pollutant.

*Comment:* Several commenters requested EPA clarify what equipment are included as part of the SSI unit. The commenters stated that the proposed rules do not specify the equipment and without clarification, a SSI unit could be interpreted inconsistently or over-broadly. Commenters requested clarification regarding whether the "modification" (which refers to an "SSI unit") applies to the multiple hearth or fluid bed "reactor" or whether it includes the entire system including all air emission controls and auxiliary equipment.

*Response:* We agree that the definition of the SSI unit in the proposed rule was unclear as to what equipment constitutes the SSI unit. We have revised the definition of SSI unit in the final rule. A SSI unit means an incineration unit combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incineration unit designs include fluidized bed and multiple hearth. We have clarified that a SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack.

## VI. Impacts of the Final Action

As discussed in sections IV and V of this preamble, we have made several revisions to the impacts analyses for the final rules. We have incorporated revisions to the variability calculation. These revisions include: incorporating weighted UPL's for existing FB units, selecting log-normal results when it is not clear that data are normally distributed, and revising CO limits based on an analysis of the span of the test. The result of these changes increased UPL values for most pollutants.

Additionally, we have incorporated corrections to the inventory and calculation inputs provided by the commenters where applicable. We have also revised the calculation of baseline emissions by revising the defaults assigned to SSI units where information was not available. These changes resulted in decreasing the baseline emissions for each of the pollutants. The combination of increase UPL and decreased baseline emissions resulted in less SSI units estimated to need additional control to meet the MACT floor limits.

For the final rules, we also selected the MACT floor level of control for both subcategories instead of selecting a beyond-the-floor requirement.

For the final rules we have also revised the types of controls costed to meet the MACT floor limits. For SSI that we estimate will need further control of PM, Cd, or Pb to meet the MACT floor, we have costed out wet ESP as a more appropriate PM control for high moisture streams. We have also costed out SNCR for SSI that we estimate will need further control of $NO_X$ to meet the MACT floor limits. As at proposal, we have costed out packed-bed scrubbers

for SSI that we estimate will need further control of HCl or $SO_2$.

*A. Impacts of the Final Action for Existing Units*

1. What are the primary air impacts?

We have estimated the potential emission reductions that may be realized through implementation of the final emission limits. As discussed in section V of this preamble, we have revised the estimation of baseline emissions and emission reductions to present a range to show the variability in the emission calculations between estimated actual and estimated potential sludge feed rates. Table 12 of this preamble summarizes the emission reductions for MACT compliance for each pollutant. The analysis is documented in the memorandum "Revised Analysis of Beyond the Maximum Achievable Control Technology (MACT) Floor Controls for Existing SSI Units" in the SSI docket (EPA–HQ–OAR–2009–0559).

TABLE 12—PROJECTED EMISSION REDUCTIONS FOR EXISTING SSI UNITS COMPLYING WITH THE PROPOSED EMISSION LIMITS

| Pollutant | Range of reductions achieved through meeting MACT by subcategory (TPY) | | Range of total reductions (TPY) |
|---|---|---|---|
| | FB | MH | |
| Cd | 0 | 0.5–0.6 | 0.5–0.6 |
| CO | 0 | 0 | 0 |
| HCl | 0.73–0.94 | 18–29 | 19–30 |
| Hg | 0.0005–0.0006 | 0.0017–0.0019 | 0.0022–0.0025 |
| $NO_X$ | 6.8–16 | 0 | 6.8–16 |
| Pb | 0 | 1.2–1.5 | 1.2–1.5 |
| PCDD/PCDF TEQ | 0 | 0 | 0 |
| PCDD/PCDF TMB | 0 | 0 | 0 |
| PM | 0 | 58–70 | 58–70 |
| $SO_2$ | 17–21 | 420–680 | 430–700 |

2. What are the water and solid waste impacts?

We anticipate affected sources will need to apply additional controls to meet the proposed emission limits. These controls may utilize water, such as wet scrubbers, which would need to be treated. We estimate an annual requirement of 234 million gallons per year of additional wastewater will be generated as a result of operating additional controls or increased sorbents.

The analysis is documented in the memorandum "Revised Secondary Impacts for the Sewage Sludge Incineration Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

3. What are the energy impacts?

The energy impacts associated with meeting the proposed emission limits consist primarily of additional electricity needs to run added or improved air pollution control devices. For example, increased scrubber pump horsepower may cause slight increases in electricity consumption; sorbent injection controls would likewise require electricity to power pumps and motors. We anticipate that an additional 5,420 megawatt-hours per year will be required for the additional and improved control devices. The analysis is documented in the memorandum "Revised Secondary Impacts for the Sewage Sludge Incineration Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

4. What are the secondary air impacts?

For SSI units adding controls to meet the final emission limits, we anticipate very minor secondary air impacts. The combustion of fuel needed to generate additional electricity will yield slight increases in emissions, including $NO_X$, CO, PM and $SO_2$ and an increase in $CO_2$ emissions. Since $NO_X$ and $SO_2$ are covered by capped emissions trading programs, and methodological limitations prevent us from quantifying the change in CO and PM, we do not estimate an increase in secondary air impacts for this rule from additional electricity demand.

5. What are the cost and economic impacts?

We have estimated compliance costs for all existing units to add the necessary controls, monitoring equipment, inspections, recordkeeping, and reporting requirements to comply with Option 1 (*i.e.,* the selected SSI standards). Based on this analysis, we anticipate an overall total capital investment of $55 million with an associated total annualized cost of $18 million, in 2008 dollars (and using a discount rate of seven percent), as shown in Table 13 of this preamble. We anticipate that owner/operators will need to install one or more air pollution control devices for 43 of the 204 affected units to meet the final emission limits. The analysis is documented in the memorandum "Revised Analysis of Beyond the Maximum Achievable Control Technology (MACT) Floor Controls for Existing SSI Units" in the SSI docket (EPA–HQ–OAR–2009–0559).

TABLE 13—SUMMARY OF COSTS FOR EXISTING SSI IF ALL ENTITIES COMPLY WITH PROPOSED EMISSION LIMITS

[Millions of 2008$]

| Sub-category | Capital cost ($million) | Annualized cost ($million/yr) [a] |
|---|---|---|
| FB | 10.1 | 3.1 |
| MH | 45.0 | 14.7 |
| Total | 55.0 | 17.8 |

[a] Calculated using a discount factor of seven percent.

*Analysis of Alternative Sewage Sludge Disposal.* At proposal, we evaluated landfilling as an alternative disposal method. We have revised our costs and impacts of this alternative based on comments received on the proposal and corrections made to the analysis. Table 14 of this preamble summarizes the revised costs and impacts of this alternative if small entities choose to landfill rather than incinerate sewage sludge. A detailed discussion of the landfilling alternative analysis is provided in the memorandum "Revised Cost and Emission Reduction of the MACT Floor Level of Control" in the SSI docket (EPA–HQ–OAR–2009–0559).

Based on the revised impacts, it is unlikely that many sources will find landfilling an appropriate alternative. However, the selection of a management option for sewage sludge is often a local

decision that is based on environmental protection concerns, community needs, geographic constraints, and economic conditions. Given a full evaluation of these factors, for some sources, landfilling or land treatment may be a better management option than incineration.

TABLE 14—SUMMARY OF REVISED COSTS FOR SMALL ENTITIES THAT LANDFILL IN LIEU OF INCINERATION

[Millions of 2008$]

| Sub-category | Capital cost ($million) | Annualized cost ($million/yr) [a] |
|---|---|---|
| FB | 278 | 38 |
| MH | 313 | 42.7 |
| Total | 591 | 80.7 |

[a] Calculated using a discount factor of seven percent.

*B. Impacts of the Final Action for New Units*

As discussed in the proposal, based on trends of SSI units constructed and replaced, technical advantages of FB incinerators, and information provided by the industry on likely units constructed, we believe that new SSI units constructed are likely to be FB incinerators.

1. What are the primary air impacts?

We have estimated the potential emission reductions that may be realized through implementation of the final emission limits on two new FB incinerators potentially being constructed in the next 5 years. Table 15 of this preamble summarizes these emission reductions for MACT compliance for each pollutant from two new FB incinerators. The analysis is documented in the memorandum "Revised Estimation of Impacts for New Units Constructed Within 5 Years After Promulgation of the SSI NSPS" in the SSI docket (EPA–HQ–OAR–2009–0559).

TABLE 15—EMISSION REDUCTIONS FOR TWO NEW SSI UNITS (I.E., FLUIDIZED BED INCINERATORS) CONSTRUCTED

| Pollutant | Emission reduction (TPY) |
|---|---|
| Cd | 0 |
| CDD/CDF, TEQ | 0.0000000033 |
| CDD/CDF, TMB | 0.000000051 |
| CO | 0.26 |
| HCl | 0 |
| Hg | 0.0026 |
| $NO_X$ | 14 |
| Pb | 0.00053 |
| PM | 0 |
| $PM_{2.5}$ | 0 |
| $SO_2$ | 0 |

2. What are the water and solid waste impacts?

We anticipate affected sources would need to apply controls in addition to what they would have planned to include in the absence of this rule to meet the final emission limits. These controls may utilize water, such as wet scrubbers, which would need to be treated. We estimate an annual requirement of 8.6 million gallons per year of additional wastewater will be generated as a result of operating additional controls or increased sorbents for the two new units expected to come on-line in the next 5 years. The analysis is documented in the memorandum "Revised Analysis of Secondary Impacts for the Sewage Sludge Incineration Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

Likewise, the application of PM controls results in particulate collected that would require disposal. Furthermore, activated carbon injection may be used by some sources, which would result in solid waste needing disposal. The annual amounts of solid waste that will require disposal are anticipated to be approximately 34 TPY from activated carbon injection for the two units.

3. What are the energy impacts?

The energy impacts associated with meeting the final emission limits would consist primarily of additional electricity needs to run added or improved air pollution control devices. For example, increased scrubber pump horsepower may cause slight increases in electricity consumption. Sorbent injection controls would likewise require electricity to power pumps and motors. By our estimate, we anticipate that an additional 300 megawatt-hours per year will be required for the additional and improved control devices for the two new units modeled to come on-line in the next 5 years. The analysis is documented in the memorandum "Revised Analysis of Secondary Impacts for the Sewage Sludge Incineration Source Category Analysis of New Units for the Sewage Sludge Incineration Source Category" in the SSI docket (EPA–HQ–OAR–2009–0559).

4. What are the secondary air impacts?

For SSI units adding controls to meet the final emission limits, we anticipate very minor secondary air impacts. The analysis is documented in the memorandum "Revised Analysis of Secondary Impacts for the Sewage Sludge Incineration Source Category."

5. What are the cost impacts?

We have estimated compliance costs for new SSI units coming on-line in the next 5 years. This analysis is based on a model plant, the assumption that two new units will come on-line and will add the necessary controls, monitoring equipment, inspections, recordkeeping, and reporting requirements to comply with the final SSI standards. Based on this analysis, we anticipate an overall total capital investment of $8 million (2008$) with an associated total annualized cost of $2 million (2008$ and using a seven percent discount rate). This analysis assumes that new SSI units constructed are only FB incinerators.

## VII. Statutory and Executive Order Reviews

*A. Executive Order 12866 and 13563: Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and EO 13563 (76 FR 3821, January 21, 2011), this action is a "significant regulatory action" because it was likely to have an annual effect on the economy of $100 million or more based on the proposed standards. However, the cost of the final standards are no longer likely to have an annual effect on the economy of $100 million or more. Despite the change in costs, EPA submitted this action to the Office of Management and Budget (OMB) for review under EOs 12866 and 13563 and any changes made in response to OMB recommendations have been documented in the docket for this action. Although EPA prepared a RIA of the potential costs and benefits associated with the proposed standards we are simply updating the RIA rather than revising it.

A RIA was prepared in September of 2010 for the proposed Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units. However, based on the lower costs associated with the selected alternative in this final action we are providing an update of the RIA rather than completely revising the RIA. Within this update, we are providing updated costs and benefits of the controls analyzed and have provided a comparison of the selected controls with the alternatives.[13] While the characteristics of the controls analyzed have changed, we have also provided a comparison of the costs and benefits of

[13] In the RIA, the controls analyzed are referred to as Option 1 (MACT floor), Option 2 (MACT floor, plus afterburner for MH units), and Option 3 (MACT floor, plus afterburner and activated carbon injection and fabric filter for MH units).

the proposed controls analyzed with the selected alternative in this final action. A summary of the differences are presented below.

• Costs for the selected controls analyzed for promulgation are 80% lower and benefits are 81% lower than they were for the selected controls analyzed for proposal.

• Because the regulated sewage sludge incineration is a government provided service that does not involve a market, no price, quantity, or employment impacts were estimated for the proposal RIA. The economic impact analysis focused on the comparison of control cost to total governmental revenue. Because the costs are 80% lower for the selected controls analyzed for promulgation compared to the proposed controls analyzed, the control costs are expected to be a smaller portion of government revenues for the selected controls for promulgation than they were for the proposed controls.

• Because of insufficient information, employment changes due to the requirements for operating and maintaining control equipment were not estimated. Also, we did not have the information needed to estimate any labor changes related to governmental decisions to switch from incineration to landfilling.

• Monetized benefits are greater than costs for the selected option by $3 million to $34 million at three percent and $1 million to $29 million at seven percent. The benefits from reducing exposure to HAP, direct exposure to $NO_X$ and $SO_2$, ecosystem effects, and visibility impairment have not been monetized, including reducing 19 tons of HCl, 4 pounds of Hg, 2,400 pounds of Pb, and 1,000 pounds of Cd.

NET BENEFITS FOR FINAL SEWAGE SLUDGE INCINERATORS NSPS AND EG

[Millions of $2008]

| MACT floor (selected) | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Monetized Benefits | $21 to $52 | $19 to $47. |
| Costs | $18 to $18 | $18 to $18. |
| Net Benefits | $3 to $34 | $1 to $29. |

MONETIZED BENEFITS FOR FINAL SEWAGE SLUDGE INCINERATORS NSPS AND EG

| Total monetized benefits for final controls analyzed (millions of 2008$) | 3% Discount rate | 7% Discount rate |
|---|---|---|
| MACT Floor (Selected) | $21 to $52 | $19 to $47. |
| MACT Floor + Afterburner for MH units | $20 to $50 | $18 to $45. |
| MACT Floor + Afterburner and Activated carbon injection and fabric filter for MH units | $55 to $140 | $50 to $130. |

| Monetized benefits changes for MACT floor (millions of 2008$) | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Proposal (MACT Floor, all comply) | $110 to $270 | $100 to $250. |
| Final (MACT Floor) | $21 to $52 | $19 to $47. |
| % Change | −81% | −81%. |

| Monetized benefits changes for selected controls analyzed (millions of 2008$) | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Proposal (BTF Option 2, all comply) | $110 to $270 | $100 to $250. |
| Final (MACT Floor) | $21 to $52 | $19 to $47. |
| % Change | −81% | −81%. |

COSTS FOR FINAL SEWAGE SLUDGE INCINERATORS NSPS AND EG

| Total costs for final controls analyzed (millions of 2008$) | 3% or 7% Discount rate |
|---|---|
| MACT Floor (selected) | $18 |
| MACT Floor + Afterburner for MH units | 46 |
| MACT Floor + Afterburner and activated carbon injection + fabric filter for MH units | 138 |

| Costs changes for MACT floor (millions of 2008$) | 3% or 7% Discount rate |
|---|---|
| Proposal (MACT Floor, all comply) | $63 |
| Final (MACT Floor) | $18 |
| % Change | −71% |

| Cost changes for selected controls analyzed (millions of 2008$) | 3% or 7% Discount rate |
|---|---|
| Proposal (BTF Option 2, all comply) | $92 |
| Final (MACT Floor) | $18 |

| Cost changes for selected controls analyzed (millions of 2008$) | 3% or 7% Discount rate |
|---|---|
| % Change | −80% |

*B. Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to the 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 ICR documents prepared by EPA have been assigned EPA ICR number 2369.02 for subpart LLLL, and 2403.02 for subpart MMMM.

The recordkeeping and reporting requirements in this rule are based on the information collection requirements in CAA section 129 and EPA's NSPS General Provisions (40 CFR part 60, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to CAA section 114 (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and EPA's implementing regulations at 40 CFR part 2, subpart B.

The requirements in this action result in industry recordkeeping and reporting burden associated with review of the amendments for all SSI and initial and annual compliance with the emission limits using EPA approved emissions test methods. The burden also includes continuous parameter monitoring and annual inspections of air pollution control devices that may be used to meet the emission limits. Operators are required to obtain qualification and complete annual training. New units are also required to submit a report prior to construction, including a siting analysis.

When a malfunction occurs, sources must report them according to the applicable reporting requirements of Subparts LLLL and MMMM. An affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions is available to a source if it can demonstrate that certain criteria and requirements are satisfied. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 60.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation) and where the source took necessary actions to minimize emissions. In addition, the source must meet certain notification and reporting requirements. For example, the source must prepare a written root cause analysis and submit a written report to the Administrator documenting that it has met the conditions and requirements for assertion of the affirmative defense.

To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, EPA provides an administrative adjustment to this ICR that shows what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. EPA's estimate for the required notification, reports and records, including the root cause analysis, totals $3,141 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused an exceedance of an emission limit. The estimate also includes time to produce and retain the record and reports for submission to EPA. EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

The annual average burden associated with the emission guidelines over the first 3 years following promulgation is estimated to be $9.6 million. This includes 39,350 hours at a total annual labor cost of $2.2 million and total annualized capital/startup and operation and maintenance costs of $7.4 million per year, associated with the monitoring requirements, storage of data and reports and photocopying and postage over the 3-year period of the ICR. The annual inspection costs are included under the recordkeeping and reporting labor costs

The annual average burden associated with the NSPS over the first 3 years following promulgation is estimated to involve 701 hours at a total annual labor cost of $40,000. The total annualized capital/startup costs are estimated at $232,000 per year. This gives a cumulative annual burden of $272,000 per year for the NSPS. Burden is defined at 5 CFR 1320.3(b).

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it currently displays a 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.

*C. Regulatory Flexibility Act*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures 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 this action on small entities, a small entity is defined as follows: (1) A small business as defined by the SBA regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently-owned and operated and is not dominant in its field.

In the proposal, we certified that there would not be a significant economic impact on a substantial number of small entities. The economic analysis conducted at proposal identified 18 small entities none of which had cost-revenue-ratios greater than one percent. The cost analysis for the final standards showed a significant decrease (35 to 98 percent) in all costs for 11 of the 18 small entities. The cost-revenue-ratios were again estimated using the costs for the final rule and the same revenue estimates used in the proposal screening analysis. The revenue estimates were obtained using census average per capita revenue numbers ($1,696 for entities with populations between 10 thousand and 25 thousand and $1,677 for entities with populations between 25 thousand and 50 thousand) The resulting cost-revenue-ratios ranged between 0.04% and 0.5. Thus all cost-revenue-ratios were well below 1%. Therefore, we consider the final rule to

have no significant impact on a substantial number of small entities.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. None of the 18 small entities has cost-revenue-ratios greater than one percent. Thus, this is not considered to be a significant impact.

Although the final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities by allowing optional CEMS instead of requiring them, allowing information from tests conducted in recent years to show compliance rather than require all new testing and allowing reduced testing with continued compliance.

*D. Unfunded Mandates Reform Act*

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Thus, this final rule is not subject to the requirements of sections 202 or 205 of UMRA.

At proposal, EPA prepared under section 202 of the UMRA a written statement that is summarized in section VIII.D of the proposal preamble (75 FR 63260, October 14, 2010). A copy of the UMRA written statement can be found in the docket.

At proposal, the estimated costs were higher than the estimated costs of the final rule. At proposal, EPA prepared an RIA, including EPA's assessment of costs and benefits, which is detailed in the "Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units" in the docket. Based on estimated compliance costs associated with the final rule and the predicted change in prices and production in the affected industries, the estimated social costs of the final rule are $55 million ($).

At proposal, EPA consulted with governmental entities expected to be affected by the proposed rule, consistent with the intergovernmental consultation provisions of section 204 of the UMRA. Those consultations are discussed in section VIII.D of the proposal preamble (75 FR 63260).

This final rule is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Because this final rule's requirements apply equally to SSI units owned and/or operated by governments or SSI units owned and/or operated by private entities, there would be no requirements that uniquely apply to such government or impose any disproportionate impacts on them.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

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

EPA's proposed action estimated expenditures of greater than $100 million to state and local governments and therefore as specified by the Executive Order, EPA consulted with elected state and local government officials, or their representative national organizations, when developing regulations and policies that impose substantial compliance costs on state and local governments. Pursuant to Agency policy, EPA conducted a briefing for the "Big 10" intergovernmental organizations representing elected state and local government officials, as discussed in section VIII.D of the proposal preamble (75 FR 63260) to formally request their comments and input on the action. The Big 10 provided EPA with feedback on the proposed standards and EG for SSI units.

EPA has concluded that this final rule will not have federalism implications, as defined by Agency guidance for implementing the Executive Order, due to the final rule's direct compliance costs on state or local governments resulting in expenditures of less than $100 million.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

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

During proposal EPA was not aware of any SSI owned or operated by an Indian tribe or tribal governments, thus, Executive Order 13175 did not appear to have implications. However as specified in Executive Order 13175, (65 FR 67249, November 9, 2000), EPA has attempted to outreach and discuss possible SSI implications with tribal contacts.

EPA presented information on the SSI proposal and specifically solicited additional comment on the proposed action from tribal contacts in the proposal period via the NTAA conference calls.

EPA has received coordinated comments from the NTAA; those comments can be reviewed in the public docket, document number EPA–HQ–OAR–2009–0559–0130.1. Commenters expressed that SSI units located in proximity to Indian country units, obtaining Title V permits, may trigger tribal consultation with regard to potential impact from the SSI unit. Commenters are dismayed, as they believe EPA failed to consult with Indian tribes regarding the standards and have failed to fully assess the potential impacts of SSI units on tribal communities. Lastly, commenters recommended that EPA provide a map overlay that accounts for both SSI units and tribal lands so tribes can acquire a better understanding on how they might be affected by such sites and these standards in general.

EPA participated on two NTAA conference calls to discuss the rule development process, first to provide general information on the development of the SSI standards and second providing more specific background information on the purpose of the rulemaking, number and locations of units, and unit types. EPA allowed time for clarifying questions and requested information if any NTAA members were aware of any type of incinerator burning sewage sludge in Indian Country. EPA will provide a map overlay for the SSI docket so that tribes can acquire a better understanding on how they might be affected by SSI sites and the standards in general.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the

potential to influence the regulation. This final action is not subject to Executive Order 13045 because it is based solely on technology performance. We note however, that reductions in air emissions by these facilities will improve air quality, with expected positive impacts for children's health.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Orders 12866 and 13563.

*I. National Technology Transfer and Advancement Act*

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

EPA conducted searches for the "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units" through the Enhanced National Standards Service Network Database managed by the ANSI. We also contacted VCS organizations, accessed, and searched their data bases.

This rulemaking involves technical standards. EPA has decided to use ANSI/ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses," for its manual methods of measuring the oxygen or carbon dioxide content of the exhaust gas. These parts of ASME PTC 19.10–1981 are acceptable alternatives to EPA Methods 6, 7. This standard is available from the ASME, Three Park Avenue, New York, NY 10016–5990.

Another VCS, ASTM D6784–02 (Reapproved 2008), "Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated From Coal-Fired Stationary Sources (Ontario Hydro Method)" is an acceptable alternative to Method 29 and 30B. EPA has also decided to use EPA Methods 5, 6, 6C, 7, 7E, 9, 10, 10A, 10B, 22, 23, 26A, 29 and 30B. No VCS were found for EPA Method 9 and 22.

During the search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to EPA's reference method, EPA ordered a copy of the standard and reviewed it as a potential equivalent method. All potential standards were reviewed to determine the practicality of the VCS for this rule. This review requires significant method validation data that meet the requirements of EPA Method 301 for accepting alternative methods or scientific, engineering and policy equivalence to procedures in EPA reference methods. EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

The search identified other VCS that were potentially applicable for this rule in lieu of EPA reference methods. After reviewing the available standards, EPA determined that candidate VCS (ASME B133.9–1994 (2001), ISO 9096:1992 (2003), ANSI/ASME PTC PTC–38–1980 (1985), ASTM D3685/D3685M–98 (2005), CAN/CSA Z223.1–M1977, ANSI/ASME PTC 19.10–1981, ISO 10396:1993 (2007), ISO 12039:2001, ASTM D5835–95 (2007), ASTM D6522–00 (2005), CAN/CSA Z223.2–M86 (1999), ISO 7934:1998, ISO 11632:1998, ASTM D1608–98 (2003), ISO I1564:1998, CAN/CSA Z223.24–MI983, CAN/CSA Z223.21–MI978, ASTM D3162–94 (2005), EN 1948–3 (1996), EN 1911–1,2,3 (1998), ASTM D6735–01, EN 13211:2001, CAN/CSA Z223.26–MI987) identified for measuring emissions of pollutants or their surrogates subject to emission standards in the rule would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations.

Under 40 CFR 60.13(i) of the NSPS General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule and any amendments.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income populations. Additionally, the Agency has reviewed this final rule to determine if there was existing disproportionately high and adverse human health or environmental effects on minority or low-income populations that could be mitigated by this rulemaking. An analysis of demographic data showed that the average of populations in close proximity to the sources, and thus most likely to be effected by the sources, were similar in demographic composition to national averages. The results of the demographic analysis are presented in "Review of Environmental Justice Impacts," June 2010, a copy of which is available in the SSI docket (EPA–HQ–OAR–2009–0559).

This final action establishes national emission standards for new and existing SSI units. The EPA estimates that there are approximately 204 such units covered by this rule. The final rule will reduce emissions of many of the listed HAP emitted from this source. This includes emissions of Cd, HCl, Pb, and Hg. Adverse health effects from these pollutants include cancer, irritation of the lungs, skin and mucus membranes, effects on the central nervous system and damage to the kidneys and acute health disorders. The rule will also result in substantial reductions of criteria pollutants such as CO, $NO_X$, PM and $PM_{2.5}$ and $SO_2$. Sulfur dioxide and $NO_X$ are precursors for the formation of $PM_{2.5}$ and ozone. Reducing these emissions will reduce ozone and $PM_{2.5}$ formation and associated health effects, such as adult premature mortality, chronic and acute bronchitis, asthma and other respiratory and cardiovascular diseases. For additional information, please refer to the RIA contained in the docket for this rulemaking. In EPA's July 2010 "Interim Guidance on Considering Environmental Justice During the Development of an Action," EPA defines "environmental justice" as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development,

implementation, and enforcement of environmental laws, regulations, and policies.

To help achieve EPA's goal for Environmental Justice (*i.e.,* the fair treatment and meaningful involvement of all people), EPA places particular emphasis on the public health of and environmental conditions affecting minority, low-income, and indigenous populations. In recognizing that these populations frequently bear a disproportionate burden of environmental harms and risks, EPA works to protect them from adverse public health and environmental effects of its programs. EPA looks at the vulnerabilities of these populations because they have historically been exposed to a combination of physical, chemical, biological, social, and cultural factors that have imposed greater environmental burdens on them than those imposed on the general population.

To promote meaningful involvement, EPA has developed a communication and outreach strategy to ensure that interested communities have access to this final rule, are aware of its content and have an opportunity to comment during the comment period. During the comment period, EPA publicized the rulemaking via environmental newsletters, tribal newsletters, environmental justice listservs, and the Internet, including the OPEI Rulemaking Gateway Web site (*http://yosemite.epa.gov/opei/RuleGate.nsf/*). EPA will also provide general rulemaking fact sheets (*e.g.,* why is this important for my community) for environmental justice community groups and conduct conference calls with interested communities. In addition, state and Federal permitting requirements will provide state and local governments and members of affected communities the opportunity to provide comments on the permit conditions associated with permitting the sources affected by this rulemaking.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective May 20, 2011.

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 21, 2011.

**Lisa Jackson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, part 60 of the Code of Federal Regulations, is amended as follows:

## PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

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

■ 2. Section 60.17 is amended by:
■ a. Adding paragraph (a)(93);
■ b. Revising paragraph (h)(4); and
■ c. Adding paragraph (o) to read as follows:

### § 60.17 Incorporations by reference.

* * * * *

(a) * * *

(93) ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008, IBR approved for §§ 60.2165(j), 60.2730(j), tables 1, 5, 6 and 8 to subpart CCCC, tables 2, 6, 7, and 9 to subpart DDDD, §§ 60.4900(b)(4)(v), 60.5220(b)(4)(v), tables 1 and 2 to subpart LLLL, and tables 2 and 3 to subpart MMMM.

* * * * *

(h) * * *

(4) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], IBR approved for § 60.56c(b)(4), § 60.63(f)(2) and (f)(4), § 60.106(e)(2), §§ 60.104a(d)(3), (d)(5), (d)(6), (h)(3), (h)(4), (h)(5), (i)(3), (i)(4), (i)(5), (j)(3), and (j)(4), § 60.105a(d)(4), (f)(2), (f)(4), (g)(2), and (g)(4), § 60.106a(a)(1)(iii), (a)(2)(iii), (a)(2)(v), (a)(2)(viii), (a)(3)(ii), and (a)(3)(v), and § 60.107a(a)(1)(ii), (a)(1)(iv), (a)(2)(ii), (c)(2), (c)(4), and (d)(2), tables 1 and 3 of subpart EEEE, tables 2 and 4 of subpart FFFF, table 2 of subpart JJJJ, §§ 60.4415(a)(2) and (a)(3), 60.2145(s)(1)(i) and (ii), 60.2145(t)(1)(ii), 60.2145(t)(5)(i), 60.2710(s)(1)(i) and (ii), 60.2710(t)(1)(ii), 60.2710(t)(5)(i), 60.2710(w)(3), 60.2730(q)(3), 60.4900(b)(4)(vii) and (viii), 60.4900(b)(5)(i), 60.5220(b)(4)(vii) and (viii), 60.5220(b)(5)(i), tables 1 and 2 to subpart LLLL, and tables 2 and 3 to subpart MMMM.

* * * * *

(o) The following material is available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov.*

(1) Office of Air Quality Planning and Standards (OAQPS) Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, IBR approved for §§ 60.2145(r)(2), 60.2710(r)(2), 60.4905(b)(3)(i)(B), and 60.5225(b)(3)(i)(B).

(2) [Reserved]

■ 3. Part 60 is amended by adding subparts LLLL and MMMM to read as follows:

## Subpart LLLL—Standards of Performance for New Sewage Sludge Incineration Units

Sec.

**Introduction**

60.4760 What does this subpart do?
60.4765 When does this subpart become effective?

**Applicability and Delegation of Authority**

60.4770 Does this subpart apply to my sewage sludge incineration unit?
60.4775 What is a new sewage sludge incineration unit?
60.4780 What sewage sludge incineration units are exempt from this subpart?
60.4785 Who implements and enforces this subpart?
60.4790 How are these new source performance standards structured?
60.4795 Do all nine components of these new source performance standards apply at the same time?

**Preconstruction Siting Analysis**

60.4800 Who must prepare a siting analysis?
60.4805 What is a siting analysis?

**Operator Training and Qualification**

60.4810 What are the operator training and qualification requirements?
60.4815 When must the operator training course be completed?
60.4820 How do I obtain my operator qualification?
60.4825 How do I maintain my operator qualification?
60.4830 How do I renew my lapsed operator qualification?
60.4835 What if all the qualified operators are temporarily not accessible?
60.4840 What site-specific documentation is required and how often must it be reviewed by qualified operators and plant personnel?

**Emission Limits, Emission Standards, and Operating Limits and Requirements**

60.4845 What emission limits and standards must I meet and by when?
60.4850 What operating limits and requirements must I meet and by when?
60.4855 How do I establish operating limits if I do not use a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection, or if I limit emissions in some other manner, to comply with the emission limits?
60.4860 Do the emission limits, emission standards, and operating limits apply during periods of startup, shutdown, and malfunction?
60.4861 How do I establish affirmative defense for exceedance of an emission limit or standard during malfunction?

**Initial Compliance Requirements**

60.4865 How and when do I demonstrate initial compliance with the emission limits and standards?
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60.4875 By what date must I conduct the initial air pollution control device inspection and make any necessary repairs?
60.4880 How do I develop a site-specific monitoring plan for my continuous monitoring, bag leak detection, and ash handling systems, and by what date must I conduct an initial performance evaluation?

**Continuous Compliance Requirements**

60.4885 How and when do I demonstrate continuous compliance with the emission limits and standards?
60.4890 How do I demonstrate continuous compliance with my operating limits?
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**Performance Testing, Monitoring, and Calibration Requirements**

60.4900 What are the performance testing, monitoring, and calibration requirements for compliance with the emission limits and standards?
60.4905 What are the monitoring and calibration requirements for compliance with my operating limits?

**Recordkeeping and Reporting**

60.4910 What records must I keep?
60.4915 What reports must I submit?

**Title V Operating Permits**

60.4920 Am I required to apply for and obtain a Title V operating permit for my unit?
60.4925 When must I submit a title V permit application for my new SSI unit?

**Definitions**

60.4930 What definitions must I know?

**Tables**

Table 1 to Subpart LLLL of Part 60—Emission Limits and Standards for Fluidized Bed New Sewage Sludge Incineration Units
Table 2 to Subpart LLLL of Part 60—Emission Limits and Standards for New Multiple Hearth Sewage Sludge Incineration Units
Table 3 to Subpart LLLL of Part 60—Operating Parameters for New Sewage Sludge Incineration Units
Table 4 to Subpart LLLL of Part 60—Toxic Equivalency Factors
Table 5 to Subpart LLLL of Part 60—Summary of Reporting Requirements for New Sewage Sludge Incineration Units

## Introduction

### § 60.4760 What does this subpart do?

This subpart establishes new source performance standards for sewage sludge incineration (SSI) units. To the extent any requirement of this subpart is inconsistent with the requirements of subpart A of this part, the requirements of this subpart will apply.

### § 60.4765 When does this subpart become effective?

This subpart takes effect on *September 21, 2011.* Some of the requirements in this subpart apply to planning a SSI unit and must be completed even before construction is initiated on a SSI unit (*i.e.,* the preconstruction requirements in §§ 60.4800 and 60.4805). Other requirements such as the emission limits, emission standards, and operating limits apply after the SSI unit begins operation.

## Applicability and Delegation of Authority

### § 60.4770 Does this subpart apply to my sewage sludge incineration unit?

Yes, your SSI unit is an affected source if it meets all the criteria specified in paragraphs (a) through (c) of this section.

(a) Your SSI unit is a SSI unit for which construction commenced after October 14, 2010 or for which modification commenced after September 21, 2011.

(b) Your SSI unit is a SSI unit as defined in § 60.4930.

(c) Your SSI unit is not exempt under § 60.4780.

### § 60.4775 What is a new sewage sludge incineration unit?

(a) A new SSI unit is a SSI unit that meets either of the two criteria specified in paragraph (a)(1) or (a)(2) of this section.

(1) Commenced construction after October 14, 2010.

(2) Commenced modification after September 21, 2011.

(b) Physical or operational changes made to your SSI unit to comply with the emission guidelines in subpart MMMM of this part (Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units) do not qualify as a modification under this subpart.

### § 60.4780 What sewage sludge incineration units are exempt from this subpart?

This subpart exempts combustion units that incinerate sewage sludge and are not located at a wastewater treatment facility designed to treat domestic sewage sludge. These units may be subject to another subpart of this part (*e.g.,* subpart CCCC of this part). The owner or operator of such a combustion unit must notify the Administrator of an exemption claim under this section.

### § 60.4785 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the Administrator, as defined in § 60.2, or a delegated authority such as your state, local, or tribal agency. If the Administrator has delegated authority to your state, local, or tribal agency, then that agency (as well as the Administrator) has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency, the authorities contained in paragraph (c) of this section are retained by the Administrator and are not transferred to the state, local, or tribal agency.

(c) The authorities that will not be delegated to state, local, or tribal agencies are specified in paragraphs (c)(1) through (c)(8) of this section.

(1) Approval of alternatives to the emission limits and standards in Tables 1 and 2 to this subpart and operating limits established under § 60.4850.

(2) Approval of major alternatives to test methods.

(3) Approval of major alternatives to monitoring.

(4) Approval of major alternatives to recordkeeping and reporting.

(5) The requirements in § 60.4855.

(6) The requirements in § 60.4835(b)(2).

(7) Performance test and data reduction waivers under § 60.8(b).

(8) Preconstruction siting analysis in § 60.4800 and § 60.4805.

### § 60.4790 How are these new source performance standards structured?

These new source performance standards contain the nine major

components listed in paragraphs (a) through (i) of this section.

(a) Preconstruction siting analysis.

(b) Operator training and qualification.

(c) Emission limits, emission standards, and operating limits.

(d) Initial compliance requirements.

(e) Continuous compliance requirements.

(f) Performance testing, monitoring, and calibration requirements.

(g) Recordkeeping and reporting.

(h) Definitions.

(i) Tables.

**§ 60.4795 Do all nine components of these new source performance standards apply at the same time?**

No. You must meet the preconstruction siting analysis requirements before you commence construction of the SSI unit. The operator training and qualification, emission limits, emission standards, operating limits, performance testing, and compliance, monitoring, and most recordkeeping and reporting requirements are met after the SSI unit begins operation.

## Preconstruction Siting Analysis

**§ 60.4800 Who must prepare a siting analysis?**

(a) You must prepare a siting analysis if you plan to commence construction of a SSI unit after October 14, 2010.

(b) You must prepare a siting analysis if you are required to submit an initial application for a construction permit under 40 CFR part 51, subpart I, or 40 CFR part 52, as applicable, for the modification of your SSI unit.

**§ 60.4805 What is a siting analysis?**

(a) The siting analysis must consider air pollution control alternatives that minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment, including impacts of the affected SSI unit on ambient air quality, visibility, soils, and vegetation. In considering such alternatives, the analysis may consider costs, energy impacts, nonair environmental impacts, or any other factors related to the practicability of the alternatives.

(b) Analyses of your SSI unit's impacts that are prepared to comply with state, local, or other Federal regulatory requirements may be used to satisfy the requirements of this section, provided they include the consideration of air pollution control alternatives specified in paragraph (a) of this section.

(c) You must complete and submit the siting requirements of this section as required under § 60.4915(a)(3) prior to commencing construction.

## Operator Training and Qualification

**§ 60.4810 What are the operator training and qualification requirements?**

(a) A SSI unit cannot be operated unless a fully trained and qualified SSI unit operator is accessible, either at the facility or can be at the facility within 1 hour. The trained and qualified SSI unit operator may operate the SSI unit directly or be the direct supervisor of one or more other plant personnel who operate the unit. If all qualified SSI unit operators are temporarily not accessible, you must follow the procedures in § 60.4835.

(b) Operator training and qualification must be obtained through a state-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (c)(3) of this section.

(1) Training on the 10 subjects listed in paragraphs (c)(1)(i) through (c)(1)(x) of this section.

(i) Environmental concerns, including types of emissions.

(ii) Basic combustion principles, including products of combustion.

(iii) Operation of the specific type of incinerator to be used by the operator, including proper startup, sewage sludge feeding, and shutdown procedures.

(iv) Combustion controls and monitoring.

(v) Operation of air pollution control equipment and factors affecting performance (if applicable).

(vi) Inspection and maintenance of the incinerator and air pollution control devices.

(vii) Actions to prevent malfunctions or to prevent conditions that may lead to malfunctions.

(viii) Bottom and fly ash characteristics and handling procedures.

(ix) Applicable Federal, State, and local regulations, including Occupational Safety and Health Administration workplace standards.

(x) Pollution prevention.

(2) An examination designed and administered by the state-approved program.

(3) Written material covering the training course topics that may serve as reference material following completion of the course.

**§ 60.4815 When must the operator training course be completed?**

The operator training course must be completed by the later of the two dates specified in paragraphs (a) and (b) of this section.

(a) Six months after your SSI unit startup.

(b) The date before an employee assumes responsibility for operating the SSI unit or assumes responsibility for supervising the operation of the SSI unit.

**§ 60.4820 How do I obtain my operator qualification?**

(a) You must obtain operator qualification by completing a training course that satisfies the criteria under § 60.4810(b).

(b) Qualification is valid from the date on which the training course is completed and the operator successfully passes the examination required under § 60.4810(c)(2).

**§ 60.4825 How do I maintain my operator qualification?**

To maintain qualification, you must complete an annual review or refresher course covering, at a minimum, the five topics described in paragraphs (a) through (e) of this section.

(a) Update of regulations.

(b) Incinerator operation, including startup and shutdown procedures, sewage sludge feeding, and ash handling.

(c) Inspection and maintenance.

(d) Prevention of malfunctions or conditions that may lead to malfunction.

(e) Discussion of operating problems encountered by attendees.

**§ 60.4830 How do I renew my lapsed operator qualification?**

You must renew a lapsed operator qualification before you begin operation of a SSI unit by one of the two methods specified in paragraphs (a) and (b) of this section.

(a) For a lapse of less than 3 years, you must complete a standard annual refresher course described in § 60.4825.

(b) For a lapse of 3 years or more, you must repeat the initial qualification requirements in § 60.4820(a).

**§ 60.4835 What if all the qualified operators are temporarily not accessible?**

If a qualified operator is not at the facility and cannot be at the facility within 1 hour, you must meet the criteria specified in either paragraph (a) or (b) of this section, depending on the length of time that a qualified operator is not accessible.

(a) When a qualified operator is not accessible for more than 8 hours, the SSI unit may be operated for less than 2 weeks by other plant personnel who are familiar with the operation of the SSI unit and who have completed a review

of the information specified in § 60.4840 within the past 12 months. However, you must record the period when a qualified operator was not accessible and include this deviation in the annual report as specified under § 60.4915(d).

(b) When a qualified operator is not accessible for 2 weeks or more, you must take the two actions that are described in paragraphs (b)(1) and (b)(2) of this section.

(1) Notify the Administrator of this deviation in writing within 10 days. In the notice, state what caused this deviation, what you are doing to ensure that a qualified operator is accessible, and when you anticipate that a qualified operator will be accessible.

(2) Submit a status report to the Administrator every 4 weeks outlining what you are doing to ensure that a qualified operator is accessible, stating when you anticipate that a qualified operator will be accessible, and requesting approval from the Administrator to continue operation of the SSI unit. You must submit the first status report 4 weeks after you notify the Administrator of the deviation under paragraph (b)(1) of this section.

(i) If the Administrator notifies you that your request to continue operation of the SSI unit is disapproved, the SSI unit may continue operation for 30 days, and then must cease operation.

(ii) Operation of the unit may resume if a qualified operator is accessible as required under § 60.4810(a). You must notify the Administrator within 5 days of having resumed operations and of having a qualified operator accessible.

### § 60.4840 What site-specific documentation is required and how often must it be reviewed by qualified operators and plant personnel?

(a) You must maintain at the facility the documentation of the operator training procedures specified under § 60.4910(c)(1) and make the documentation readily accessible to all SSI unit operators.

(b) You must establish a program for reviewing the information listed in § 60.4910(c)(1) with each qualified incinerator operator and other plant personnel who may operate the unit according to the provisions of § 60.4835(a), according to the following schedule:

(1) The initial review of the information listed in § 60.4910(c)(1) must be conducted within 6 months after the effective date of this subpart or prior to an employee's assumption of responsibilities for operation of the SSI unit, whichever date is later.

(2) Subsequent annual reviews of the information listed in § 60.4910(c)(1) must be conducted no later than 12 months following the previous review.

## Emission Limits, Emission Standards, and Operating Limits and Requirements

### § 60.4845 What emission limits and standards must I meet and by when?

You must meet the emission limits and standards specified in Table 1 or 2 to this subpart within 60 days after your SSI unit reaches the feed rate at which it will operate or within 180 days after its initial startup, whichever comes first. The emission limits and standards apply at all times the unit is operating, and during periods of malfunction. The emission limits and standards apply to emissions from a bypass stack or vent while sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time).

### § 60.4850 What operating limits and requirements must I meet and by when?

You must meet, as applicable, the operating limits and requirements specified in paragraphs (a) through (d) and (h) of this section, according to the schedule specified in paragraph (e) of this section. The operating parameters for which you will establish operating limits for a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection are listed in Table 3 to this subpart. You must comply with the operating requirements in paragraph (f) of this section and the requirements in paragraph (g) of this section for meeting any new operating limits, re-established in § 60.4890. The operating limits apply at all times that sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time).

(a) You must meet a site-specific operating limit for minimum operating temperature of the combustion chamber (or afterburner combustion chamber) that you establish in § 60.4890(a)(2)(i).

(b) If you use a wet scrubber, electrostatic precipitator, or activated carbon injection to comply with an emission limit, you must meet the site-specific operating limits that you establish in § 60.4870 for each operating parameter associated with each air pollution control device.

(c) If you use a fabric filter to comply with the emission limits, you must install the bag leak detection system specified in §§ 60.4880(b) and 60.4905(b)(3)(i) and operate the bag leak detection system such that the alarm does not sound more than 5 percent of the operating time during a 6-month period. You must calculate the alarm time as specified in § 60.4870.

(d) You must meet the operating requirements in your site-specific fugitive emission monitoring plan, submitted as specified in § 60.4880(d) to ensure that your ash handling system will meet the emission standard for fugitive emissions from ash handling.

(e) You must meet the operating limits and requirements specified in paragraphs (a) through (d) of this section 60 days after your SSI unit reaches the feed rate at which it will operate, or within 180 days after its initial startup, whichever comes first.

(f) You must monitor the feed rate and moisture content of the sewage sludge fed to the sewage sludge incinerator, as specified in paragraphs (f)(1) and (f)(2) of this section.

(1) Continuously monitor the sewage sludge feed rate and calculate a daily average for all hours of operation during each 24-hour period. Keep a record of the daily average feed rate, as specified in § 60.4910(f)(3)(ii).

(2) Take at least one grab sample per day of the sewage sludge fed to the sewage sludge incinerator. If you take more than one grab sample in a day, calculate the daily average for the grab samples. Keep a record of the daily average moisture content, as specified in § 60.4910(f)(3)(ii).

(g) For the operating limits and requirements specified in paragraphs (a) through (d) and (h) of this section, you must meet any new operating limits and requirements, re-established according to § 60.4890(d).

(h) If you use an air pollution control device other than a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection to comply with the emission limits in Table 1 or 2 to this subpart, you must meet any site-specific operating limits or requirements that you establish as required in § 60.4855.

### § 60.4855 How do I establish operating limits if I do not use a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection, or if I limit emissions in some other manner, to comply with the emission limits?

If you use an air pollution control device other than a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection, or limit emissions in some other manner (*e.g.,* materials balance) to comply with the emission limits in § 60.4845, you must meet the requirements in paragraphs (a) and (b) of this section.

(a) Meet the applicable operating limits and requirements in § 60.4850,

and establish applicable operating limits according to § 60.4870.

(b) Petition the Administrator for specific operating parameters, operating limits, and averaging periods to be established during the initial performance test and to be monitored continuously thereafter.

(1) You are responsible for submitting any supporting information in a timely manner to enable the Administrator to consider the application prior to the performance test. You must not conduct the initial performance test until after the petition has been approved by the Administrator, and you must comply with the operating limits as written, pending approval by the Administrator. Neither submittal of an application, nor the Administrator's failure to approve or disapprove the application relieves you of the responsibility to comply with any provision of this subpart.

(2) Your petition must include the five items listed in paragraphs (b)(2)(i) through (b)(2)(v) of this section.

(i) Identification of the specific parameters you propose to monitor.

(ii) A discussion of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters, and how limits on these parameters will serve to limit emissions of regulated pollutants.

(iii) A discussion of how you will establish the upper and/or lower values for these parameters that will establish the operating limits on these parameters, including a discussion of the averaging periods associated with those parameters for determining compliance.

(iv) A discussion identifying the methods you will use to measure and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments.

(v) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

### § 60.4860 Do the emission limits, emission standards, and operating limits apply during periods of startup, shutdown, and malfunction?

The emission limits and standards apply at all times and during periods of malfunction. The operating limits apply at all times that sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time).

### § 60.4861 How do I establish an affirmative defense for exceedance of an emission limit or standard during malfunction?

In response to an action to enforce the numerical emission standards set forth in paragraph § 60.4845, you may assert an affirmative defense to a claim for civil penalties for exceedances of emission limits that are caused by malfunction, as defined in § 60.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that the conditions in paragraphs (a)(1) through (a)(9) of this section are met.

(1) The excess emissions meet:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices, and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for, and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance, and (2) Repairs were made as expeditiously as possible when the applicable emission limits were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs, and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions, and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage, and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health, and

(6) All emissions monitoring and control systems were kept in operation if at all possible consistent with safety and good air pollution control practices, and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, and

(8) At all times, the affected facility was operated in a manner consistent with good practices for minimizing emissions, and

(9) A written root cause analysis has been prepared the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) The owner or operator of the SSI unit experiencing an exceedance of its emission limit(s) during a malfunction, shall notify the Administrator by telephone or facsimile (fax) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 60.4845 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

## Initial Compliance Requirements

### § 60.4865 How and when do I demonstrate initial compliance with the emission limits and standards?

To demonstrate initial compliance with the emission limits and standards in Table 1 or 2 to this subpart, use the procedures specified in paragraph (a) of this section for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling, and follow the procedures specified in paragraph (b) of this section for carbon monoxide. In lieu of using the procedures specified in paragraph (a) of this section, you also have the option to demonstrate initial compliance using the procedures specified in paragraph (b) of this section for particulate matter,

hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead. You must meet the requirements of paragraphs (a) or (b) of this section, as applicable, and paragraphs (c) and (d) of this section, according to the performance testing, monitoring, and calibration requirements in § 60.4900(a) and (b). Except as provided in paragraph (e) of this section, within 60 days after your SSI unit reaches the feed rate at which it will operate, or within 180 days after its initial startup, whichever comes first, you must demonstrate that your SSI unit meets the emission limits and standards specified in Table 1 or 2 to this subpart.

(a) Demonstrate initial compliance using the performance test required in § 60.8. You must demonstrate that your SSI unit meets the emission limits and standards specified in Table 1 or 2 to this subpart for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling using the performance test. The initial performance test must be conducted using the test methods, averaging methods, and minimum sampling volumes or durations specified in Table 1 or 2 to this subpart and according to the testing, monitoring, and calibration requirements specified in § 60.4900(a).

(b) Demonstrate initial compliance using a continuous emissions monitoring system or continuous automated sampling system. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**. Collect data as specified in § 60.4900(b)(6) and use the following procedures:

(1) To demonstrate initial compliance with the carbon monoxide emission limit specified in Table 1 or 2 to this subpart, you must use the carbon monoxide continuous emissions monitoring system specified in § 60.4900(b). For determining compliance with the carbon monoxide concentration limit using carbon monoxide CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured carbon monoxide concentration without correcting for oxygen concentration in averaging with other carbon monoxide concentrations (corrected to 7 percent oxygen) to determine the 24-hour average value.

(2) To demonstrate initial compliance with the emission limits specified in Table 1 or 2 to this subpart for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead, you may substitute the use of a continuous monitoring system in lieu of conducting the initial performance test required in paragraph (a) of this section, as follows:

(i) You may substitute the use of a continuous emissions monitoring system for any pollutant specified in paragraph (b)(2) of this section in lieu of conducting the initial performance test for that pollutant in paragraph (a) of this section.

(ii) You may substitute the use of a continuous automated sampling system for mercury or dioxins/furans in lieu of conducting the initial mercury or dioxin/furan performance test in paragraph (a) of this section.

(3) If you use a continuous emissions monitoring system to demonstrate compliance with an applicable emission limit in Table 1 or 2 to this subpart, as described in paragraph (b)(1) or (b)(2) of this section, you must use the continuous emissions monitoring system and follow the requirements specified in § 60.4900(b). You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen (or carbon dioxide). You must demonstrate initial compliance using a 24-hour block average of these 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of Method 19 of 40 CFR part 60, appendix A–7.

(4) If you use a continuous automated sampling system to demonstrate compliance with an applicable emission limit in Table 1 or 2 to this subpart, as described in paragraph (b)(2) of this section, you must:

(i) Use the continuous automated sampling system specified in § 60.58b(p) and (q), and measure and calculate average emissions corrected to 7 percent oxygen (or carbon dioxide) according to § 60.58b(p) and your monitoring plan.

(A) Use the procedures specified in § 60.58b(p) to calculate 24-hour block averages to determine compliance with the mercury emission limit in Table 1 or 2 to this subpart.

(B) Use the procedures specified in § 60.58b(p) to calculate 2-week block averages to determine compliance with the dioxin/furan (total mass basis or toxic equivalency basis) emission limits in Table 1 or 2 to this subpart.

(ii) Comply with the provisions in § 60.58b(q) to develop a monitoring plan. For mercury continuous automated sampling systems, you must use Performance Specification 12B of appendix B of part 75 and Procedure 5 of appendix F of this part.

(5) Except as provided in paragraph (e) of this section, you must complete your initial performance evaluations required under your monitoring plan for any continuous emissions monitoring system and continuous automated sampling systems according to the provisions of § 60.4880. Your performance evaluation must be conducted using the procedures and acceptance criteria specified in § 60.4880(a)(3).

(c) To demonstrate initial compliance with the dioxins/furans toxic equivalency emission limit in Table 1 or 2 to this subpart, determine dioxins/furans toxic equivalency as follows:

(1) Measure the concentration of each dioxin/furan tetra- through octachlorinated-isomer emitted using Method 23 at 40 CFR part 60, appendix A–7.

(2) Multiply the concentration of each dioxin/furan (tetra- through octa-chlorinated) isomer by its corresponding toxic equivalency factor specified in Table 4 to this subpart.

(3) Sum the products calculated in accordance with paragraph (c)(2) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

(d) Submit an initial compliance report, as specified in § 60.4915(c).

(e) If you demonstrate initial compliance using the performance test specified in paragraph (a) of this section, then the provisions of this paragraph (e) apply. If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure, you must notify the Administrator in writing as specified in § 60.4915(g). You must conduct the initial performance test as soon as practicable after the force majeure occurs. The Administrator will determine whether or not to grant the extension to the initial performance test deadline, and will notify you in writing of approval or disapproval of the request for an extension as soon as practicable. Until an extension of the performance test deadline has been approved by the Administrator, you remain strictly subject to the requirements of this subpart.

**§ 60.4870 How do I establish my operating limits?**

(a) You must establish the site-specific operating limits specified in paragraphs (b) through (h) of this section or established in § 60.4855, as applicable, during your initial performance tests required in § 60.4865. You must meet the requirements in § 60.4890(d) to confirm these operating limits or re-establish new operating limits using operating data recorded during any performance tests or performance evaluations required in § 60.4885. You must follow the data measurement and recording frequencies and data averaging times specified in Table 3 to this subpart or as established in § 60.4855, and you must follow the testing, monitoring, and calibration requirements specified in §§ 60.4900 and 60.4905 or established in § 60.4855. You are not required to establish operating limits for the operating parameters listed in Table 3 to this subpart for a control device if you use a continuous monitoring system to demonstrate compliance with the emission limits in Table 1 or 2 to this subpart for the applicable pollutants, as follows:

(1) For a scrubber designed to control emissions of hydrogen chloride or sulfur dioxide, you are not required to establish an operating limit and monitor, scrubber liquid flow rate or scrubber liquid pH if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for hydrogen chloride or sulfur dioxide.

(2) For a scrubber designed to control emissions of particulate matter, cadmium, and lead, you are not required to establish an operating limit and monitor pressure drop across the scrubber or scrubber liquid flow rate if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for particulate matter, cadmium, and lead.

(3) For an electrostatic precipitator designed to control emissions of particulate matter, cadmium, and lead, you are not required to establish an operating limit and monitor secondary voltage of the collection plates, secondary amperage of the collection plates, or effluent water flow rate at the outlet of the electrostatic precipitator if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for particulate matter, cadmium, and lead.

(4) For an activated carbon injection system designed to control emissions of mercury, you are not required to establish an operating limit and monitor sorbent injection rate and carrier gas flow rate (or carrier gas pressure drop) if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for mercury.

(5) For an activated carbon injection system designed to control emissions of dioxins/furans, you are not required to establish an operating limit and monitor sorbent injection rate and carrier gas flow rate (or carrier gas pressure drop) if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for dioxins/furans (total mass basis or toxic equivalency basis).

(b) Minimum pressure drop across each wet scrubber used to meet the particulate matter, lead, and cadmium emission limits in Table 1 or 2 to this subpart, equal to the lowest 4-hour average pressure drop across each such wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits.

(c) Minimum scrubber liquid flow rate (measured at the inlet to each wet scrubber), equal to the lowest 4-hour average liquid flow rate measured during the most recent performance test demonstrating compliance with all applicable emission limits.

(d) Minimum scrubber liquid pH for each wet scrubber used to meet the sulfur dioxide or hydrogen chloride emission limits in Table 1 or 2 to this subpart, equal to the lowest 1-hour average scrubber liquid pH measured during the most recent performance test demonstrating compliance with the sulfur dioxide and hydrogen chloride emission limits.

(e) Minimum combustion chamber operating temperature (or minimum afterburner temperature), equal to the lowest 4-hour average combustion chamber operating temperature (or afterburner temperature) measured during the most recent performance test demonstrating compliance with all applicable emission limits.

(f) Minimum power input to the electrostatic precipitator collection plates, equal to the lowest 4-hour average power measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits. Power input must be calculated as the product of the secondary voltage and secondary amperage to the electrostatic precipitator collection plates. Both the secondary voltage and secondary amperage must be recorded during the performance test.

(g) Minimum effluent water flow rate at the outlet of the electrostatic precipitator, equal to the lowest 4-hour average effluent water flow rate at the outlet of the electrostatic precipitator measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits.

(h) For activated carbon injection, establish the site-specific operating limits specified in paragraphs (h)(1) through (h)(3) of this section.

(1) Minimum mercury sorbent injection rate, equal to the lowest 4-hour average mercury sorbent injection rate measured during the most recent performance test demonstrating compliance with the mercury emission limit.

(2) Minimum dioxin/furan sorbent injection rate, equal to the lowest 4-hour average dioxin/furan sorbent injection rate measured during the most recent performance test demonstrating compliance with the dioxin/furan (total mass basis or toxic equivalency basis) emission limit.

(3) Minimum carrier gas flow rate or minimum carrier gas pressure drop, as follows:

(i) Minimum carrier gas flow rate, equal to the lowest 4-hour average carrier gas flow rate measured during the most recent performance test demonstrating compliance with the applicable emission limit.

(ii) Minimum carrier gas pressure drop, equal to the lowest 4-hour average carrier gas flow rate measured during the most recent performance test demonstrating compliance with the applicable emission limit.

**§ 60.4875 By what date must I conduct the initial air pollution control device inspection and make any necessary repairs?**

(a) You must conduct an air pollution control device inspection according to § 60.4900(c) within 60 days of installing an air pollution control device or within 180 days of startup of the SSI unit using the air pollution control device, whichever comes first.

(b) Within 10 operating days following the air pollution control device inspection under paragraph (a) of this section, all necessary repairs must be completed unless you obtain written approval from the Administrator establishing a date whereby all necessary repairs of the SSI unit must be completed.

**§ 60.4880 How do I develop a site-specific monitoring plan for my continuous monitoring, bag leak detection, and ash handling systems, and by what date must I conduct an initial performance evaluation?**

You must develop and submit to the Administrator for approval a site-specific monitoring plan for each continuous monitoring system required under this subpart, according to the requirements in paragraphs (a) through (d) of this section. This requirement also applies to you if you petition the Administrator for alternative monitoring parameters under § 60.13(i) and paragraph (e) of this section. If you use a continuous automated sampling system to comply with the mercury or dioxin/furan (total mass basis or toxic equivalency basis) emission limit, you must develop your monitoring plan as specified in § 60.58b(q), and you are not required to meet the requirements in paragraphs (a) and (b) of this section. You must also submit a site-specific monitoring plan for your ash handling system, as specified in paragraph (d) of this section. You must submit and update your monitoring plans as specified in paragraphs (f) through (h) of this section.

(a) For each continuous monitoring system, your monitoring plan must address the elements and requirements specified in paragraphs (a)(1) through (a)(8) of this section. You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(1) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.*, on or downstream of the last control device).

(2) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems.

(3) Performance evaluation procedures and acceptance criteria (*e.g.*, calibrations).

(i) For continuous emissions monitoring systems, your performance evaluation and acceptance criteria must include, but is not limited to, the following:

(A) The applicable requirements for continuous emissions monitoring systems specified in § 60.13.

(B) The applicable performance specifications (*e.g.*, relative accuracy tests) in appendix B of this part.

(C) The applicable procedures (*e.g.*, quarterly accuracy determinations and daily calibration drift tests) in appendix F of this part.

(D) A discussion of how the occurrence and duration of out-of-control periods will affect the suitability of CEMS data, where out-of-control has the meaning given in section (a)(7)(i) of this section.

(ii) For continuous parameter monitoring systems, your performance evaluation and acceptance criteria must include, but is not limited to the following:

(A) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(A)(*1*) through (*4*) of this section.

(*1*) Install the flow sensor and other necessary equipment in a position that provides a representative flow.

(*2*) Use a flow sensor with a measurement sensitivity of no greater than 2 percent of the expected process flow rate.

(*3*) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(*4*) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(B) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(B)(*1*) through (*6*) of this section.

(*1*) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.*, particulate matter scrubber pressure drop).

(*2*) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(*3*) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(*4*) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.*, check for pressure tap pluggage daily).

(*5*) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(*6*) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(C) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(C)(*1*) through (*4*) of this section.

(*1*) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(*2*) Ensure the sample is properly mixed and representative of the fluid to be measured.

(*3*) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day.

(*4*) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(D) If you have an operating limit that requires the use of a temperature measurement device, you must meet the requirements in paragraphs (a)(3)(ii)(D)(*1*) through (*4*) of this section.

(*1*) Install the temperature sensor and other necessary equipment in a position that provides a representative temperature.

(*2*) Use a temperature sensor with a minimum tolerance of 2.8 degrees Celsius (5 degrees Fahrenheit), or 1.0 percent of the temperature value, whichever is larger, for a noncryogenic temperature range.

(*3*) Use a temperature sensor with a minimum tolerance of 2.8 degrees Celsius (5 degrees Fahrenheit), or 2.5 percent of the temperature value, whichever is larger, for a cryogenic temperature range.

(*4*) Conduct a temperature measurement device performance evaluation at the time of each performance test but no less frequently than annually.

(E) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the requirements in paragraphs (a)(3)(ii)(E)(*1*) and (*2*) of this section.

(*1*) Install sensors to measure (secondary) voltage and current to the electrostatic precipitator collection plates.

(*2*) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance

test but no less frequently than annually.

(F) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (*e.g.,* weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (a)(3)(ii)(F)(*1*) and (*2*) of this section.

(*1*) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate.

(*2*) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(4) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d).

(5) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13.

(6) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b), (c), (c)(1), (c)(4), (d), (e), (f) and (g).

(7) Provisions for periods when the continuous monitoring system is out of control, as follows:

(i) A continuous monitoring system is out of control if the conditions of paragraph (a)(7)(i)(A) or (a)(7)(i)(B) of this section are met.

(A) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the applicable performance specification or in the relevant standard.

(B) The continuous monitoring system fails a performance test audit (*e.g.*, cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit.

(ii) When the continuous monitoring system is out of control as specified in paragraph (a)(7)(i) of this section, you must take the necessary corrective action and must repeat all necessary tests that indicate that the system is out of control. You must take corrective action and conduct retesting until the performance requirements are below the applicable limits. The beginning of the out-of-control period is the hour you conduct a performance check (*e.g.*, calibration drift) that indicates an exceedance of the performance requirements established under this part. The end of the out-of-control period is the hour following the completion of corrective action and successful demonstration that the system is within the allowable limits.

(8) Schedule for conducting initial and periodic performance evaluations.

(b) If a bag leak detection system is used, your monitoring plan must include a description of the following items:

(1) Installation of the bag leak detection system in accordance with paragraphs (b)(1)(i) and (ii) of this section.

(i) Install the bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (*e.g.,* for a positive pressure fabric filter) of the fabric filter.

(ii) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(2) Initial and periodic adjustment of the bag leak detection system, including how the alarm set-point will be established. Use a bag leak detection system equipped with a system that will sound an alarm when the system detects an increase in relative particulate matter emissions over a preset level. The alarm must be located where it is observed readily and any alert is detected and recognized easily by plant operating personnel.

(3) Evaluations of the performance of the bag leak detection system, performed in accordance with your monitoring plan and consistent with the guidance provided in Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997 (incorporated by reference, see § 60.17).

(4) Operation of the bag leak detection system, including quality assurance procedures.

(5) Maintenance of the bag leak detection system, including a routine maintenance schedule and spare parts inventory list.

(6) Recordkeeping (including record retention) of the bag leak detection system data. Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor.

(c) You must conduct an initial performance evaluation of each continuous monitoring system and bag leak detection system, as applicable, in accordance with your monitoring plan and § 60.13(c). For the purposes of this subpart, the provisions of § 60.13(c) also apply to the bag leak detection system. You must conduct the initial performance evaluation of each continuous monitoring system within 60 days of installation of the monitoring system.

(d) You must submit a monitoring plan specifying the ash handling system operating procedures that you will follow to ensure that you meet the fugitive emissions limit specified in Table 1 or 2 to this subpart.

(e) You may submit an application to the Administrator for approval of alternate monitoring requirements to demonstrate compliance with the standards of this subpart, subject to the provisions of paragraphs (e)(1) through (e)(6) of this section.

(1) The Administrator will not approve averaging periods other than those specified in this section, unless you document, using data or information, that the longer averaging period will ensure that emissions do not exceed levels achieved over the duration of three performance test runs.

(2) If the application to use an alternate monitoring requirement is approved, you must continue to use the original monitoring requirement until approval is received to use another monitoring requirement.

(3) You must submit the application for approval of alternate monitoring requirements no later than the notification of performance test. The application must contain the information specified in paragraphs (e)(3)(i) through (e)(3)(iii) of this section:

(i) Data or information justifying the request, such as the technical or economic infeasibility, or the impracticality of using the required approach.

(ii) A description of the proposed alternative monitoring requirement, including the operating parameter to be monitored, the monitoring approach and technique, the averaging period for the limit, and how the limit is to be calculated.

(iii) Data or information documenting that the alternative monitoring requirement would provide equivalent or better assurance of compliance with the relevant emission standard.

(4) The Administrator will notify you of the approval or denial of the application within 90 calendar days after receipt of the original request, or within 60 calendar days of the receipt of any supplementary information, whichever is later. The Administrator will not approve an alternate monitoring application unless it would provide equivalent or better assurance of compliance with the relevant emission standard. Before disapproving any alternate monitoring application, the Administrator will provide the following:

(i) Notice of the information and findings upon which the intended disapproval is based.

(ii) Notice of opportunity for you to present additional supporting information before final action is taken on the application. This notice will specify how much additional time is allowed for you to provide additional supporting information.

(5) You are responsible for submitting any supporting information in a timely manner to enable the Administrator to consider the application prior to the performance test. Neither submittal of an application, nor the Administrator's failure to approve or disapprove the application relieves you of the responsibility to comply with any provision of this subpart.

(6) The Administrator may decide at any time, on a case-by-case basis, that additional or alternative operating limits, or alternative approaches to establishing operating limits, are necessary to demonstrate compliance with the emission standards of this subpart.

(f) You must submit your monitoring plans required in paragraphs (a) and (b) of this section at least 60 days before your initial performance evaluation of your continuous monitoring system(s).

(g) You must submit your monitoring plan for your ash handling system, as required in paragraph (d) of this section, at least 60 days before your initial compliance test date.

(h) You must update and resubmit your monitoring plan if there are any changes or potential changes in your monitoring procedures or if there is a process change, as defined in § 60.4930.

## Continuous Compliance Requirements

### § 60.4885 How and when do I demonstrate continuous compliance with the emission limits and standards?

To demonstrate continuous compliance with the emission limits and standards specified in Table 1 or 2 to this subpart, use the procedures specified in paragraph (a) of this section for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling, and follow the procedures specified in paragraph (b) of this section for carbon monoxide. In lieu of using the procedures specified in paragraph (a) of this section, you also have the option to demonstrate continuous compliance using the procedures specified in paragraph (b) of this section for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead. You must meet the requirements of paragraphs (a) and (b) of this section, as applicable, and paragraphs (c) through (e) of this section, according to the performance testing, monitoring, and calibration requirements in § 60.4900(a) and (b). You may also petition the Administrator for alternative monitoring parameters as specified in paragraph (f) of this section.

(a) Demonstrate continuous compliance using a performance test. Except as provided in paragraphs (a)(3) and (e) of this section, following the date that the initial performance test for each pollutant in Table 1 or 2 to this subpart except carbon monoxide is completed, you must conduct a performance test for each such pollutant on an annual basis (between 11 and 13 calendar months following the previous performance test). The performance test must be conducted using the test methods, averaging methods, and minimum sampling volumes or durations specified in Table 1 or 2 to this subpart and according to the testing, monitoring, and calibration requirements specified in § 60.4900(a).

(1) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward. The Administrator may request a repeat performance test at any time.

(2) You must repeat the performance test within 60 days of a process change, as defined in § 60.4930.

(3) Except as specified in paragraphs (a)(1) and (2) of this section, you can conduct performance tests less often for a given pollutant, as specified in paragraphs (a)(3)(i) through (iii) of this section.

(i) You can conduct performance tests less often if your performance tests for the pollutant for at least 2 consecutive years show that your emissions are at or below 75 percent of the emission limit specified in Table 2 or 3 to this subpart, and there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions. In this case, you do not have to conduct a performance test for that pollutant for the next 2 years. You must conduct a performance test during the third year and no more than 37 months after the previous performance test.

(ii) If your SSI unit continues to meet the emission limit for the pollutant, you may choose to conduct performance tests for the pollutant every third year if your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions, but each such performance test must be conducted no more than 37 months after the previous performance test.

(iii) If a performance test shows emissions exceeded 75 percent of the emission limit for a pollutant, you must conduct annual performance tests for that pollutant until all performance tests over 2 consecutive years show compliance.

(b) Demonstrate continuous compliance using a continuous emissions monitoring system or continuous automated sampling system. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**. Collect data as specified in § 60.4900(b)(6) and use the following procedures:

(1) To demonstrate continuous compliance with the carbon monoxide emission limit, you must use the carbon monoxide continuous emissions monitoring system specified in § 60.4900(b). For determining compliance with the carbon monoxide concentration limit using carbon monoxide CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured carbon monoxide concentration without correcting for oxygen concentration in averaging with other carbon monoxide concentrations (corrected to 7 percent oxygen) to determine the 24-hour average value.

(2) To demonstrate continuous compliance with the emission limits for particulate matter, hydrogen chloride, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead, you may substitute the use of a continuous monitoring system in lieu of conducting the annual performance test required in paragraph (a) of this section, as follows:

(i) You may substitute the use of a continuous emissions monitoring system for any pollutant specified in paragraph (b)(2) of this section in lieu of conducting the annual performance test for that pollutant in paragraph (a) of this section.

(ii) You may substitute the use of a continuous automated sampling system for mercury or dioxins/furans in lieu of

conducting the annual mercury or dioxin/furan performance test in paragraph (a) of this section.

(3) If you use a continuous emissions monitoring system to demonstrate compliance with an applicable emission limit in either paragraph (b)(1) or (b)(2) of this section, you must use the continuous emissions monitoring system and follow the requirements specified in § 60.4900(b). You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen (or carbon dioxide). You must demonstrate initial compliance using a 24-hour block average of these 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of Method 19 of 40 CFR part 60, appendix A–7.

(4) If you use a continuous automated sampling system to demonstrate compliance with an applicable emission limit in paragraph (b)(2) of this section, you must:

(i) Use the continuous automated sampling system specified in § 60.58b(p) and (q), and measure and calculate average emissions corrected to 7 percent oxygen (or carbon dioxide) according to § 60.58b(p) and your monitoring plan.

(A) Use the procedures specified in § 60.58b(p) to calculate 24-hour averages to determine compliance with the mercury emission limit in Table 1 or 2 to this subpart.

(B) Use the procedures specified in § 60.58b(p) to calculate 2-week averages to determine compliance with the dioxin/furan emission limit (total mass basis or toxic equivalency basis) in Table 1 or 2 to this subpart.

(ii) Update your monitoring plan as specified in § 60.4880(e). For mercury continuous automated sampling systems, you must use Performance Specification 12B of appendix B of part 75 and Procedure 5 of appendix F of this part.

(5) Except as provided in paragraph (e) of this section, you must complete your periodic performance evaluations required under your monitoring plan for any continuous emissions monitoring system and continuous automated sampling systems, according to the schedule specified in your monitoring plan. If you were previously determining compliance by conducting an annual performance test (or according to the less frequent testing for a pollutant as provided in paragraph (a)(3) of this section), you must complete the initial performance evaluation required in your monitoring plan in § 60.4880 for the continuous monitoring system prior to using the continuous emissions monitoring system to demonstrate compliance or continuous automated sampling system. Your performance evaluation must be conducted using the procedures and acceptance criteria specified in § 60.4880(a)(3).

(c) To demonstrate compliance with the dioxins/furans toxic equivalency emission limit in paragraph (a) or (b) of this section, you must determine dioxins/furans toxic equivalency as follows:

(1) Measure the concentration of each dioxin/furan tetra- through octa-chlorinated isomer emitted using EPA Method 23.

(2) For each dioxin/furan (tetra- through octa-chlorinated) isomer measured in accordance with paragraph (c)(1) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in Table 4 to this subpart.

(3) Sum the products calculated in accordance with paragraph (c)(2) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

(d) You must submit the annual compliance report specified in § 60.4915(d). You must submit the deviation report specified in § 60.4915(e) for each instance that you did not meet each emission limit in Table 1 or 2 to this subpart.

(e) If you demonstrate continuous compliance using a performance test, as specified in paragraph (a) of this section, then the provisions of this paragraph (e) apply. If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure, you must notify the Administrator in writing as specified in § 60.4915(g). You must conduct the performance test as soon as practicable after the force majeure occurs. The Administrator will determine whether or not to grant the extension to the performance test deadline, and will notify you in writing of approval or disapproval of the request for an extension as soon as practicable. Until an extension of the performance test deadline has been approved by the Administrator, you remain strictly subject to the requirements of this subpart.

(f) After any initial requests in § 60.4880 for alternative monitoring requirements for initial compliance, you may subsequently petition the Administrator for alternative monitoring parameters as specified in §§ 60.13(i) and 60.4880(e).

**§ 60.4890 How do I demonstrate continuous compliance with my operating limits?**

You must continuously monitor your operating parameters as specified in paragraph (a) of this section and meet the requirements of paragraphs (b) and (c) of this section, according to the monitoring and calibration requirements in § 60.4905. You must confirm and re-establish your operating limits as specified in paragraph (d) of this section.

(a) You must continuously monitor the operating parameters specified in paragraphs (a)(1) and (a)(2) of this section using the continuous monitoring equipment and according to the procedures specified in § 60.4905 or established in § 60.4855. To determine compliance, you must use the data averaging period specified in Table 3 to this subpart (except for alarm time of the baghouse leak detection system) unless a different averaging period is established under § 60.4855.

(1) You must demonstrate that the SSI unit meets the operating limits established according to §§ 60.4855 and 60.4870 and paragraph (d) of this section for each applicable operating parameter.

(2) You must demonstrate that the SSI unit meets the operating limit for bag leak detection systems as follows:

(i) For a bag leak detection system, you must calculate the alarm time as follows:

(A) If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted.

(B) If corrective action is required, each alarm time shall be counted as a minimum of 1 hour.

(C) If you take longer than 1 hour to initiate corrective action, each alarm time (*i.e.,* time that the alarm sounds) is counted as the actual amount of time taken by you to initiate corrective action.

(ii) Your maximum alarm time is equal to 5 percent of the operating time during a 6-month period, as specified in § 60.4850(c).

(b) Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. You must submit the deviation report specified in § 60.4915(e) for each instance that you did not meet one of

your operating limits established under this subpart.

(c) You must submit the annual compliance report specified in § 60.4915(d) to demonstrate continuous compliance.

(d) You must confirm your operating limits according to paragraph (d)(1) of this section or re-establish operating limits according to paragraph (d)(2) of this section. Your operating limits must be established so as to assure ongoing compliance with the emission limits. These requirements also apply to your operating requirements in your fugitive emissions monitoring plan specified in § 60.4850(d).

(1) Your operating limits must be based on operating data recorded during any performance test required in § 60.4885(a) or any performance evaluation required in § 60.4885(b)(5).

(2) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward.

### § 60.4895 By what date must I conduct annual air pollution control device inspections and make any necessary repairs?

(a) You must conduct an annual inspection of each air pollution control device used to comply with the emission limits, according to § 60.4900(c), no later than 12 months following the previous annual air pollution control device inspection.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless you obtain written approval from the Administrator establishing a date whereby all necessary repairs of the affected SSI unit must be completed.

## Performance Testing, Monitoring, and Calibration Requirements

### § 60.4900 What are the performance testing, monitoring, and calibration requirements for compliance with the emission limits and standards?

You must meet, as applicable, the performance testing requirements specified in paragraph (a) of this section, the monitoring requirements specified in paragraph (b) of this section, the air pollution control device inspections requirements specified in paragraph (c) of this section, and the bypass stack provisions specified in paragraph (d) of this section.

(a) *Performance testing requirements.*

(1) All performance tests must consist of a minimum of three test runs conducted under conditions representative of normal operations, as specified in § 60.8(c). Emissions in excess of the emission limits or standards during periods of startup, shutdown, and malfunction are considered deviations from the applicable emission limits or standards.

(2) You must document that the dry sludge burned during the performance test is representative of the sludge burned under normal operating conditions by:

(i) Maintaining a log of the quantity of sewage sludge burned during the performance test by continuously monitoring and recording the average hourly rate that sewage sludge is fed to the incinerator.

(ii) Maintaining a log of the moisture content of the sewage sludge burned during the performance test by taking grab samples of the sewage sludge fed to the incinerator for each 8 hour period that testing is conducted.

(3) All performance tests must be conducted using the test methods, minimum sampling volume, observation period, and averaging methods specified in Table 1 or 2 to this subpart.

(4) Method 1 at 40 CFR part 60, appendix A–1 must be used to select the sampling location and number of traverse points.

(5) Method 3A or 3B at 40 CFR part 60, appendix A–2 must be used for gas composition analysis, including measurement of oxygen concentration. Method 3A or 3B at 40 CFR part 60, appendix A–2 must be used simultaneously with each method.

(6) All pollutant concentrations must be adjusted to 7 percent oxygen using Equation 1 of this section:

$$C_{adj} = C_{meas}(20.9-7)/(20.9-\%O_2) \quad \text{(Eq. 1)}$$

Where:

$C_{adj}$ = Pollutant concentration adjusted to 7 percent oxygen.

$C_{meas}$ = Pollutant concentration measured on a dry basis.

(20.9–7) = 20.9 percent oxygen − 7 percent oxygen (defined oxygen correction basis).

20.9 = Oxygen concentration in air, percent.

$\%O_2$ = Oxygen concentration measured on a dry basis, percent.

(7) Performance tests must be conducted and data reduced in accordance with the test methods and procedures contained in this subpart unless the Administrator does one of the following.

(i) Specifies or approves, in specific cases, the use of a method with minor changes in methodology.

(ii) Approves the use of an equivalent method.

(iii) Approves the use of an alternative method the results of which he has determined to be adequate for indicating whether a specific source is in compliance.

(iv) Waives the requirement for performance tests because you have demonstrated by other means to the Administrator's satisfaction that the affected SSI unit is in compliance with the standard.

(v) Approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors. Nothing in this paragraph is construed to abrogate the Administrator's authority to require testing under section 114 of the Clean Air Act.

(8) You must provide the Administrator at least 30 days prior notice of any performance test, except as specified under other subparts, to afford the Administrator the opportunity to have an observer present. If after 30 days notice for an initially scheduled performance test, there is a delay (due to operational problems, *etc.*) in conducting the scheduled performance test, you must notify the Administrator as soon as possible of any delay in the original test date, either by providing at least 7 days prior notice of the rescheduled date of the performance test, or by arranging a rescheduled date with the Administrator by mutual agreement.

(9) You must provide, or cause to be provided, performance testing facilities as follows:

(i) Sampling ports adequate for the test methods applicable to the SSI unit, as follows:

(A) Constructing the air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by applicable test methods and procedures.

(B) Providing a stack or duct free of cyclonic flow during performance tests, as demonstrated by applicable test methods and procedures.

(ii) Safe sampling platform(s).

(iii) Safe access to sampling platform(s).

(iv) Utilities for sampling and testing equipment.

(10) Unless otherwise specified in this subpart, each performance test must consist of three separate runs using the applicable test method. Each run must be conducted for the time and under the conditions specified in the applicable standard. Compliance with each emission limit must be determined by calculating the arithmetic mean of the three runs. In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond your control, compliance may, upon the Administrator's approval, be determined using the arithmetic mean of the results of the two other runs.

(11) During each test run specified in paragraph (a)(1) of this section, you must operate your sewage sludge incinerator at a minimum of 85 percent of your maximum permitted capacity.

(b) *Continuous monitor requirements.* You must meet the following requirements, as applicable, when using a continuous monitoring system to demonstrate compliance with the emission limits in Table 1 or 2 to this subpart. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. If you elect to use a continuous emissions monitoring system instead of conducting annual performance testing, you must meet the requirements of paragraphs (b)(1) through (b)(6) of this section. If you elect to use a continuous automated sampling system instead of conducting annual performance testing, you must meet the requirements of paragraph (b)(7) of this section. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**.

(1) You must notify the Administrator one month before starting use of the continuous monitoring system.

(2) You must notify the Administrator one month before stopping use of the continuous monitoring system, in which case you must also conduct a performance test prior to ceasing operation of the system.

(3) You must install, operate, calibrate, and maintain an instrument for continuously measuring and recording the emissions to the atmosphere in accordance with the following:

(i) Section 60.13 of subpart A of this part.

(ii) The following performance specifications of appendix B of this part, as applicable:

(A) For particulate matter, Performance Specification 11 of appendix B of this part.

(B) For hydrogen chloride, Performance Specification 15 of appendix B of this part.

(C) For carbon monoxide, Performance Specification 4B of appendix B of this part with the modifications shown in Tables 1 and 2 to this subpart.

(D) [Reserved]

(E) For mercury, Performance Specification 12A of appendix B of this part.

(F) For nitrogen oxides, Performance Specification 2 of appendix B of this part.

(G) For sulfur dioxide, Performance Specification 2 of appendix B of this part.

(iii) For continuous emissions monitoring systems, the quality assurance procedures (*e.g.,* quarterly accuracy determinations and daily calibration drift tests) of appendix F of this part specified in paragraphs (b)(3)(iii)(A) through (b)(3)(iii)(G) of this section. For each pollutant, the span value of the continuous emissions monitoring system is two times the applicable emission limit, expressed as a concentration.

(A) For particulate matter, Procedure 2 in appendix F of this part.

(B) For hydrogen chloride, Procedure 1 in appendix F of this part except that the Relative Accuracy Test Audit requirements of Procedure 1 shall be replaced with the validation requirements and criteria of sections 11.1.1 and 12.0 of Performance Specification 15 of appendix B of this part.

(C) For carbon monoxide, Procedure 1 in appendix F of this part.

(D) [Reserved]

(E) For mercury, Procedures 5 in appendix F of this part.

(F) For nitrogen oxides, Procedure 1 in appendix F of this part.

(G) For sulfur dioxide, Procedure 1 in appendix F of this part.

(iv) If your monitoring system has a malfunction or out-of-control period, you must complete repairs and resume operation of your monitoring system as expeditiously as possible.

(4) During each relative accuracy test run of the continuous emissions monitoring system using the performance specifications in paragraph (b)(3)(ii) of this section, emission data for each regulated pollutant and oxygen (or carbon dioxide as established in paragraph (b)(5) of this section) must be collected concurrently (or within a 30- to 60-minute period) by both the continuous emissions monitoring systems and the test methods specified in paragraphs (b)(4)(i) through (b)(4)(viii) of this section. Relative accuracy testing must be at representative operating conditions while the SSI unit is charging sewage sludge.

(i) For particulate matter, Method 5 at 40 CFR part 60, appendix A–3 or Method 26A or 29 at 40 CFR part 60, appendix A–8 shall be used.

(ii) For hydrogen chloride, Method 26 or 26A at 40 CFR part 60, appendix A–8, shall be used as specified in Tables 2 and 3 to this subpart.

(iii) For carbon monoxide, Method 10, 10A, or 10B at 40 CFR part 60, appendix A–4, shall be used.

(iv) For dioxins/furans, Method 23 at 40 CFR part 60, appendix A–7, shall be used.

(v) For mercury, cadmium, and lead, Method 29 at 40 CFR part 60, appendix A–8 shall be used. Alternatively for mercury, Method 30B at 40 CFR part 60, appendix A–8 or ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), may be used.

(vi) For nitrogen oxides, Method 7 or 7E at 40 CFR part 60, appendix A–4, shall be used.

(vii) For sulfur dioxide, Method 6 or 6C at 40 CFR part 60, appendix A–4, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) must be used. For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide continuous emissions monitoring system should be no greater than 20 percent of the mean value of the method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the method and the continuous emissions monitoring system, whichever is greater.

(viii) For oxygen (or carbon dioxide as established in (b)(5) of this section), Method 3A or 3B at 40 CFR part 60, appendix A–2, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(5) You may request that compliance with the emission limits be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon

dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (b)(5)(i) through (b)(5)(iv) of this section. This relationship may be re-established during subsequent performance tests.

(i) The fuel factor equation in Method 3B at 40 CFR part 60, appendix A–2 must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A or 3B at 50 CFR part 60, appendix A–2, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor.

(ii) Samples must be taken for at least 30 minutes in each hour.

(iii) Each sample must represent a 1-hour average.

(iv) A minimum of three runs must be performed.

(6) You must operate the continuous monitoring system and collect data with the continuous monitoring system as follows:

(i) You must collect data using the continuous monitoring system at all times the affected SSI unit is operating and at the intervals specified in paragraph (b)(6)(ii) of this section, except for periods of monitoring system malfunctions that occur during periods specified in § 60.4880(a)(7)(i), repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments). Any such periods that you do not collect data using the continuous monitoring system constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(ii) You must collect continuous emissions monitoring system data in accordance with § 60.13(e)(2).

(iii) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities conducted during monitoring system malfunctions must not be included in calculations used to report emissions or operating levels. Any such periods must be reported in a deviation report.

(iv) Any data collected during periods when the monitoring system is out of control as specified in § 60.4880(a)(7)(i), repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or control activities conducted during out-of-control periods must not be included in calculations used to report emissions or operating levels. Any such periods that do not coincide with a monitoring system malfunction constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(v) You must use all the data collected during all periods except those periods specified in paragraphs (b)(6)(iii) and (b)(6)(iv) of this section in assessing the operation of the control device and associated control system.

(7) If you elect to use a continuous automated sampling system instead of conducting annual performance testing, you must:

(i) Install, calibrate, maintain, and operate a continuous automated sampling system according to the site-specific monitoring plan developed in § 60.58b(p)(1) through (p)(6), (p)(9), (p)(10), and (q).

(ii) Collect data according to § 60.58b(p)(5) and paragraph (b)(6) of this section.

(c) *Air pollution control device inspections.* You must conduct air pollution control device inspections that include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation.

(2) Generally observe that the equipment is maintained in good operating condition.

(3) Develop a site-specific monitoring plan according to the requirements in § 60.4880. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i).

(d) *Bypass stack.* Use of the bypass stack at any time that sewage sludge is being charged to the SSI unit is an emissions standards deviation for all pollutants listed in Table 1 or 2 to this subpart. The use of the bypass stack during a performance test invalidates the performance test.

**§ 60.4905 What are the monitoring and calibration requirements for compliance with my operating limits?**

(a) You must install, operate, calibrate, and maintain the continuous parameter monitoring systems according to the requirements in paragraphs (a)(1) and (2) of this section.

(1) Meet the following general requirements for flow, pressure, pH, and operating temperature measurement devices:

(i) You must collect data using the continuous monitoring system at all times the affected SSI unit is operating and at the intervals specified in paragraph (a)(1)(ii) of this section, except for periods of monitoring system malfunctions that occur during periods specified in § 60.4880(a)(7)(i), repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments). Any such periods that you do not collect data using the continuous monitoring system constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(ii) You must collect continuous parameter monitoring system data in accordance with § 60.13(e)(2).

(iii) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities conducted during monitoring system malfunctions must not be included in calculations used to report emissions or operating levels. Any such periods must be reported in your annual deviation report.

(iv) Any data collected during periods when the monitoring system is out of control as specified in § 60.4880(a)(7)(i), repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or control activities conducted during out-of-control periods must not be included in calculations used to report emissions or operating levels. Any such periods that do not coincide with a monitoring system malfunction, as defined in § 60.4930, constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(v) You must use all the data collected during all periods except those periods specified in paragraphs (a)(1)(iii) and (a)(1)(iv) of this section in assessing the operation of the control device and associated control system.

(vi) Record the results of each inspection, calibration, and validation check.

(2) Operate and maintain your continuous monitoring system according to your monitoring plan required under § 60.4880. Additionally:

(i) For carrier gas flow rate monitors (for activated carbon injection), during the performance test conducted pursuant to § 60.4885, you must demonstrate that the system is maintained within +/−5 percent accuracy, according to the procedures in appendix A to part 75 of this chapter.

(ii) For carrier gas pressure drop monitors (for activated carbon

injection), during the performance test conducted pursuant to § 60.4885, you must demonstrate that the system is maintained within +/−5 percent accuracy.

(b) You must operate and maintain your bag leak detection system in continuous operation according to your monitoring plan required under § 60.4880. Additionally:

(1) For positive pressure fabric filter systems that do not duct all compartments of cells to a common stack, a bag leak detection system must be installed in each baghouse compartment or cell.

(2) Where multiple bag leak detectors are required, the system's instrumentation and alarm may be shared among detectors.

(3) You must initiate procedures to determine the cause of every alarm within 8 hours of the alarm, and you must alleviate the cause of the alarm within 24 hours of the alarm by taking whatever corrective action(s) are necessary. Corrective actions may include, but are not limited to the following:

(i) Inspecting the fabric filter for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in particulate matter emissions.

(ii) Sealing off defective bags or filter media.

(iii) Replacing defective bags or filter media or otherwise repairing the control device.

(iv) Sealing off a defective fabric filter compartment.

(v) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system.

(vi) Shutting down the process producing the particulate matter emissions.

(c) You must operate and maintain the continuous parameter monitoring systems specified in paragraphs (a) and (b) of this section in continuous operation according to your monitoring plan required under § 60.4880.

(d) If your SSI unit has a bypass stack, you must install, calibrate (to manufacturers' specifications), maintain, and operate a device or method for measuring the use of the bypass stack including date, time, and duration.

## Recordkeeping and Reporting

### § 60.4910 What records must I keep?

You must maintain the items (as applicable) specified in paragraphs (a) through (n) of this section for a period of at least 5 years. All records must be available on site in either paper copy or computer-readable format that can be printed upon request, unless an alternative format is approved by the Administrator.

(a) *Date.* Calendar date of each record.

(b) *Siting.* All documentation produced as a result of the siting requirements of §§ 60.4800 and 60.4805.

(c) *Operator Training.* Documentation of the operator training procedures and records specified in paragraphs (c)(1) through (c)(4) of this section. You must make available and readily accessible at the facility at all times for all SSI unit operators the documentation specified in paragraph (c)(1) of this section.

(1) Documentation of the following operator training procedures and information:

(i) Summary of the applicable standards under this subpart.

(ii) Procedures for receiving, handling, and feeding sewage sludge.

(iii) Incinerator startup, shutdown, and malfunction preventative and corrective procedures.

(iv) Procedures for maintaining proper combustion air supply levels.

(v) Procedures for operating the incinerator and associated air pollution control systems within the standards established under this subpart.

(vi) Monitoring procedures for demonstrating compliance with the incinerator operating limits.

(vii) Reporting and recordkeeping procedures.

(viii) Procedures for handling ash.

(ix) A list of the materials burned during the performance test, if in addition to sewage sludge.

(x) For each qualified operator and other plant personnel who may operate the unit according to the provisions of § 60.4835(a), the phone and/or pager number at which they can be reached during operating hours.

(2) Records showing the names of SSI unit operators and other plant personnel who may operate the unit according to the provisions of § 60.4835(a), as follows:

(i) Records showing the names of SSI unit operators and other plant personnel who have completed review of the information in paragraph (c)(1) of this section as required by § 60.4840(b), including the date of the initial review and all subsequent annual reviews.

(ii) Records showing the names of the SSI operators who have completed the operator training requirements under § 60.4810, met the criteria for qualification under § 60.4820, and maintained or renewed their qualification under § 60.4825 or § 60.4830. Records must include documentation of training, including the dates of their initial qualification and all subsequent renewals of such qualifications.

(3) Records showing the periods when no qualified operators were accessible for more than 8 hours, but less than 2 weeks, as required in § 60.4835(a).

(4) Records showing the periods when no qualified operators were accessible for 2 weeks or more along with copies of reports submitted as required in § 60.4835(b).

(d) *Air pollution control device inspections.* Records of the results of initial and annual air pollution control device inspections conducted as specified in §§ 60.4875 and 60.4900(c), including any required maintenance and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(e) *Performance test reports.*

(1) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and standards and/or to establish operating limits, as applicable.

(2) Retain a copy of the complete performance test report, including calculations.

(3) Keep a record of the hourly dry sludge feed rate measured during performance test runs, as specified in § 60.4900(a)(2)(i).

(4) Keep any necessary records to demonstrate that the performance test was conducted under conditions representative of normal operations, including a record of the moisture content measured as required in § 60.4900(a)(2)(ii) for each grab sample taken of the sewage sludge burned during the performance test.

(f) *Continuous monitoring data.* Records of the following data, as applicable:

(1) For continuous emissions monitoring systems, all 1-hour average concentrations of particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans total mass basis, mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead emissions.

(2) For continuous automated sampling systems, all average concentrations measured for mercury and dioxins/furans total mass basis at the frequencies specified in your monitoring plan.

(3) For continuous parameter monitoring systems:

(i) All 1-hour average values recorded for the following operating parameters, as applicable:

(A) Combustion chamber operating temperature (or afterburner temperature).

(B) If a wet scrubber is used to comply with the rule, pressure drop across each wet scrubber system, liquid flow rate to each wet scrubber used to comply with the emission limit in Table 1 or 2 to this subpart for particulate matter, cadmium, or lead, and scrubber liquid flow rate and scrubber liquid pH for each wet scrubber used to comply with an emission limit in Table 1 or 2 to this subpart for sulfur dioxide or hydrogen chloride.

(C) If an electrostatic precipitator is used to comply with the rule, secondary voltage and secondary amperage of the electrostatic precipitator collection plates, and effluent water flow rate at the outlet of the wet electrostatic precipitator.

(D) If activated carbon injection is used to comply with the rule, sorbent flow rate and carrier gas flow rate or pressure drop, as applicable.

(ii) All daily average values recorded for the feed rate and moisture content of the sewage sludge fed to the sewage sludge incinerator, monitored and calculated as specified in § 60.4850(f).

(iii) If a fabric filter is used to comply with the rule, the date, time, and duration of each alarm and the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of operating time during each 6-month period that the alarm sounds, calculated as specified in § 60.4890.

(iv) For other control devices for which you must establish operating limits under § 60.4855, you must maintain data collected for all operating parameters used to determine compliance with the operating limits, at the frequencies specified in your monitoring plan.

(g) *Other records for continuous monitoring systems.* You must keep the following records, as applicable:

(1) Keep records of any notifications to the Administrator in § 60.4915(h)(1) of starting or stopping use of a continuous monitoring system for determining compliance with any emissions limit.

(2) Keep records of any requests under § 60.4900(b)(5) that compliance with the emission limits be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen.

(3) If activated carbon injection is used to comply with the rule, the type of sorbent used and any changes in the type of sorbent used.

(h) *Deviation Reports.* Records of any deviation reports submitted under § 60.4915(e) and (f).

(i) *Equipment specifications and operation and maintenance requirements.* Equipment specifications and related operation and maintenance requirements received from vendors for the incinerator, emission controls, and monitoring equipment.

(j) *Inspections, calibrations, and validation checks of monitoring devices.* Records of inspections, calibrations, and validations checks of any monitoring devices as required under §§ 60.4900 and 60.4905.

(k) *Monitoring plan and performance evaluations for continuous monitoring systems.* Records of the monitoring plans required under § 60.4880, and records of performance evaluations required under § 60.4885(b)(5).

(l) *Less frequent testing.* If, consistent with 60.4885(a)(3), you elect to conduct performance tests less frequently than annually, you must keep annual records that document that your emissions in the 2 previous consecutive years were at or below 75 percent of the applicable emission limit in Table 1 or 2 to this subpart, and document that there were no changes in source operations or air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past 2 years.

(m) *Use of bypass stack.* Records indicating use of the bypass stack, including dates, times, and durations as required under § 60.4905(d).

(n) If a malfunction occurs, you must keep a record of the information submitted in your annual report in § 60.4915(d)(16).

**§ 60.4915 What reports must I submit?**

You must submit the reports specified in paragraphs (a) through (j) of this section. See Table 5 to this subpart for a summary of these reports.

(a) *Notification of construction.* You must submit a notification prior to commencing construction that includes the four items listed in paragraphs (a)(1) through (a)(4) of this section:

(1) A statement of intent to construct.

(2) The anticipated date of commencement of construction.

(3) All documentation produced as a result of the siting requirements of § 60.4805.

(4) Anticipated date of initial startup.

(b) *Notification of initial startup.* You must submit the information specified in paragraphs (b)(1) through (b)(5) of this section prior to initial startup:

(1) The maximum design dry sludge burning capacity.

(2) The anticipated and permitted maximum dry sludge feed rate.

(3) If applicable, the petition for site-specific operating limits specified in § 60.4855.

(4) The anticipated date of initial startup.

(5) The site-specific monitoring plan required under § 60.4880, at least 60 days before your initial performance evaluation of your continuous monitoring system.

(6) The site-specific monitoring plan for your ash handling system required under § 60.4880, at least 60 days before your initial performance test to demonstrate compliance with your fugitive ash emission limit.

(c) *Initial compliance report.* You must submit the following information no later than 60 days following the initial performance test.

(1) Company name, physical address, and mailing address.

(2) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(3) Date of report.

(4) The complete test report for the initial performance test results obtained by using the test methods specified in Table 1 or 2 to this subpart.

(5) If an initial performance evaluation of a continuous monitoring system was conducted, the results of that initial performance evaluation.

(6) The values for the site-specific operating limits established pursuant to §§ 60.4850 and 60.4855 and the calculations and methods, as applicable, used to establish each operating limit.

(7) If you are using a fabric filter to comply with the emission limits, documentation that a bag leak detection system has been installed and is being operated, calibrated, and maintained as required by § 60.4850(b).

(8) The results of the initial air pollution control device inspection required in § 60.4875, including a description of repairs.

(d) *Annual compliance report.* You must submit an annual compliance report that includes the items listed in paragraphs (d)(1) through (d)(16) of this section for the reporting period specified in paragraph (d)(3) of this section. You must submit your first annual compliance report no later than 12 months following the submission of the initial compliance report in paragraph (c) of this section. You must submit subsequent annual compliance reports no more than 12 months following the previous annual compliance report. (You may be required to submit these reports (or additional compliance information) more frequently by the title V operating permit required in § 60.4920.)

(1) Company name, physical address, and mailing address.

(2) Statement by a responsible official, with that official's name, title, and

signature, certifying the accuracy of the content of the report.

(3) Date of report and beginning and ending dates of the reporting period.

(4) If a performance test was conducted during the reporting period, the results of that performance test.

(i) If operating limits were established during the performance test, include the value for each operating limit and, as applicable, the method used to establish each operating limit, including calculations.

(ii) If activated carbon is used during the performance test, include the type of activated carbon used.

(5) For each pollutant and operating parameter recorded using a continuous monitoring system, the highest average value and lowest average value recorded during the reporting period, as follows:

(i) For continuous emission monitoring systems and continuous automated sampling systems, report the highest and lowest 24-hour average emission value.

(ii) For continuous parameter monitoring systems, report the following values:

(A) For all operating parameters except scrubber liquid pH, the highest and lowest 12-hour average values.

(B) For scrubber liquid pH, the highest and lowest 3-hour average values.

(6) If there are no deviations during the reporting period from any emission limit, emission standard, or operating limit that applies to you, a statement that there were no deviations from the emission limits, emission standard, or operating limits.

(7) Information for bag leak detection systems recorded under § 60.4910(f)(3)(iii).

(8) If a performance evaluation of a continuous monitoring system was conducted, the results of that performance evaluation. If new operating limits were established during the performance evaluation, include your calculations for establishing those operating limits.

(9) If you elect to conduct performance tests less frequently as allowed in § 60.4885(a)(3) and did not conduct a performance test during the reporting period, you must include the dates of the last two performance tests, a comparison of the emission level you achieved in the last two performance tests to the 75 percent emission limit threshold specified in § 60.4885(a)(3), and a statement as to whether there have been any process changes and whether the process change resulted in an increase in emissions.

(10) Documentation of periods when all qualified SSI unit operators were unavailable for more than 8 hours, but less than 2 weeks.

(11) Results of annual air pollution control device inspections recorded under § 60.4910(d) for the reporting period, including a description of repairs.

(12) If there were no periods during the reporting period when your continuous monitoring systems had a malfunction, a statement that there were no periods during which your continuous monitoring systems had a malfunction.

(13) If there were no periods during the reporting period when a continuous monitoring system was out of control, a statement that there were no periods during which your continuous monitoring system was out of control.

(14) If there were no operator training deviations, a statement that there were no such deviations during the reporting period.

(15) If you did not make revisions to your site-specific monitoring plan during the reporting period, a statement that you did not make any revisions to your site-specific monitoring plan during the reporting period. If you made revisions to your site-specific monitoring plan during the reporting period, a copy of the revised plan.

(16) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction.

(e) *Deviation reports.*

(1) You must submit a deviation report if:

(i) Any recorded operating parameter level, based on the averaging time specified in Table 3 to this subpart, is above the maximum operating limit or below the minimum operating limit established under this subpart.

(ii) The bag leak detection system alarm sounds for more than 5 percent of the operating time for the 6-month reporting period.

(iii) Any recorded 24-hour block average emissions level is above the emission limit, if a continuous monitoring system is used to comply with an emission limit.

(iv) There are visible emissions of combustion ash from an ash conveying system for more than 5 percent of the hourly observation period.

(v) A performance test was conducted that deviated from any emission limit in Table 1 or 2 to this subpart.

(vi) A continuous monitoring system was out of control.

(vii) You had a malfunction (*e.g.*, continuous monitoring system malfunction) that caused or may have caused any applicable emission limit to be exceeded.

(2) The deviation report must be submitted by August 1 of that year for data collected during the first half of the calendar year (January 1 to June 30), and by February 1 of the following year for data you collected during the second half of the calendar year (July 1 to December 31).

(3) For each deviation where you are using a continuous monitoring system to comply with an associated emission limit or operating limit, report the items described in paragraphs (e)(3)(i) through (e)(3)(viii) of this section.

(i) Company name, physical address, and mailing address.

(ii) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(iii) The calendar dates and times your unit deviated from the emission limits, emission standards, or operating limits requirements.

(iv) The averaged and recorded data for those dates.

(v) Duration and cause of each deviation from the following:

(A) Emission limits, emission standards, operating limits, and your corrective actions.

(B) Bypass events and your corrective actions.

(vi) Dates, times, and causes for monitor downtime incidents.

(vii) A copy of the operating parameter monitoring data during each deviation and any test report that documents the emission levels.

(viii) If there were periods during which the continuous monitoring system malfunctioned or was out of control, you must include the following information for each deviation from an emission limit or operating limit:

(A) The date and time that each malfunction started and stopped.

(B) The date, time, and duration that each continuous monitoring system was inoperative, except for zero (low-level) and high-level checks.

(C) The date, time, and duration that each continuous monitoring system was out of control, including start and end dates and hours and descriptions of corrective actions taken.

(D) The date and time that each deviation started and stopped, and

whether each deviation occurred during a period of malfunction, during a period when the system as out of control, or during another period.

(E) A summary of the total duration of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period.

(F) A breakdown of the total duration of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes.

(G) A summary of the total duration of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the SSI unit at which the continuous monitoring system downtime occurred during that reporting period.

(H) An identification of each parameter and pollutant that was monitored at the SSI unit.

(I) A brief description of the SSI unit.

(J) A brief description of the continuous monitoring system.

(K) The date of the latest continuous monitoring system certification or audit.

(L) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period.

(4) For each deviation where you are not using a continuous monitoring system to comply with the associated emission limit or operating limit, report the following items:

(i) Company name, physical address, and mailing address.

(ii) Statement by a responsible official with that official's name, title, and signature, certifying the accuracy of the content of the report.

(iii) The total operating time of each affected SSI during the reporting period.

(iv) The calendar dates and times your unit deviated from the emission limits, emission standards, or operating limits requirements.

(v) The averaged and recorded data for those dates.

(vi) Duration and cause of each deviation from the following:

(A) Emission limits, emission standard, and operating limits, and your corrective actions.

(B) Bypass events and your corrective actions.

(vii) A copy of any performance test report that showed a deviation from the emission limits or standard.

(viii) A brief description of any malfunction reported in paragraph (e)(1)(vii) of this section, including a description of actions taken during the malfunction to minimize emissions in accordance with 60.11(d) and to correct the malfunction.

(f) *Qualified operator deviation.*

(1) If all qualified operators are not accessible for 2 weeks or more, you must take the two actions in paragraphs (f)(1)(i) and (f)(1)(ii) of this section.

(i) Submit a notification of the deviation within 10 days that includes the three items in paragraphs (f)(1)(i)(A) through (f)(1)(i)(C) of this section.

(A) A statement of what caused the deviation.

(B) A description of actions taken to ensure that a qualified operator is accessible.

(C) The date when you anticipate that a qualified operator will be available.

(ii) Submit a status report to the Administrator every 4 weeks that includes the three items in paragraphs (f)(1)(ii)(A) through (f)(1)(ii)(C) of this section.

(A) A description of actions taken to ensure that a qualified operator is accessible.

(B) The date when you anticipate that a qualified operator will be accessible.

(C) Request for approval from the Administrator to continue operation of the SSI unit.

(2) If your unit was shut down by the Administrator, under the provisions of § 60.4835(b)(2)(i), due to a failure to provide an accessible qualified operator, you must notify the Administrator within 5 days of meeting § 60.4835(b)(2)(ii) that you are resuming operation.

(g) *Notification of a force majeure.* If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure:

(1) You must notify the Administrator, in writing as soon as practicable following the date you first knew, or through due diligence should have known that the event may cause or caused a delay in conducting a performance test beyond the regulatory deadline, but the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification must occur as soon as practicable.

(2) You must provide to the Administrator a written description of the force majeure event and a rationale for attributing the delay in conducting the performance test beyond the regulatory deadline to the force majeure; describe the measures taken or to be taken to minimize the delay; and identify a date by which you propose to conduct the performance test.

(h) *Other notifications and reports required.* You must submit other notifications as provided by § 60.7 and as follows:

(1) You must notify the Administrator 1 month before starting or stopping use of a continuous monitoring system for determining compliance with any emission limit.

(2) You must notify the Administrator at least 30 days prior to any performance test conducted to comply with the provisions of this subpart, to afford the Administrator the opportunity to have an observer present.

(3) As specified in § 60.4900(a)(8), you must notify the Administrator at least 7 days prior to the date of a rescheduled performance test for which notification was previously made in paragraph (h)(2) of this section.

(i) *Report submission form.*

(1) Submit initial, annual, and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(2) As of January 1, 2012 and within 60 days after the date of completing each performance test, as defined in § 63.2, conducted to demonstrate compliance with this subpart, you must submit relative accuracy test audit (*i.e.,* reference method) data and performance test (*i.e.,* compliance test) data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (*see http://www.epa.gov/ttn/chief/ert/ert_tool.html/*) or other compatible electronic spreadsheet. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

(j) *Changing report dates.* If the Administrator agrees, you may change the semi-annual or annual reporting dates. See § 60.19(c) for procedures to seek approval to change your reporting date.

## Title V Operating Permits

### § 60.4920 Am I required to apply for and obtain a title V operating permit for my unit?

Yes, if you are subject to this subpart, you are required to apply for and obtain a Title V operating permit unless you meet the relevant requirements for an exemption specified in § 60.4780.

### § 60.4925 When must I submit a title V permit application for my new SSI unit?

(a) If your new SSI unit subject to this subpart is not subject to an earlier permit application deadline, a complete Title V permit application must be submitted on or before one of the dates specified in paragraph (a)(1) or (a)(2) of

this section. (*See* section 503(c) of the Clean Air Act and 40 CFR 70.5(a)(1)(i) and 40 CFR 71.5(a)(1)(i)).

(1) For a SSI unit that commenced operation as a new SSI unit as of March 21, 2011, then a complete title V permit application must be submitted not later than March 21, 2012.

(2) For a SSI unit that does not commence operation as a new SSI unit until after March 21, 2011, then a complete title V permit application must be submitted not later than 12 months after the date the unit commences operation as a new source.

(b) If your new SSI unit subject to this subpart is subject to title V as a result of some triggering requirement(s) other than this subpart (for example, a unit subject to this subpart may be a major source or part of a major source), then your unit may be required to apply for a title V permit prior to the deadlines specified in paragraph (a) of this section. If more than one requirement triggers a source's obligation to apply for a title V permit, the 12-month timeframe for filing a title V permit application is triggered by the requirement that first causes the source to be subject to title V. (See section 503(c) of the Clean Air Act and 40 CFR 70.3(a) and (b), 40 CFR 70.5(a)(1)(i), 40 CFR 71.3(a) and (b), and 40 CFR 71.5(a)(1)(i).)

(c) A "complete" title V permit application is one that has been determined or deemed complete by the relevant permitting authority under section 503(d) of the Clean Air Act and 40 CFR 70.5(a)(2) or 40 CFR 71.5(a)(2). You must submit a complete permit application by the relevant application deadline in order to operate after this date in compliance with Federal law. (See sections 503(d) and 502(a) of the Clean Air Act and 40 CFR 70.7(b) and 40 CFR 71.7(b).)

## Definitions

### § 60.4930 What definitions must I know?

Terms used but not defined in this subpart are defined in the Clean Air Act and § 60.2.

*Affected source* means a sewage sludge incineration unit as defined in § 60.4930.

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

*Auxiliary fuel* means natural gas, liquefied petroleum gas, fuel oil, or diesel fuel.

*Bag leak detection system* means an instrument that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.,* baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

*Bypass stack* means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

*Calendar year* means 365 consecutive days starting on January 1 and ending on December 31.

*Continuous automated sampling system* means the total equipment and procedures for automated sample collection and sample recovery/analysis to determine a pollutant concentration or emission rate by collecting a single integrated sample(s) or multiple integrated sample(s) of the pollutant (or diluent gas) for subsequent on- or off-site analysis; integrated sample(s) collected are representative of the emissions for the sample time as specified by the applicable requirement.

*Continuous emissions monitoring system* means a monitoring system for continuously measuring and recording the emissions of a pollutant from an affected facility.

*Continuous monitoring system* (CMS) means a continuous emissions monitoring system, continuous automated sampling system, continuous parameter monitoring system, or other manual or automatic monitoring that is used for demonstrating compliance with an applicable regulation on a continuous basis as defined by this subpart. The term refers to the total equipment used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters.

*Continuous parameter monitoring system* means a monitoring system for continuously measuring and recording operating conditions associated with air pollution control device systems (*e.g.,* operating temperature, pressure, and power).

*Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limit, operating limit, or operator qualification and accessibility requirements.

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

*Dioxins/furans* means tetra- through octachlorinated dibenzo-p-dioxins and dibenzofurans.

*Electrostatic precipitator or wet electrostatic precipitator* means an air pollution control device that uses both electrical forces and, if applicable, water to remove pollutants in the exit gas from a sewage sludge incinerator stack.

*Existing sewage sludge incineration unit* means a sewage sludge incineration unit the construction of which is commenced on or before October 14, 2010.

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

*Fluidized bed incinerator* means an enclosed device in which organic matter and inorganic matter in sewage sludge are combusted in a bed of particles suspended in the combustion chamber gas.

*Malfunction* means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused, in part, by poor maintenance or careless operation are not malfunctions.

*Modification* means a change to an existing SSI unit later than September 21, 2011 and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the SSI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the SSI unit used to calculate these costs, see the definition of SSI unit.

(2) Any physical change in the SSI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

*Modified sewage sludge incineration (SSI) unit* means an existing SSI unit that undergoes a modification, as defined in this section.

*Multiple hearth incinerator* means a circular steel furnace that contains a number of solid refractory hearths and a central rotating shaft; rabble arms that are designed to slowly rake the sludge on the hearth are attached to the rotating shaft. Dewatered sludge enters at the top and proceeds downward through the

furnace from hearth to hearth, pushed along by the rabble arms.

*New sewage sludge incineration unit* means a SSI unit the construction of which is commenced after October 14, 2010 which would be applicable to such unit or a modified solid waste incineration unit.

*Operating day* means a 24-hour period between 12:00 midnight and the following midnight during which any amount of sewage sludge is combusted at any time in the SSI unit.

*Particulate matter* means filterable particulate matter emitted from SSI units as measured by Method 5 at 40 CFR part 60, appendix A–3 or Methods 26A or 29 at 40 CFR part 60, appendix A–8.

*Power input to the electrostatic precipitator* means the product of the test-run average secondary voltage and the test-run average secondary amperage to the electrostatic precipitator collection plates.

*Process change* means a significant permit revision, but only with respect to those pollutant-specific emission units for which the proposed permit revision is applicable, including but not limited to:

(1) A change in the process employed at the wastewater treatment facility associated with the affected SSI unit (*e.g.,* the addition of tertiary treatment at the facility, which changes the method used for disposing of process solids and processing of the sludge prior to incineration).

(2) A change in the air pollution control devices used to comply with the emission limits for the affected SSI unit (*e.g.,* change in the sorbent used for activated carbon injection).

*Sewage sludge* means solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated during the firing of sewage sludge in a sewage sludge incineration unit or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

*Sewage sludge feed rate* means the rate at which sewage sludge is fed into the incinerator unit.

*Sewage sludge incineration (SSI) unit* means an incineration unit combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incineration unit designs include fluidized bed and multiple hearth. A SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack.

*Shutdown* means the period of time after all sewage sludge has been combusted in the primary chamber.

*Solid waste* means any garbage, refuse, sewage sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1342), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

*Standard conditions,* when referring to units of measure, means a temperature of 68 °F (20 °C) and a pressure of 1 atmosphere (101.3 kilopascals).

*Startup* means the period of time between the activation, including the firing of fuels (*e.g.,* natural gas or distillate oil), of the system and the first feed to the unit.

*Toxic equivalency* means the product of the concentration of an individual dioxin isomer in an environmental mixture and the corresponding estimate of the compound-specific toxicity relative to tetrachlorinated dibenzo-p-dioxin, referred to as the toxic equivalency factor for that compound. Table 4 to this subpart lists the toxic equivalency factors.

*Wet scrubber* means an add-on air pollution control device that utilizes an aqueous or alkaline scrubbing liquid to collect particulate matter (including nonvaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

*You* means the owner or operator of a SSI unit that meets the criteria in § 60.4770.

TABLE 1 TO SUBPART LLLL OF PART 60—EMISSION LIMITS AND STANDARDS FOR NEW FLUIDIZED BED SEWAGE SLUDGE INCINERATION UNITS

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Particulate matter | 9.6 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 5 at 40 CFR part 60, appendix A–3; Method 26A or Method 29 at 40 CFR part 60, appendix A–8). |
| Hydrogen chloride | 0.24 parts per million by dry volume. | 3-run average (Collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 26A at 40 CFR part 60, appendix A–8). |

TABLE 1 TO SUBPART LLLL OF PART 60—EMISSION LIMITS AND STANDARDS FOR NEW FLUIDIZED BED SEWAGE SLUDGE INCINERATION UNITS—Continued

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Carbon monoxide | 27 parts per million by dry volume | 24-hour block average (using 1-hour averages of data). For determining compliance with the carbon monoxide concentration limit using carbon monoxide CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured carbon monoxide concentration without correcting for oxygen concentration in averaging with other carbon monoxide concentrations (corrected to 7 percent oxygen) to determine the 24-hour average value. | Continuous emissions monitoring system. (Performance Specification 4B of this part, using a low-range span of 100 ppm and a high-range span of 1000 ppm, and a RA of 0.5 ppm instead of 5 ppm specified in section 13.2. For the cylinder gas audit of Procedure 1, +/− 15% or 0.5 whichever is greater). |
| Dioxins/furans (total mass basis); or<br>Dioxins/furans (toxic equivalency basis) [b] | 0.013 nanograms per dry standard cubic meter (total mass basis); or<br>0.0044 nanograms per dry standard cubic meter (toxic equivalency basis). | 3-run average (collect a minimum volume of 3 dry standard cubic meters per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Mercury | 0.0010 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[c] collect a minimum volume of 3 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A–8). | Performance test (Method 29 at 40 CFR part 60, appendix A–8; Method 30B at 40 CFR part 60, appendix A–8; or ASTM D6784–02 (Reapproved 2008).[c] |
| Oxides of nitrogen | 30 parts per million by dry volume | 3-run average (Collect sample for a minimum duration of one hour per run). | Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4). |
| Sulfur dioxide | 5.3 parts per million by dry volume. | 3-run average (For Method 6, collect a minimum volume of 100 liters per run. For Method 6C, sample for a minimum duration of one hour per run). | Performance test (Method 6 or 6C at 40 CFR part 40, appendix A–4; or ANSI/ASME PTC 19.10–1981.[c] |
| Cadmium | 0.0011 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use GFAAS or ICP/MS for the analytical finish. |
| Lead | 0.00062 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 3 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8. Use GFAAS or ICP/MS for the analytical finish. |
| Fugitive emissions from ash handling. | Visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 of appendix A–7 of this part). |

[a] All emission limits are measured at 7 percent oxygen, dry basis at standard conditions.
[b] You have the option to comply with either the dioxin/furan emission limit on a total mass basis or the dioxin/furan emission limit on a toxic equivalency basis.
[c] Incorporated by reference, *see* § 60.17.

TABLE 2 TO SUBPART LLLL OF PART 60—EMISSION LIMITS AND STANDARDS FOR NEW MULTIPLE HEARTH SEWAGE SLUDGE INCINERATION UNITS

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Particulate matter | 60 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 0.75 dry standard cubic meters per run). | Performance test (Method 5 at 40 CFR part 60, appendix A–3; Method 26A or Method 29 at 40 CFR part 60, appendix A–8). |
| Hydrogen chloride | 1.2 parts per million by dry volume. | 3-run average (For Method 26, collect a minimum volume of 200 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Carbon monoxide | 52 parts per million by dry volume | 24-hour block average (using 1-hour averages of data). | Continuous emissions monitoring system. (Performance Specification 4B of this part, using a low-range span of 100 ppm and a high-range span of 1000 ppm, and a relative accuracy of 0.5 ppm instead of 5 ppm specified in section 13.2. For the cylinder gas audit of Procedure 1, +/− 15% or 0.5 whichever is greater). |
| Dioxins/furans (total mass basis); or<br>Dioxins/furans (toxic equivalency basis) [b] | 0.045 nanograms per dry standard cubic meter (total mass basis); or<br>0.0022 nanograms per dry standard cubic meter (toxic equivalency basis). | 3-run average (collect a minimum volume of 3 dry standard cubic meters per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Mercury | 0.15 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[c] collect a minimum volume of 1 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A–8). | Performance test (Method 29 at 40 CFR part 60, appendix A–8; Method 30B at 40 CFR part 60, appendix A–8; or ASTM D6784–02 (Reapproved 2008).[c] |
| Oxides of nitrogen | 210 parts per million by dry volume. | 3-run average (Collect sample for a minimum duration of one hour per run). | Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4). |
| Sulfur dioxide | 26 parts per million by dry volume | 3-run average (For Method 6, collect a minimum volume of 200 liters per run. For Method 6C, collect sample for a minimum duration of one hour per run). | Performance test (Method 6 or 6C at 40 CFR part 40, appendix A–4; or ANSI/ASME PTC 19.10–1981.[c] |
| Cadmium | 0.0024 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use GFAAS or ICP/MS for the analytical finish. |
| Lead | 0.0035 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8. Use GFAAS or ICP/MS for the analytical finish. |
| Fugitive emissions from ash handling. | Visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 of appendix A–7 of this part). |

[a] All emission limits are measured at 7 percent oxygen, dry basis at standard conditions.
[b] You have the option to comply with either the dioxin/furan emission limit on a total mass basis or the dioxin/furan emission limit on a toxic equivalency basis.
[c] Incorporated by reference, *see* § 60.17.

TABLE 3 TO SUBPART LLLL OF PART 60—OPERATING PARAMETERS FOR NEW SEWAGE SLUDGE INCINERATION UNITS [A]

| For these operating parameters | You must establish these operating limits | And monitor using these minimum frequencies | | |
|---|---|---|---|---|
| | | Data measurement | Data recording [b] | Data averaging period for compliance |
| **All sewage sludge incineration units** | | | | |
| Combustion chamber operating temperature or afterburner temperature. | Minimum combustion chamber operating temperature or afterburner temperature. | Continuous | Every 15 minutes | 12-hour block. |
| Fugitive emissions from ash handling | Site-specific operating requirements | Not applicable | Not applicable | Not applicable. |
| **Scrubber** | | | | |
| Pressure drop across each wet scrubber. | Minimum pressure drop | Continuous | Every 15 minutes | 12-hour block. |
| Scrubber liquid flow rate | Minimum flow rate | Continuous | Every 15 minutes | 12-hour block. |
| Scrubber liquid pH | Minimum pH | Continuous | Every 15 minutes | 3-hour block. |
| **Fabric Filter** | | | | |
| Alarm time of the bag leak detection system alarm. | Maximum alarm time of the bag leak detection system alarm (this operating limit is provided in § 60.4850 and is not established on a site-specific basis). | | | |
| **Electrostatic precipitator** | | | | |
| Secondary voltage of the electrostatic precipitator collection plates. | Minimum power input to the electrostatic precipitator collection plates. | Continuous | Hourly | 12-hour block. |
| Secondary amperage of the electrostatic precipitator collection plates. | | | | |
| Effluent water flow rate at the outlet of the electrostatic precipitator. | Minimum effluent water flow rate at the outlet of the electrostatic precipitator. | Hourly | Hourly | 12-hour block. |
| **Activated carbon injection** | | | | |
| Mercury sorbent injection rate | Minimum mercury sorbent injection rate. | Hourly | Hourly | 12-hour block. |
| Dioxin/furan sorbent injection rate | Minimum dioxin/furan sorbent injection rate. | | | |
| Carrier gas flow rate or carrier gas pressure drop. | Minimum carrier gas flow rate or minimum carrier gas pressure drop. | Continuous | Every 15 minutes | 12-hour block. |

[a] As specified in § 60.4870, you may use a continuous emissions monitoring system or continuous automated sampling system in lieu of establishing certain operating limits.

[b] This recording time refers to the minimum frequency that the continuous monitor or other measuring device initially records data. For all data recorded every 15 minutes, you must calculate hourly arithmetic averages. For all parameters, you use hourly averages to calculate the 12-hour or 3-hour block average specified in this table for demonstrating compliance. You maintain records of 1-hour averages.

TABLE 4 TO SUBPART LLLL OF PART 60—TOXIC EQUIVALENCY FACTORS

| Dioxin/furan isomer | Toxic equivalency factor |
|---|---|
| 2,3,7,8-tetrachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,7,8-pentachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin | 0.01 |
| octachlorinated dibenzo-p-dioxin | 0.0003 |
| 2,3,7,8-tetrachlorinated dibenzofuran | 0.1 |
| 2,3,4,7,8-pentachlorinated dibenzofuran | 0.3 |
| 1,2,3,7,8-pentachlorinated dibenzofuran | 0.03 |
| 1,2,3,4,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzofuran | 0.1 |
| 2,3,4,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzofuran | 0.01 |
| 1,2,3,4,7,8,9-heptachlorinated dibenzofuran | 0.01 |
| octachlorinated dibenzofuran | 0.0003 |

TABLE 5 TO SUBPART LLLL OF PART 60—SUMMARY OF REPORTING REQUIREMENTS FOR NEW SEWAGE SLUDGE INCINERATION UNITS [A]

| Report | Due date | Contents | Reference |
|---|---|---|---|
| Notification of construction | Prior to commencing construction. | 1. Statement of intent to construct<br>2. Anticipated date of commencement of construction.<br>3. Documentation for siting requirements.<br>4. Anticipated date of initial startup. | § 60.4915(a). |
| Notification of initial startup | Prior to initial startup | 1. Maximum design dry sewage sludge burning capacity<br>2. Anticipated and permitted maximum feed rate.<br>3. If applicable, the petition for site-specific operating limits.<br>4. Anticipated date of initial startup.<br>5. Site-specific monitoring plan.<br>6. The site-specific monitoring plan for your ash handling system. | § 60.4915(b). |
| Initial compliance report | No later than 60 days following the initial performance test. | 1. Company name and address<br>2. Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.<br>3. Date of report.<br>4. Complete test report for the initial performance test.<br>5. Results of CMS [b] performance evaluation.<br>6. The values for the site-specific operating limits and the calculations and methods, as applicable, used to establish each operating limit.<br>7. Documentation of installation of bag leak detection system for fabric filter.<br>8. Results of initial air pollution control device inspection, including a description of repairs. | § 60.4915(c). |
| Annual compliance report | No later than 12 months following the submission of the initial compliance report; subsequent reports are to be submitted no more than 12 months following the previous report. | 1. Company name and address<br>2. Statement and signature by responsible official.<br>3. Date and beginning and ending dates of report.<br>4. If a performance test was conducted during the reporting period, the results of the test, including any new operating limits and associated calculations and the type of activated carbon used, if applicable.<br>5. For each pollutant and operating parameter recorded using a CMS, the highest recorded 3-hour average and the lowest recorded 3-hour average, as applicable.<br>6. If no deviations from emission limits, emission standards, or operating limits occurred, a statement that no deviations occurred.<br>7. If a fabric filter is used, the date, time, and duration of alarms.<br>8. If a performance evaluation of a CMS was conducted, the results, including any new operating limits and their associated calculations.<br>9. If you met the requirements of § 60.4885(a)(3) and did not conduct a performance test, include the dates of the last three performance tests, a comparison to the 50 percent emission limit threshold of the emission level achieved in the last three performance tests, and a statement as to whether there have been any process changes.<br>10. Documentation of periods when all qualified SSI unit operators were unavailable for more than 8 hours but less than 2 weeks.<br>11. Results of annual pollutions control device inspections, including description of repairs.<br>12. If there were no periods during which your CMSs had malfunctions, a statement that there were no periods during which your CMSs had malfunctions.<br>13. If there were no periods during which your CMSs were out of control, a statement that there were no periods during which your CMSs were out of control.<br>14. If there were no operator training deviations, a statement that there were no such deviations.<br>15. Information on monitoring plan revisions, including a copy of any revised monitoring plan. | §§ 60.4915(d). |

TABLE 5 TO SUBPART LLLL OF PART 60—SUMMARY OF REPORTING REQUIREMENTS FOR NEW SEWAGE SLUDGE INCINERATION UNITS [A]—Continued

| Report | Due date | Contents | Reference |
|---|---|---|---|
| Deviation report (deviations from emission limits, emission standards, or operating limits, as specified in § 60.4915(e)(1)). | By August 1 of a calendar year for data collected during the first half of the calendar year; by February 1 of a calendar year for data collected during the second half of the calendar year. | *If using a CMS:* 1. Company name and address .....<br>2. Statement by a responsible official.<br>3. The calendar dates and times your unit deviated from the emission limits or operating limits.<br>4. The averaged and recorded data for those dates.<br>5. Duration and cause of each deviation.<br>6. Dates, times, and causes for monitor downtime incidents.<br>7. A copy of the operating parameter monitoring data during each deviation and any test report that documents the emission levels.<br>8. For periods of CMS malfunction or when a CMS was out of control, you must include the information specified in § 60.4915(e)(3)(viii).<br>*If not using a CMS:* .....<br>1. Company name and address .....<br>2. Statement by a responsible official.<br>3. The total operating time of each affected SSI.<br>4. The calendar dates and times your unit deviated from the emission limits, emission standard, or operating limits.<br>5. The averaged and recorded data for those dates.<br>6. Duration and cause of each deviation.<br>7. A copy of any performance test report that showed a deviation from the emission limits or standards.<br>8. A brief description of any malfunction, a description of actions taken during the malfunction to minimize emissions, and corrective action taken. | § 60.4915(e). |
| Notification of qualified operator deviation (if all qualified operators are not accessible for 2 weeks or more). | Within 10 days of deviation | 1. Statement of cause of deviation .....<br>2. Description of actions taken to ensure that a qualified operator will be available.<br>3. The date when a qualified operator will be accessible. | § 60.4915(f). |
| Notification of status of qualified operator deviation. | Every 4 weeks following notification of deviation. | 1. Description of actions taken to ensure that a qualified operator is accessible.<br>2. The date when you anticipate that a qualified operator will be accessible.<br>3. Request for approval to continue operation. | § 60.4915(f). |
| Notification of resumed operation following shutdown (due to qualified operator deviation and as specified in § 60.4835(b)(2)(i). | Within 5 days of obtaining a qualified operator and resuming operation. | 1. Notification that you have obtained a qualified operator and are resuming operation. | § 60.4915(f). |
| Notification of a force majeure | As soon as practicable following the date you first knew, or through due diligence should have known that the event may cause or caused a delay in conducting a performance test beyond the regulatory deadline; the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification must occur as soon as practicable. | 1. Description of the force majeure event .....<br>2. Rationale for attributing the delay in conducting the performance test beyond the regulatory deadline to the force majeure.<br>3. Description of the measures taken or to be taken to minimize the delay.<br>4. Identification of the date by which you propose to conduct the performance test. | § 60.4915(g). |
| Notification of intent to start or stop use of a CMS. | 1 month before starting or stopping use of a CMS. | 1. Intent to start or stop use of a CMS ..... | § 60.4915(h). |
| Notification of intent to conduct a performance test. | At least 30 days prior to the performance test. | 1. Intent to conduct a performance test to comply with this subpart. | |
| Notification of intent to conduct a rescheduled performance test. | At least 7 days prior to the date of a rescheduled performance test. | 1. Intent to conduct a rescheduled performance test to comply with this subpart. | |

[a] This table is only a summary, see the referenced sections of the rule for the complete requirements.
[b] CMS means continuous monitoring system.

## Subpart MMMM—Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units

Sec.

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### Introduction

#### 60.5000 What is the purpose of this subpart?

This subpart establishes emission guidelines and compliance schedules for the control of emissions from sewage sludge incineration (SSI) units. The pollutants addressed by these emission guidelines are listed in Tables 2 and 3 to this subpart. These emission guidelines are developed in accordance with sections 111(d) and 129 of the Clean Air Act and subpart B of this part. To the extent any requirement of this subpart is inconsistent with the requirements of subpart A of this part, the requirements of this subpart will apply.

#### § 60.5005 Am I affected by this subpart?

(a) If you are the Administrator of an air quality program in a state or United States protectorate with one or more SSI units that commenced construction on or before October 14, 2010, you must submit a state plan to U.S. Environmental Protection Agency (EPA) that implements the emission guidelines contained in this subpart.

(b) You must submit the state plan to EPA by March 21, 2012.

**§ 60.5010 Is a state plan required for all states?**

No. You are not required to submit a state plan if there are no SSI units for which construction commenced on or before October 14, 2010 in your state, and you submit a negative declaration letter in place of the state plan.

**§ 60.5015 What must I include in my state plan?**

(a) You must include the nine items described in paragraphs (a)(1) through (a)(9) of this section in your state plan.

(1) Inventory of affected SSI units, including those that have ceased operation but have not been dismantled.

(2) Inventory of emissions from affected SSI units in your state.

(3) Compliance schedules for each affected SSI unit.

(4) Emission limits, emission standards, operator training and qualification requirements, and operating limits for affected SSI units that are at least as protective as the emission guidelines contained in this subpart.

(5) Performance testing, recordkeeping, and reporting requirements.

(6) Certification that the hearing on the state plan was held, a list of witnesses and their organizational affiliations, if any, appearing at the hearing, and a brief written summary of each presentation or written submission.

(7) Provision for state progress reports to EPA.

(8) Identification of enforceable state mechanisms that you selected for implementing the emission guidelines of this subpart.

(9) Demonstration of your state's legal authority to carry out the sections 111(d) and 129 state plan.

(b) Your state plan may deviate from the format and content of the emission guidelines contained in this subpart. However, if your state plan does deviate in content, you must demonstrate that your state plan is at least as protective as the emission guidelines contained in this subpart. Your state plan must address regulatory applicability, increments of progress for retrofit, operator training and qualification, emission limits and standards, performance testing, operating limits, monitoring, and recordkeeping and reporting.

(c) You must follow the requirements of subpart B of this part (Adoption and Submittal of state plans for Designated Facilities) in your state plan.

**§ 60.5020 Is there an approval process for my state plan?**

Yes. The EPA will review your state plan according to § 60.27.

**§ 60.5025 What if my state plan is not approvable?**

If you do not submit an approvable state plan (or a negative declaration letter) by March 21, 2013, EPA will develop a Federal plan according to § 60.27 to implement the emission guidelines contained in this subpart. Owners and operators of SSI units not covered by an approved state plan must comply with the Federal plan. The Federal plan is an interim action and will be automatically withdrawn when your state plan is approved.

**§ 60.5030 Is there an approval process for a negative declaration letter?**

No. The EPA has no formal review process for negative declaration letters. Once your negative declaration letter has been received, EPA will place a copy in the public docket and publish a notice in the **Federal Register**. If, at a later date, a SSI unit for which construction commenced on or before October 14, 2010 is found in your state, the Federal plan implementing the emission guidelines contained in this subpart would automatically apply to that SSI unit until your state plan is approved.

**§ 60.5035 What compliance schedule must I include in my state plan?**

(a) For SSI units that commenced construction on or before October 14, 2010, your state plan must include compliance schedules that require SSI units to achieve final compliance as expeditiously as practicable after approval of the state plan but not later than the earlier of the two dates specified in paragraphs (a)(1) and (a)(2) of this section.

(1) March 21, 2016.

(2) Three years after the effective date of state plan approval.

(b) For compliance schedules that extend more than 1 year following the effective date of state plan approval, state plans must include dates for enforceable increments of progress as specified in § 60.5090.

**§ 60.5040 Are there any state plan requirements for this subpart that apply instead of the requirements specified in subpart B?**

Yes. Subpart B establishes general requirements for developing and processing section 111(d) state plans. This subpart applies instead of the requirements in subpart B of this part, as specified in paragraphs (a) and (b) of this section:

(a) State plans developed to implement this subpart must be as protective as the emission guidelines contained in this subpart. State plans must require all SSI units to comply by the dates specified in § 60.5035. This applies instead of the option for case-by-case less stringent emission standards and longer compliance schedules in § 60.24(f).

(b) State plans developed to implement this subpart are required to include two increments of progress for the affected SSI units. These two minimum increments are the final control plan submittal date and final compliance date in § 60.21(h)(1) and (5). This applies instead of the requirement of § 60.24(e)(1) that would require a state plan to include all five increments of progress for all SSI units.

**§ 60.5045 In lieu of a state plan submittal, are there other acceptable option(s) for a state to meet its section 111(d)/129 (b)(2) obligations?**

Yes, a state may meet its Clean Air Act section 111(d)/129 obligations by submitting an acceptable written request for delegation of the Federal plan that meets the requirements of this section. This is the only other option for a state to meet its section 111(d)/129 obligations.

(a) An acceptable Federal plan delegation request must include the following:

(1) A demonstration of adequate resources and legal authority to administer and enforce the Federal plan.

(2) The items under § 60.5015(a)(1), (a)(2), and (a)(7).

(3) Certification that the hearing on the state delegation request, similar to the hearing for a state plan submittal, was held, a list of witnesses and their organizational affiliations, if any, appearing at the hearing, and a brief written summary of each presentation or written submission.

(4) A commitment to enter into a Memorandum of Agreement with the Regional Administrator that sets forth the terms, conditions, and effective date of the delegation and that serves as the mechanism for the transfer of authority. Additional guidance and information is given in EPA's Delegation Manual, Item 7–139, Implementation and Enforcement of 111(d)(2) and 111(d)/(2)/129 (b)(3) Federal plans.

(b) A state with an already approved SSI Clean Air Act section 111(d)/129 state plan is not precluded from receiving EPA approval of a delegation request for the revised Federal plan, provided the requirements of paragraph (a) of this section are met, and at the time of the delegation request, the state

also requests withdrawal of EPA's previous state plan approval.

(c) A state's Clean Air Act section 111(d)/129 obligations are separate from its obligations under title V of the Clean Air Act.

**§ 60.5050 What authorities will not be delegated to state, local, or tribal agencies?**

The authorities that will not be delegated to state, local, or tribal agencies are specified in paragraphs (a) through (g) of this section.

(a) Approval of alternatives to the emission limits and standards in Tables 2 and 3 to this subpart and operating limits established under § 60.5175 or § 60.5190.

(b) Approval of major alternatives to test methods.

(c) Approval of major alternatives to monitoring.

(d) Approval of major alternatives to recordkeeping and reporting.

(e) The requirements in § 60.5175.

(f) The requirements in § 60.5155(b)(2).

(g) Performance test and data reduction waivers under § 60.8(b).

**§ 60.5055 Does this subpart directly affect SSI unit owners and operators in my state?**

(a) No. This subpart does not directly affect SSI unit owners and operators in your state. However, SSI unit owners and operators must comply with the state plan you develop to implement the emission guidelines contained in this subpart. States may choose to incorporate the model rule text directly in their state plan.

(b) If you do not submit an approvable plan to implement and enforce the guidelines contained in this subpart by March 21, 2012, EPA will implement and enforce a Federal plan, as provided in § 60.5025, to ensure that each unit within your state that commenced construction on or before October 14, 2010 reaches compliance with all the provisions of this subpart by the dates specified in § 60.5035.

## Applicability of State Plans

**§ 60.5060 What SSI units must I address in my state plan?**

(a) Your state plan must address SSI units that meet all three criteria described in paragraphs (a)(1) through (3) of this section.

(1) SSI units in your state that commenced construction on or before October 14, 2010.

(2) SSI units that meet the definition of a SSI unit as defined in § 60.5250.

(3) SSI units not exempt under § 60.5065.

(b) If the owner or operator of a SSI unit makes changes that meet the definition of modification after September 21, 2011, the SSI unit becomes subject to subpart LLLL of this part and the state plan no longer applies to that unit.

(c) If the owner or operator of a SSI unit makes physical or operational changes to a SSI unit for which construction commenced on or before September 21, 2011 primarily to comply with your state plan, subpart LLLL of this part does not apply to that unit. Such changes do not qualify as modifications under subpart LLLL of this part.

**§ 60.5065 What SSI units are exempt from my state plan?**

This subpart exempts combustion units that incinerate sewage sludge and are not located at a wastewater treatment facility designed to treat domestic sewage sludge. These units may be subject to another subpart of this part (*e.g.,* subpart CCCC of this part). The owner or operator of such a combustion unit must notify the Administrator of an exemption claim under this section.

## Use of Model Rule

**§ 60.5070 What is the "model rule" in this subpart?**

(a) The model rule is the portion of these emission guidelines (§§ 60.5085 through 60.5250) that addresses the regulatory requirements applicable to SSI units. The model rule provides these requirements in regulation format. You must develop a state plan that is at least as protective as the model rule. You may use the model rule language as part of your state plan. Alternative language may be used in your state plan if you demonstrate that the alternative language is at least as protective as the model rule contained in this subpart.

(b) In the model rule of §§ 60.5085 through 60.5250, "you" and "Administrator" have the meaning specified in § 60.5250.

**§ 60.5075 How does the model rule relate to the required elements of my state plan?**

Use the model rule to satisfy the state plan requirements specified in § 60.5015(a)(3) through (a)(5).

**§ 60.5080 What are the principal components of the model rule?**

The model rule contains the nine major components listed in paragraphs (a) through (i) of this section.

(a) Increments of progress toward compliance.

(b) Operator training and qualification.

(c) Emission limits, emission standards, and operating limits.

(d) Initial compliance requirements.

(e) Continuous compliance requirements.

(f) Performance testing, monitoring, and calibration requirements.

(g) Recordkeeping and reporting.

(h) Definitions.

(i) Tables.

## Model Rule—Increments of Progress

**§ 60.5085 What are my requirements for meeting increments of progress and achieving final compliance?**

If you plan to achieve compliance more than 1 year following the effective date of state plan approval, you must meet the two increments of progress specified in paragraphs (a) and (b) of this section.

(a) Submit a final control plan.

(b) Achieve final compliance.

**§ 60.5090 When must I complete each increment of progress?**

Table 1 to this subpart specifies compliance dates for each increment of progress.

**§ 60.5095 What must I include in the notifications of achievement of increments of progress?**

Your notification of achievement of increments of progress must include the three items specified in paragraphs (a) through (c) of this section.

(a) Notification that the increment of progress has been achieved.

(b) Any items required to be submitted with each increment of progress.

(c) Signature of the owner or operator of the SSI unit.

**§ 60.5100 When must I submit the notifications of achievement of increments of progress?**

Notifications for achieving increments of progress must be postmarked no later than 10 business days after the compliance date for the increment.

**§ 60.5105 What if I do not meet an increment of progress?**

If you fail to meet an increment of progress, you must submit a notification to the Administrator postmarked within 10 business days after the date for that increment of progress in Table 1 to this subpart. You must inform the Administrator that you did not meet the increment, and you must continue to submit reports each subsequent calendar month until the increment of progress is met.

**§ 60.5110 How do I comply with the increment of progress for submittal of a control plan?**

For your control plan increment of progress, you must satisfy the two

requirements specified in paragraphs (a) and (b) of this section.

(a) Submit the final control plan that includes the four items described in paragraphs (a)(1) through (a)(4) of this section.

(1) A description of the devices for air pollution control and process changes that you will use to comply with the emission limits and standards and other requirements of this subpart.

(2) The type(s) of waste to be burned, if waste other than sewage sludge is burned in the unit.

(3) The maximum design sewage sludge burning capacity.

(4) If applicable, the petition for site-specific operating limits under § 60.5175.

(b) Maintain an onsite copy of the final control plan.

**§ 60.5115 How do I comply with the increment of progress for achieving final compliance?**

For the final compliance increment of progress, you must complete all process changes and retrofit construction of control devices, as specified in the final control plan, so that, if the affected SSI unit is brought online, all necessary process changes and air pollution control devices would operate as designed.

**§ 60.5120 What must I do if I close my SSI unit and then restart it?**

(a) If you close your SSI unit but will restart it prior to the final compliance date in your state plan, you must meet the increments of progress specified in § 60.5085.

(b) If you close your SSI unit but will restart it after your final compliance date, you must complete emission control retrofits and meet the emission limits, emission standards, and operating limits on the date your unit restarts operation.

**§ 60.5125 What must I do if I plan to permanently close my SSI unit and not restart it?**

If you plan to close your SSI unit rather than comply with the state plan, submit a closure notification, including the date of closure, to the Administrator by the date your final control plan is due.

## Model Rule—Operator Training and Qualification

**§ 60.5130 What are the operator training and qualification requirements?**

(a) A SSI unit cannot be operated unless a fully trained and qualified SSI unit operator is accessible, either at the facility or can be at the facility within 1 hour. The trained and qualified SSI unit operator may operate the SSI unit directly or be the direct supervisor of one or more other plant personnel who operate the unit. If all qualified SSI unit operators are temporarily not accessible, you must follow the procedures in § 60.5155.

(b) Operator training and qualification must be obtained through a state-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (c)(3) of this section.

(1) Training on the 10 subjects listed in paragraphs (c)(1)(i) through (c)(1)(x) of this section.

(i) Environmental concerns, including types of emissions.

(ii) Basic combustion principles, including products of combustion.

(iii) Operation of the specific type of incinerator to be used by the operator, including proper startup, sewage sludge feeding, and shutdown procedures.

(iv) Combustion controls and monitoring.

(v) Operation of air pollution control equipment and factors affecting performance (if applicable).

(vi) Inspection and maintenance of the incinerator and air pollution control devices.

(vii) Actions to prevent malfunctions or to prevent conditions that may lead to malfunctions.

(viii) Bottom and fly ash characteristics and handling procedures.

(ix) Applicable Federal, State, and local regulations, including Occupational Safety and Health Administration workplace standards.

(x) Pollution prevention.

(2) An examination designed and administered by the state-approved program.

(3) Written material covering the training course topics that may serve as reference material following completion of the course.

**§ 60.5135 When must the operator training course be completed?**

The operator training course must be completed by the later of the three dates specified in paragraphs (a) through (c) of this section.

(a) The final compliance date (Increment 2).

(b) Six months after your SSI unit startup.

(c) Six months after an employee assumes responsibility for operating the SSI unit or assumes responsibility for supervising the operation of the SSI unit.

**§ 60.5140 How do I obtain my operator qualification?**

(a) You must obtain operator qualification by completing a training course that satisfies the criteria under § 60.5130(b).

(b) Qualification is valid from the date on which the training course is completed and the operator successfully passes the examination required under § 60.5130(c)(2).

**§ 60.5145 How do I maintain my operator qualification?**

To maintain qualification, you must complete an annual review or refresher course covering, at a minimum, the five topics described in paragraphs (a) through (e) of this section.

(a) Update of regulations.

(b) Incinerator operation, including startup and shutdown procedures, sewage sludge feeding, and ash handling.

(c) Inspection and maintenance.

(d) Prevention of malfunctions or conditions that may lead to malfunction.

(e) Discussion of operating problems encountered by attendees.

**§ 60.5150 How do I renew my lapsed operator qualification?**

You must renew a lapsed operator qualification before you begin operation of a SSI unit by one of the two methods specified in paragraphs (a) and (b) of this section.

(a) For a lapse of less than 3 years, you must complete a standard annual refresher course described in § 60.5145.

(b) For a lapse of 3 years or more, you must repeat the initial qualification requirements in § 60.5140(a).

**§ 60.5155 What if all the qualified operators are temporarily not accessible?**

If a qualified operator is not at the facility and cannot be at the facility within 1 hour, you must meet the criteria specified in either paragraph (a) or (b) of this section, depending on the length of time that a qualified operator is not accessible.

(a) When a qualified operator is not accessible for more than 8 hours, the SSI unit may be operated for less than 2 weeks by other plant personnel who are familiar with the operation of the SSI unit and who have completed a review of the information specified in § 60.5160 within the past 12 months. However, you must record the period when a qualified operator was not accessible and include this deviation in the annual report as specified under § 60.5235(d).

(b) When a qualified operator is not accessible for 2 weeks or more, you must take the two actions that are

described in paragraphs (b)(1) and (b)(2) of this section.

(1) Notify the Administrator of this deviation in writing within 10 days. In the notice, state what caused this deviation, what you are doing to ensure that a qualified operator is accessible, and when you anticipate that a qualified operator will be accessible.

(2) Submit a status report to the Administrator every 4 weeks outlining what you are doing to ensure that a qualified operator is accessible, stating when you anticipate that a qualified operator will be accessible, and requesting approval from the Administrator to continue operation of the SSI unit. You must submit the first status report 4 weeks after you notify the Administrator of the deviation under paragraph (b)(1) of this section.

(i) If the Administrator notifies you that your request to continue operation of the SSI unit is disapproved, the SSI unit may continue operation for 30 days, and then must cease operation.

(ii) Operation of the unit may resume if a qualified operator is accessible as required under § 60.5130(a). You must notify the Administrator within 5 days of having resumed operations and of having a qualified operator accessible.

### § 60.5160 What site-specific documentation is required and how often must it be reviewed by qualified operators and plant personnel?

(a) You must maintain at the facility the documentation of the operator training procedures specified under § 60.5230(c)(1) and make the documentation readily accessible to all SSI unit operators.

(b) You must establish a program for reviewing the information listed in § 60.5230(c)(1) with each qualified incinerator operator and other plant personnel who may operate the unit according to the provisions of § 60.5155(a), according to the following schedule:

(1) The initial review of the information listed in § 60.5230(c)(1) must be conducted within 6 months after the effective date of this subpart or prior to an employee's assumption of responsibilities for operation of the SSI unit, whichever date is later.

(2) Subsequent annual reviews of the information listed in § 60.5230(c)(1) must be conducted no later than 12 months following the previous review.

## Model Rule—Emission Limits, Emission Standards, and Operating Limits and Requirements

### § 60.5165 What emission limits and standards must I meet and by when?

You must meet the emission limits and standards specified in Table 2 or 3 to this subpart by the final compliance date under the approved state plan, Federal plan, or delegation, as applicable. The emission limits and standards apply at all times the unit is operating and during periods of malfunction. The emission limits and standards apply to emissions from a bypass stack or vent while sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time).

### § 60.5170 What operating limits and requirements must I meet and by when?

You must meet, as applicable, the operating limits and requirements specified in paragraphs (a) through (d) and (h) of this section, according to the schedule specified in paragraph (e) of this section. The operating parameters for which you will establish operating limits for a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection are listed in Table 4 to this subpart. You must comply with the operating requirements in paragraph (f) of this section and the requirements in paragraph (g) of this section for meeting any new operating limits, re-established in § 60.5210. The operating limits apply at all times that sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time).

(a) You must meet a site-specific operating limit for minimum operating temperature of the combustion chamber (or afterburner combustion chamber) that you establish in § 60.5190.

(b) If you use a wet scrubber, electrostatic precipitator, activated carbon injection, or afterburner to comply with an emission limit, you must meet the site-specific operating limits that you establish in § 60.5190 for each operating parameter associated with each air pollution control device.

(c) If you use a fabric filter to comply with the emission limits, you must install the bag leak detection system specified in §§ 60.5200(b) and 60.5225(b)(3)(i) and operate the bag leak detection system such that the alarm does not sound more than 5 percent of the operating time during a 6-month period. You must calculate the alarm time as specified in § 60.5210(a)(2)(i).

(d) You must meet the operating requirements in your site-specific fugitive emission monitoring plan, submitted as specified in § 60.5200(d) to ensure that your ash handling system will meet the emission standard for fugitive emissions from ash handling.

(e) You must meet the operating limits and requirements specified in paragraphs (a) through (d) of this section by the final compliance date under the approved state plan, Federal plan, or delegation, as applicable.

(f) You must monitor the feed rate and moisture content of the sewage sludge fed to the sewage sludge incinerator, as specified in paragraphs (f)(1) and (f)(2) of this section.

(1) Continuously monitor the sewage sludge feed rate and calculate a daily average for all hours of operation during each 24-hour period. Keep a record of the daily average feed rate, as specified in § 60.5230(f)(3)(ii).

(2) Take at least one grab sample per day of the sewage sludge fed to the sewage sludge incinerator. If you take more than one grab sample in a day, calculate the daily average for the grab samples. Keep a record of the daily average moisture content, as specified in § 60.5230(f)(3)(ii).

(g) For the operating limits and requirements specified in paragraphs (a) through (d) and (h) of this section, you must meet any new operating limits and requirements, re-established according to § 60.5210(d).

(h) If you use an air pollution control device other than a wet scrubber, fabric filter, electrostatic precipitator, or activated carbon injection to comply with the emission limits in Table 2 or 3 to this subpart, you must meet any site-specific operating limits or requirements that you establish as required in § 60.5175.

### § 60.5175 How do I establish operating limits if I do not use a wet scrubber, fabric filter, electrostatic precipitator, activated carbon injection, or afterburner, or if I limit emissions in some other manner, to comply with the emission limits?

If you use an air pollution control device other than a wet scrubber, fabric filter, electrostatic precipitator, activated carbon injection, or afterburner, or limit emissions in some other manner (*e.g.,* materials balance) to comply with the emission limits in § 60.5165, you must meet the requirements in paragraphs (a) and (b) of this section.

(a) Meet the applicable operating limits and requirements in § 60.4850, and establish applicable operating limits according to § 60.5190.

(b) Petition the Administrator for specific operating parameters, operating limits, and averaging periods to be established during the initial performance test and to be monitored continuously thereafter.

(1) You are responsible for submitting any supporting information in a timely manner to enable the Administrator to consider the application prior to the performance test. You must not conduct the initial performance test until after the petition has been approved by the Administrator, and you must comply with the operating limits as written, pending approval by the Administrator. Neither submittal of an application, nor the Administrator's failure to approve or disapprove the application relieves you of the responsibility to comply with any provision of this subpart.

(2) Your petition must include the five items listed in paragraphs (b)(2)(i) through (b)(2)(v) of this section.

(i) Identification of the specific parameters you propose to monitor.

(ii) A discussion of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters, and how limits on these parameters will serve to limit emissions of regulated pollutants.

(iii) A discussion of how you will establish the upper and/or lower values for these parameters that will establish the operating limits on these parameters, including a discussion of the averaging periods associated with those parameters for determining compliance.

(iv) A discussion identifying the methods you will use to measure and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments.

(v) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

**§ 60.5180 Do the emission limits, emission standards, and operating limits apply during periods of startup, shutdown, and malfunction?**

The emission limits and standards apply at all times and during periods of malfunction. The operating limits apply at all times that sewage sludge is in the combustion chamber (*i.e.,* until the sewage sludge feed to the combustor has been cut off for a period of time not less than the sewage sludge incineration residence time). For determining compliance with the CO concentration limit using CO CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured CO concentration without correcting for oxygen concentration in averaging with other CO concentrations (corrected to 7 percent $O_2$) to determine the 24-hour average value.

**§ 60.5181 How do I establish an affirmative defense for exceedance of an emission limit or standard during malfunction?**

In response to an action to enforce the numerical emission standards set forth in paragraph § 60.5165, you may assert an affirmative defense to a claim for civil penalties for exceedances of emission limits that are caused by malfunction, as defined in § 60.2. Appropriate penalties may be assessed however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that the conditions in paragraphs (a)(1) through (a)(9) of this section are met.

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and (ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices, and (iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for, and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance, and

(2) Repairs were made as expeditiously as possible when the applicable emission limits were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs, and (3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions, and (4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage, and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health, and

(6) All emissions monitoring and control systems were kept in operation if at all possible consistent with safety and good air pollution control practices, and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, and

(8) At all times, the affected facility was operated in a manner consistent with good practices for minimizing emissions, and

(9) A written root cause analysis has been prepared the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) The owner or operator of the SSI unit experiencing an exceedance of its emission limit(s) during a malfunction, shall notify the Administrator by telephone or facsimile (fax) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 60.5165 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

## Model Rule—Initial Compliance Requirements

**§ 60.5185 How and when do I demonstrate initial compliance with the emission limits and standards?**

To demonstrate initial compliance with the emission limits and standards in Table 2 or 3 to this subpart, use the procedures specified in paragraph (a) of this section. In lieu of using the procedures specified in paragraph (a) of this section, you have the option to demonstrate initial compliance using the procedures specified in paragraph (b) of this section for particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans (total mass basis or toxic

equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling. You must meet the requirements of paragraphs (a) and (b) of this section, as applicable, and paragraphs (c) through (e) of this section, according to the performance testing, monitoring, and calibration requirements in § 60.5220(a) and (b).

(a) Demonstrate initial compliance using the performance test required in § 60.8. You must demonstrate that your SSI unit meets the emission limits and standards specified in Table 2 or 3 to this subpart for particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling using the performance test. The initial performance test must be conducted using the test methods, averaging methods, and minimum sampling volumes or durations specified in Table 2 or 3 to this subpart and according to the testing, monitoring, and calibration requirements specified in § 60.5220(a).

(1) Except as provided in paragraph (e) of this section, you must demonstrate that your SSI unit meets the emission limits and standards specified in Table 2 or 3 to this subpart by your final compliance date (see Table 1 to this subpart).

(2) You may use the results from a performance test conducted within the 2 previous years that was conducted under the same conditions and demonstrated compliance with the emission limits and standards in Table 2 or 3 to this subpart, provided no process changes have been made since you conducted that performance test. However, you must continue to meet the operating limits established during the most recent performance test that demonstrated compliance with the emission limits and standards in Table 2 or 3 to this subpart. The performance test must have used the test methods specified in Table 2 or 3 to this subpart.

(b) Demonstrate initial compliance using a continuous emissions monitoring system or continuous automated sampling system. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**. Collect data as specified in § 60.5220(b)(6) and use the following procedures:

(1) To demonstrate initial compliance with the emission limits specified in Table 2 or 3 to this subpart for particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead, you may substitute the use of a continuous monitoring system in lieu of conducting the initial performance test required in paragraph (a) of this section, as follows:

(i) You may substitute the use of a continuous emissions monitoring system for any pollutant specified in paragraph (b)(1) of this section in lieu of conducting the initial performance test for that pollutant in paragraph (a) of this section. For determining compliance with the carbon monoxide concentration limit using carbon monoxide CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured carbon monoxide concentration without correcting for oxygen concentration in averaging with other carbon monoxide concentrations (corrected to 7 percent oxygen) to determine the 24-hour average value.

(ii) You may substitute the use of a continuous automated sampling system for mercury or dioxins/furans in lieu of conducting the annual mercury or dioxin/furan performance test in paragraph (a) of this section.

(2) If you use a continuous emissions monitoring system to demonstrate compliance with an applicable emission limit in Table 2 or 3 to this subpart, as described in paragraph (b)(1) of this section, you must use the continuous emissions monitoring system and follow the requirements specified in § 60.5220(b). You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen (or carbon dioxide). You must demonstrate initial compliance using a 24-hour block average of these 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of Method 19 of 40 CFR part 60, appendix A–7.

(3) If you use a continuous automated sampling system to demonstrate compliance with an applicable emission limit in Table 2 or 3 to this subpart, as described in paragraph (b)(1) of this section, you must:

(i) Use the continuous automated sampling system specified in § 60.58b(p) and (q), and measure and calculate average emissions corrected to 7 percent oxygen (or carbon dioxide) according to § 60.58b(p) and your monitoring plan.

(A) Use the procedures specified in § 60.58b(p) to calculate 24-hour block averages to determine compliance with the mercury emission limit in Table 2 to this subpart.

(B) Use the procedures specified in § 60.58b(p) to calculate 2-week block averages to determine compliance with the dioxin/furan (total mass basis or toxic equivalency basis) emission limit in Table 2 to this subpart.

(ii) Comply with the provisions in § 60.58b(q) to develop a monitoring plan. For mercury continuous automated sampling systems, you must use Performance Specification 12B of appendix B of part 75 and Procedure 5 of appendix F of this part.

(4) Except as provided in paragraph (e) of this section, you must complete your initial performance evaluations required under your monitoring plan for any continuous emissions monitoring systems and continuous automated sampling systems by your final compliance date (see Table 1 to this subpart). Your performance evaluation must be conducted using the procedures and acceptance criteria specified in § 60.5200(a)(3).

(c) To demonstrate initial compliance with the dioxins/furans toxic equivalency emission limit in Table 2 or 3 to this subpart, determine dioxins/furans toxic equivalency as follows:

(1) Measure the concentration of each dioxin/furan tetra- through octachlorinated-isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7.

(2) Multiply the concentration of each dioxin/furan (tetra- through octa-chlorinated) isomer by its corresponding toxic equivalency factor specified in Table 5 to this subpart. (3) Sum the products calculated in accordance with paragraph (c)(2) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

(d) Submit an initial compliance report, as specified in § 60.5235(b).

(e) If you demonstrate initial compliance using the performance test specified in paragraph (a) of this section, then the provisions of this paragraph (e) apply. If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure, you must notify the Administrator in writing as specified in § 60.5235(g). You must conduct the initial performance test as soon as practicable after the force majeure occurs. The Administrator will determine whether or not to grant the extension to the initial performance test

deadline, and will notify you in writing of approval or disapproval of the request for an extension as soon as practicable. Until an extension of the performance test deadline has been approved by the Administrator, you remain strictly subject to the requirements of this subpart.

**§ 60.5190 How do I establish my operating limits?**

(a) You must establish the site-specific operating limits specified in paragraphs (b) through (h) of this section or established in § 60.5175, as applicable, during your initial performance tests required in § 60.5185. You must meet the requirements in § 60.5210(d) to confirm these operating limits or re-establishre-establish new operating limits using operating data recorded during any performance tests or performance evaluations required in § 60.5205. You must follow the data measurement and recording frequencies and data averaging times specified in Table 4 to this subpart or as established in § 60.5175, and you must follow the testing, monitoring, and calibration requirements specified in §§ 60.5220 and 60.5225 or established in § 60.5175. You are not required to establish operating limits for the operating parameters listed in Table 4 to this subpart for a control device if you use a continuous monitoring system to demonstrate compliance with the emission limits in Table 2 or 3 to this subpart for the applicable pollutants, as follows:

(1) For a scrubber designed to control emissions of hydrogen chloride or sulfur dioxide, you are not required to establish an operating limit and monitor scrubber liquid flow rate or scrubber liquid pH if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for hydrogen chloride or sulfur dioxide.

(2) For a scrubber designed to control emissions of particulate matter, cadmium, and lead, you are not required to establish an operating limit and monitor pressure drop across the scrubber or scrubber liquid flow rate if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for particulate matter, cadmium, and lead.

(3) For an electrostatic precipitator designed to control emissions of particulate matter, cadmium, and lead, you are not required to establish an operating limit and monitor secondary voltage of the collection plates, secondary amperage of the collection plates, or effluent water flow rate at the outlet of the electrostatic precipitator if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for particulate matter, lead, and cadmium.

(4) For an activated carbon injection system designed to control emissions of mercury, you are not required to establish an operating limit and monitor sorbent injection rate and carrier gas flow rate (or carrier gas pressure drop) if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for mercury.

(5) For an activated carbon injection system designed to control emissions of dioxins/furans, you are not required to establish an operating limit and monitor sorbent injection rate and carrier gas flow rate (or carrier gas pressure drop) if you use the continuous monitoring system specified in §§ 60.4865(b) and 60.4885(b) to demonstrate compliance with the emission limit for dioxins/furans (total mass basis or toxic equivalency basis).

(b) Minimum pressure drop across each wet scrubber used to meet the particulate matter, lead, and cadmium emission limits in Table 2 or 3 to this subpart, equal to the lowest 4-hour average pressure drop across each such wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits.

(c) Minimum scrubber liquid flow rate (measured at the inlet to each wet scrubber), equal to the lowest 4-hour average liquid flow rate measured during the most recent performance test demonstrating compliance with all applicable emission limits. (d) Minimum scrubber liquid pH for each wet scrubber used to meet the sulfur dioxide or hydrogen chloride emission limits in Table 2 or 3 to this subpart, equal to the lowest 1-hour average scrubber liquid pH measured during the most recent performance test demonstrating compliance with the sulfur dioxide and hydrogen chloride emission limits.

(e) Minimum combustion chamber operating temperature (or minimum afterburner temperature), equal to the lowest 4-hour average combustion chamber operating temperature (or afterburner temperature) measured during the most recent performance test demonstrating compliance with all applicable emission limits.

(f) Minimum power input to the electrostatic precipitator collection plates, equal to the lowest 4-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits. Power input must be calculated as the product of the secondary voltage and secondary amperage to the electrostatic precipitator collection plates. Both the secondary voltage and secondary amperage must be recorded during the performance test. (g) Minimum effluent water flow rate at the outlet of the electrostatic precipitator, equal to the lowest 4-hour average effluent water flow rate at the outlet of the electrostatic precipitator measured during the most recent performance test demonstrating compliance with the particulate matter, lead, and cadmium emission limits. (h) For activated carbon injection, establish the site-specific operating limits specified in paragraphs (h)(1) through (h)(3) of this section.

(1) Minimum mercury sorbent injection rate, equal to the lowest 4-hour average mercury sorbent injection rate measured during the most recent performance test demonstrating compliance with the mercury emission limit.

(2) Minimum dioxin/furan sorbent injection rate, equal to the lowest 4-hour average dioxin/furan sorbent injection rate measured during the most recent performance test demonstrating compliance with the dioxin/furan (total mass basis or toxic equivalency basis) emission limit.

(3) Minimum carrier gas flow rate or minimum carrier gas pressure drop, as follows:

(i) Minimum carrier gas flow rate, equal to the lowest 4-hour average carrier gas flow rate measured during the most recent performance test demonstrating compliance with the applicable emission limit.

(ii) Minimum carrier gas pressure drop, equal to the lowest 4-hour average carrier gas flow rate measured during the most recent performance test demonstrating compliance with the applicable emission limit.

**§ 60.5195 By what date must I conduct the initial air pollution control device inspection and make any necessary repairs?**

(a) You must conduct an air pollution control device inspection according to § 60.5220(c) by the final compliance date under the approved state plan, Federal plan, or delegation, as applicable. For air pollution control devices installed after the final compliance date, you must conduct the air pollution control device inspection within 60 days after installation of the control device.

(b) Within 10 operating days following the air pollution control device inspection under paragraph (a) of this section, all necessary repairs must be completed unless you obtain written approval from the Administrator establishing a date whereby all necessary repairs of the SSI unit must be completed.

**§ 60.5200 How do I develop a site-specific monitoring plan for my continuous monitoring, bag leak detection, and ash handling systems, and by what date must I conduct an initial performance evaluation?**

You must develop and submit to the Administrator for approval a site-specific monitoring plan for each continuous monitoring system required under this subpart, according to the requirements in paragraphs (a) through (c) of this section. This requirement also applies to you if you petition the Administrator for alternative monitoring parameters under § 60.13(i) and paragraph (e) of this section. If you use a continuous automated sampling system to comply with the mercury or dioxin/furan (total mass basis or toxic equivalency basis) emission limits, you must develop your monitoring plan as specified in § 60.58b(q), and you are not required to meet the requirements in paragraphs (a) and (b) of this section. You must also submit a site-specific monitoring plan for your ash handling system, as specified in paragraph (d) of this section. You must submit and update your monitoring plans as specified in paragraphs (f) through (h) of this section.

(a) For each continuous monitoring system, your monitoring plan must address the elements and requirements specified in paragraphs (a)(1) through (a)(8) of this section. You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(1) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device).

(2) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems.

(3) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(i) For continuous emissions monitoring systems, your performance evaluation and acceptance criteria must include, but is not limited to, the following:

(A) The applicable requirements for continuous emissions monitoring systems specified in § 60.13.

(B) The applicable performance specifications (*e.g.,* relative accuracy tests) in appendix B of this part.

(C) The applicable procedures (*e.g.,* quarterly accuracy determinations and daily calibration drift tests) in appendix F of this part.

(D) A discussion of how the occurrence and duration of out-of-control periods will affect the suitability of CEMS data, where out-of-control has the meaning given in section (a)(7)(i) of this section.

(ii) For continuous parameter monitoring systems, your performance evaluation and acceptance criteria must include, but is not limited to, the following:

(A) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(A)(*1*) through (*4*) of this section.

(*1*) Install the flow sensor and other necessary equipment in a position that provides a representative flow.

(*2*) Use a flow sensor with a measurement sensitivity of no greater than 2 percent of the expected process flow rate.

(*3*) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(*4*) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(B) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(B)(*1*) through (*6*) of this section.

(*1*) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.,* particulate matter scrubber pressure drop).

(*2*) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(*3*) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(*4*) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.,* check for pressure tap pluggage daily).

(*5*) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(*6*) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(C) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (a)(3)(ii)(C)(*1*) through (*4*) of this section.

(*1*) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(*2*) Ensure the sample is properly mixed and representative of the fluid to be measured.

(*3*) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day.

(*4*) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the operating limit pH level) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(D) If you have an operating limit that requires the use of a temperature measurement device, you must meet the requirements in paragraphs (a)(3)(ii)(D)(*1*) through (*4*) of this section.

(*1*) Install the temperature sensor and other necessary equipment in a position that provides a representative temperature.

(*2*) Use a temperature sensor with a minimum tolerance of 2.8 degrees Celsius (5 degrees Fahrenheit), or 1.0 percent of the temperature value, whichever is larger, for a noncryogenic temperature range.

(*3*) Use a temperature sensor with a minimum tolerance of 2.8 degrees Celsius (5 degrees Fahrenheit), or 2.5 percent of the temperature value, whichever is larger, for a cryogenic temperature range.

(*4*) Conduct a temperature measurement device performance evaluation at the time of each performance test but no less frequently than annually.

(E) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the

requirements in paragraphs (a)(3)(ii)(E)(*1*) and (*2*) of this section.

(*1*) Install sensors to measure (secondary) voltage and current to the electrostatic precipitator collection plates.

(*2*) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(F) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (*e.g.,* weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (a)(3)(ii)(F)(*1*) and (*2*) of this section.

(*1*) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate.

(*2*) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(4) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d).

(5) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13.

(6) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b), (c), (c)(1), (c)(4), (d), (e), (f) and (g).

(7) Provisions for periods when the continuous monitoring system is out of control, as follows:

(i) A continuous monitoring system is out of control if the conditions of paragraph (a)(7)(i)(A) or (a)(7)(i)(B) of this section are met.

(A) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the applicable performance specification or in the relevant standard.

(B) The continuous monitoring system fails a performance test audit (*e.g.,* cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit.

(ii) When the continuous monitoring system is out of control as specified in paragraph (a)(7)(i) of this section, you must take the necessary corrective action and must repeat all necessary tests that indicate that the system is out of control. You must take corrective action and conduct retesting until the performance requirements are below the applicable limits. The beginning of the out-of-control period is the hour you conduct a performance check (*e.g.,* calibration drift) that indicates an exceedance of the performance requirements established under this part. The end of the out-of-control period is the hour following the completion of corrective action and successful demonstration that the system is within the allowable limits.

(8) Schedule for conducting initial and periodic performance evaluations of your continuous monitoring systems.

(b) If a bag leak detection system is used, your monitoring plan must include a description of the following items:

(1) Installation of the bag leak detection system in accordance with paragraphs (b)(1)(i) and (ii) of this section.

(i) Install the bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (*e.g.,* for a positive pressure fabric filter) of the fabric filter.

(ii) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(2) Initial and periodic adjustment of the bag leak detection system, including how the alarm set-point will be established. Use a bag leak detection system equipped with a system that will sound an alarm when the system detects an increase in relative particulate matter emissions over a preset level. The alarm must be located where it is observed readily and any alert is detected and recognized easily by plant operating personnel.

(3) Evaluations of the performance of the bag leak detection system, performed in accordance with your monitoring plan and consistent with the guidance provided in Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997 (incorporated by reference, see § 60.17).

(4) Operation of the bag leak detection system, including quality assurance procedures.

(5) Maintenance of the bag leak detection system, including a routine maintenance schedule and spare parts inventory list.

(6) Recordkeeping (including record retention) of the bag leak detection system data. Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor. (c) You must conduct an initial performance evaluation of each continuous monitoring system and bag leak detection system, as applicable, in accordance with your monitoring plan and to § 60.13(c). For the purpose of this subpart, the provisions of § 60.13(c) also apply to the bag leak detection system. You must conduct the initial performance evaluation of each continuous monitoring system within 60 days of installation of the monitoring system

(d) You must submit a monitoring plan specifying the ash handling system operating procedures that you will follow to ensure that you meet the fugitive emissions limit specified in Table 2 or 3 to this subpart.

(e) You may submit an application to the Administrator for approval of alternate monitoring requirements to demonstrate compliance with the standards of this subpart, subject to the provisions of paragraphs (e)(1) through (e)(6) of this section.

(1) The Administrator will not approve averaging periods other than those specified in this section, unless you document, using data or information, that the longer averaging period will ensure that emissions do not exceed levels achieved over the duration of three performance test runs.

(2) If the application to use an alternate monitoring requirement is approved, you must continue to use the original monitoring requirement until approval is received to use another monitoring requirement.

(3) You must submit the application for approval of alternate monitoring requirements no later than the notification of performance test. The application must contain the information specified in paragraphs (e)(3)(i) through (e)(3)(iii) of this section:

(i) Data or information justifying the request, such as the technical or economic infeasibility, or the impracticality of using the required approach.

(ii) A description of the proposed alternative monitoring requirement, including the operating parameter to be monitored, the monitoring approach and technique, the averaging period for the limit, and how the limit is to be calculated.

(iii) Data or information documenting that the alternative monitoring requirement would provide equivalent or better assurance of compliance with the relevant emission standard.

(4) The Administrator will notify you of the approval or denial of the application within 90 calendar days after receipt of the original request, or within 60 calendar days of the receipt of any supplementary information, whichever is later. The Administrator will not approve an alternate monitoring application unless it would provide

equivalent or better assurance of compliance with the relevant emission standard. Before disapproving any alternate monitoring application, the Administrator will provide the following:

(i) Notice of the information and findings upon which the intended disapproval is based.

(ii) Notice of opportunity for you to present additional supporting information before final action is taken on the application. This notice will specify how much additional time is allowed for you to provide additional supporting information.

(5) You are responsible for submitting any supporting information in a timely manner to enable the Administrator to consider the application prior to the performance test. Neither submittal of an application, nor the Administrator's failure to approve or disapprove the application relieves you of the responsibility to comply with any provision of this subpart.

(6) The Administrator may decide at any time, on a case-by-case basis, that additional or alternative operating limits, or alternative approaches to establishing operating limits, are necessary to demonstrate compliance with the emission standards of this subpart.

(f) You must submit your monitoring plans required in paragraphs (a) and (b) of this section at least 60 days before your initial performance evaluation of your continuous monitoring system(s).

(g) You must submit your monitoring plan for your ash handling system, as required in paragraph (d) of this section, at least 60 days before your initial compliance test date.

(h) You must update and resubmit your monitoring plan if there are any changes or potential changes in your monitoring procedures or if there is a process change, as defined in § 60.5250.

## Model Rule—Continuous Compliance Requirements

### § 60.5205 How and when do I demonstrate continuous compliance with the emission limits and standards?

To demonstrate continuous compliance with the emission limits and standards specified in Table 2 or 3 to this subpart, use the procedures specified in paragraph (a) of this section. In lieu of using the procedures specified in paragraph (a) of this section, you have the option to demonstrate initial compliance using the procedures specified in paragraph (b) of this section for particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, lead, and fugitive emissions from ash handling. You must meet the requirements of paragraphs (a) and (b) of this section, as applicable, and paragraphs (c) through (e) of this section, according to the performance testing, monitoring, and calibration requirements in § 60.5220(a) and (b). You may also petition the Administrator for alternative monitoring parameters as specified in paragraph (f) of this section.

(a) Demonstrate continuous compliance using a performance test. Except as provided in paragraphs (a)(3) and (e) of this section, following the date that the initial performance test for each pollutant in Table 2 or 3 to this subpart is completed, you must conduct a performance test for each such pollutant on an annual basis (between 11 and 13 calendar months following the previous performance test). The performance test must be conducted using the test methods, averaging methods, and minimum sampling volumes or durations specified in Table 2 or 3 to this subpart and according to the testing, monitoring, and calibration requirements specified in § 60.5220(a).

(1) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward. The Administrator may request a repeat performance test at any time.

(2) You must repeat the performance test within 60 days of a process change, as defined in § 60.5250.

(3) Except as specified in paragraphs (a)(1) and (2) of this section, you can conduct performance tests less often for a given pollutant, as specified in paragraphs (a)(3)(i) through (iii) of this section.

(i) You can conduct performance tests less often if your performance tests for the pollutant for at least 2 consecutive years show that your emissions are at or below 75 percent of the emission limit specified in Table 2 or 3 to this subpart, and there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions. In this case, you do not have to conduct a performance test for that pollutant for the next 2 years. You must conduct a performance test during the third year and no more than 37 months after the previous performance test.(ii) If your SSI unit continues to meet the emission limit for the pollutant, you may choose to conduct performance tests for the pollutant every third year if your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions, but each such performance test must be conducted no more than 37 months after the previous performance test.

(iii) If a performance test shows emissions exceeded 75 percent of the emission limit for a pollutant, you must conduct annual performance tests for that pollutant until all performance tests over 2 consecutive years show compliance.

(b) Demonstrate continuous compliance using a continuous emissions monitoring system or continuous automated sampling system. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**. Collect data as specified in § 60.5220(b)(6) and use the following procedures:

(1) To demonstrate continuous compliance with the emission limits for particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans (total mass basis or toxic equivalency basis), mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead, you may substitute the use of a continuous monitoring system in lieu of conducting the annual performance test required in paragraph (a) of this section, as follows:

(i) You may substitute the use of a continuous emissions monitoring system for any pollutant specified in paragraph (b)(1) of this section in lieu of conducting the annual performance test for that pollutant in paragraph (a) of this section. For determining compliance with the carbon monoxide concentration limit using carbon monoxide CEMS, the correction to 7 percent oxygen does not apply during periods of startup or shutdown. Use the measured carbon monoxide concentration without correcting for oxygen concentration in averaging with other carbon monoxide concentrations (corrected to 7 percent oxygen) to determine the 24-hour average value.

(ii) You may substitute the use of a continuous automated sampling system for mercury or dioxins/furans in lieu of conducting the annual mercury or dioxin/furan performance test in paragraph (a) of this section.

(2) If you use a continuous emissions monitoring system to demonstrate compliance with an applicable emission limit in paragraph (b)(1) of this section, you must use the continuous emissions monitoring system and follow the requirements specified in § 60.5220(b). You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen (or carbon dioxide). You must demonstrate initial compliance using a 24-hour block average of these 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of Method 19 of 40 CFR part 60, appendix A–7.

(3) If you use a continuous automated sampling system to demonstrate compliance with an applicable emission limit in paragraph (b)(1) of this section, you must:

(i) Use the continuous automated sampling system specified in § 60.58b(p) and (q), and measure and calculate average emissions corrected to 7 percent oxygen (or carbon dioxide) according to § 60.58b(p) and your monitoring plan.

(A) Use the procedures specified in § 60.58b(p) to calculate 24-hour averages to determine compliance with the mercury emission limit in Table 2 to this subpart.

(B) Use the procedures specified in § 60.58b(p) to calculate 2-week averages to determine compliance with the dioxin/furan (total mass basis or toxic equivalency basis) emission limits in Table 2 to this subpart.

(ii) Update your monitoring plan as specified in § 60.4880(e). For mercury continuous automated sampling systems, you must use Performance Specification 12B of appendix B of part 75 and Procedure 5 of appendix F of this part.

(4) Except as provided in paragraph (e) of this section, you must complete your periodic performance evaluations required in your monitoring plan for any continuous emissions monitoring systems and continuous automated sampling systems, according to the schedule specified in your monitoring plan. If you were previously determining compliance by conducting an annual performance test (or according to the less frequent testing for a pollutant as provided in paragraph (a)(3) of this section), you must complete the initial performance evaluation required under your monitoring plan in § 60.5200 for the continuous monitoring system prior to using the continuous emissions monitoring system to demonstrate compliance or continuous automated sampling system. Your performance evaluation must be conducted using the procedures and acceptance criteria specified in § 60.5200(a)(3).

(c) To demonstrate compliance with the dioxins/furans toxic equivalency emission limit in paragraph (a) or (b) of this section, you must determine dioxins/furans toxic equivalency as follows:

(1) Measure the concentration of each dioxin/furan tetra- through octachlorinated-isomer emitted using Method 23 at 40 CFR part 60, appendix A–7.

(2) For each dioxin/furan (tetra- through octachlorinated) isomer measured in accordance with paragraph (c)(1) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in Table 5 to this subpart.

(3) Sum the products calculated in accordance with paragraph (c)(2) of this section to obtain the total concentration of dioxins/furans emitted in terms of toxic equivalency.

(d) You must submit an annual compliance report as specified in § 60.5235(c). You must submit a deviation report as specified in § 60.5235(d) for each instance that you did not meet each emission limit in Table 2 to this subpart.

(e) If you demonstrate continuous compliance using a performance test, as specified in paragraph (a) of this section, then the provisions of this paragraph (e) apply. If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure, you must notify the Administrator in writing as specified in § 60.5235(g). You must conduct the performance test as soon as practicable after the force majeure occurs. The Administrator will determine whether or not to grant the extension to the performance test deadline, and will notify you in writing of approval or disapproval of the request for an extension as soon as practicable. Until an extension of the performance test deadline has been approved by the Administrator, you remain strictly subject to the requirements of this subpart.

(f) After any initial requests in § 60.5200 for alternative monitoring requirements for initial compliance, you may subsequently petition the Administrator for alternative monitoring parameters as specified in §§ 60.13(i) and 60.5200(e).

**§ 60.5210 How do I demonstrate continuous compliance with my operating limits?**

You must continuously monitor your operating parameters as specified in paragraph (a) of this section and meet the requirements of paragraphs (b) and (c) of this section, according to the monitoring and calibration requirements in § 60.5225. You must confirm and re-establish your operating limits as specified in paragraph (d) of this section.

(a) You must continuously monitor the operating parameters specified in paragraphs (a)(1) and (a)(2) of this section using the continuous monitoring equipment and according to the procedures specified in § 60.5225 or established in § 60.5175. To determine compliance, you must use the data averaging period specified in Table 4 to this subpart (except for alarm time of the baghouse leak detection system) unless a different averaging period is established under § 60.5175.

(1) You must demonstrate that the SSI unit meets the operating limits established according to §§ 60.5175 and 60.5190 and paragraph (d) of this section for each applicable operating parameter.

(2) You must demonstrate that the SSI unit meets the operating limit for bag leak detection systems as follows:

(i) For a bag leak detection system, you must calculate the alarm time as follows:

(A) If inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted.

(B) If corrective action is required, each alarm time shall be counted as a minimum of 1 hour.

(C) If you take longer than 1 hour to initiate corrective action, each alarm time (*i.e.,* time that the alarm sounds) is counted as the actual amount of time taken by you to initiate corrective action.

(ii) Your maximum alarm time is equal to 5 percent of the operating time during a 6-month period, as specified in § 60.5170(c).

(b) Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. You must submit the deviation report specified in § 60.5235(d) for each instance that you did not meet one of your operating limits established under this subpart.

(c) You must submit the annual compliance report specified in § 60.5235(c) to demonstrate continuous compliance.

(d) You must confirm your operating limits according to paragraph (d)(1) of this section or re-establish operating limits according to paragraph (d)(2) of this section. Your operating limits must be established so as to assure ongoing compliance with the emission limits. These requirements also apply to your operating requirements in your fugitive emissions monitoring plan specified in § 60.5170(d).

(1) Your operating limits must be based on operating data recorded during any performance test required in § 60.5205(a) or any performance evaluation required in § 60.5205(b)(4).

(2) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward.

**§ 60.5215 By what date must I conduct annual air pollution control device inspections and make any necessary repairs?**

(a) You must conduct an annual inspection of each air pollution control device used to comply with the emission limits, according to § 60.5220(c), no later than 12 months following the previous annual air pollution control device inspection.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless you obtain written approval from the Administrator establishing a date whereby all necessary repairs of the affected SSI unit must be completed.

## Model Rule—Performance Testing, Monitoring, and Calibration Requirements

**§ 60.5220 What are the performance testing, monitoring, and calibration requirements for compliance with the emission limits and standards?**

You must meet, as applicable, the performance testing requirements specified in paragraph (a) of this section, the monitoring requirements specified in paragraph (b) of this section, the air pollution control device inspections requirements specified in paragraph (c) of this section, and the bypass stack provisions specified in paragraph (d) of this section.

(a) *Performance testing requirements.*

(1) All performance tests must consist of a minimum of three test runs conducted under conditions representative of normal operations, as specified in § 60.8(c). Emissions in excess of the emission limits or standards during periods of startup, shutdown, and malfunction are considered deviations from the applicable emission limits or standards.

(2) You must document that the dry sludge burned during the performance test is representative of the sludge burned under normal operating conditions by:

(i) Maintaining a log of the quantity of sewage sludge burned during the performance test by continuously monitoring and recording the average hourly rate that sewage sludge is fed to the incinerator.

(ii) Maintaining a log of the moisture content of the sewage sludge burned during the performance test by taking grab samples of the sewage sludge fed to the incinerator for each 8 hour period that testing is conducted.

(3) All performance tests must be conducted using the test methods, minimum sampling volume, observation period, and averaging method specified in Table 2 or 3 to this subpart.

(4) Method 1 at 40 CFR part 60, appendix A must be used to select the sampling location and number of traverse points.

(5) Method 3A or 3B at 40 CFR part 60, appendix A–2 must be used for gas composition analysis, including measurement of oxygen concentration. Method 3A or 3B at 40 CFR part 60, appendix A–2 must be used simultaneously with each method.

(6) All pollutant concentrations must be adjusted to 7 percent oxygen using Equation 1 of this section:

$$C_{adj} = C_{meas}(20.9-7)/(20.9-\%O_2) \quad \text{(Eq. 1)}$$

Where:

$C_{adj}$ = Pollutant concentration adjusted to 7 percent oxygen.

$C_{meas}$ = Pollutant concentration measured on a dry basis.

(20.9 − 7) = 20.9 percent oxygen − 7 percent oxygen (defined oxygen correction basis).

20.9 = Oxygen concentration in air, percent.

$\%O_2$ = Oxygen concentration measured on a dry basis, percent.

(7) Performance tests must be conducted and data reduced in accordance with the test methods and procedures contained in this subpart unless the Administrator does one of the following.

(i) Specifies or approves, in specific cases, the use of a method with minor changes in methodology.

(ii) Approves the use of an equivalent method.

(iii) Approves the use of an alternative method the results of which he has determined to be adequate for indicating whether a specific source is in compliance.

(iv) Waives the requirement for performance tests because you have demonstrated by other means to the Administrator's satisfaction that the affected SSI unit is in compliance with the standard.

(v) Approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors. Nothing in this paragraph is construed to abrogate the Administrator's authority to require testing under section 114 of the Clean Air Act.

(8) You must provide the Administrator at least 30 days prior notice of any performance test, except as specified under other subparts, to afford the Administrator the opportunity to have an observer present. If after 30 days notice for an initially scheduled performance test, there is a delay (due to operational problems, *etc.*) in conducting the scheduled performance test, you must notify the Administrator as soon as possible of any delay in the original test date, either by providing at least 7 days prior notice of the rescheduled date of the performance test, or by arranging a rescheduled date with the Administrator by mutual agreement.

(9) You must provide, or cause to be provided, performance testing facilities as follows:

(i) Sampling ports adequate for the test methods applicable to the SSI unit, as follows:

(A) Constructing the air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by applicable test methods and procedures.

(B) Providing a stack or duct free of cyclonic flow during performance tests, as demonstrated by applicable test methods and procedures.

(ii) Safe sampling platform(s).

(iii) Safe access to sampling platform(s).

(iv) Utilities for sampling and testing equipment.

(10) Unless otherwise specified in this subpart, each performance test must consist of three separate runs using the applicable test method. Each run must be conducted for the time and under the conditions specified in the applicable standard. Compliance with each

emission limit must be determined by calculating the arithmetic mean of the three runs. In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond your control, compliance may, upon the Administrator's approval, be determined using the arithmetic mean of the results of the two other runs.

(11) During each test run specified in paragraph (a)(1) of this section, you must operate your sewage sludge incinerator at a minimum of 85 percent of your maximum permitted capacity.

(b) *Continuous monitor requirements.* You must meet the following requirements, as applicable, when using a continuous monitoring system to demonstrate compliance with the emission limits in Table 2 or 3 to this subpart. The option to use a continuous emissions monitoring system for hydrogen chloride, dioxins/furans, cadmium, or lead takes effect on the date a final performance specification applicable to hydrogen chloride, dioxins/furans, cadmium, or lead is published in the **Federal Register**. If you elect to use a continuous emissions monitoring system instead of conducting annual performance testing, you must meet the requirements of paragraphs (b)(1) through (b)(6) of this section. If you elect to use a continuous automated sampling system instead of conducting annual performance testing, you must meet the requirements of paragraph (b)(7) of this section. The option to use a continuous automated sampling system for dioxins/furans takes effect on the date a final performance specification for such a continuous automated sampling system is published in the **Federal Register**.

(1) You must notify the Administrator 1 month before starting use of the continuous emissions monitoring system.

(2) You must notify the Administrator 1 month before stopping use of the continuous emissions monitoring system, in which case you must also conduct a performance test within prior to ceasing operation of the system.

(3) You must install, operate, calibrate, and maintain an instrument for continuously measuring and recording the emissions to the atmosphere in accordance with the following:

(i) Section 60.13 of subpart A of this part.

(ii) The following performance specifications of appendix B of this part, as applicable:

(A) For particulate matter, Performance Specification 11 of appendix B of this part.

(B) For hydrogen chloride, Performance Specification 15 of appendix B of this part.

(C) For carbon monoxide, Performance Specification 4B of appendix B of this part with spans appropriate to the applicable emission limit.

(D) [Reserved]

(E) For mercury, Performance Specification 12A of appendix B of this part.

(F) For nitrogen oxides, Performance Specification 2 of appendix B of this part.

(G) For sulfur dioxide, Performance Specification 2 of appendix B of this part.

(iii) For continuous emissions monitoring systems, the quality assurance procedures (*e.g.,* quarterly accuracy determinations and daily calibration drift tests) of appendix F of this part specified in paragraphs (b)(3)(iii)(A) through (b)(3)(iii)(G) of this section. For each pollutant, the span value of the continuous emissions monitoring system is two times the applicable emission limit, expressed as a concentration.

(A) For particulate matter, Procedure 2 in appendix F of this part.

(B) For hydrogen chloride, Procedure 1 in appendix F of this part except that the Relative Accuracy Test Audit requirements of Procedure 1 shall be replaced with the validation requirements and criteria of sections 11.1.1 and 12.0 of Performance Specification 15 of appendix B of this part.

(C) For carbon monoxide, Procedure 1 in appendix F of this part.

(D) [Reserved]

(E) For mercury, Procedures 5 in appendix F of this part.

(F) For nitrogen oxides, Procedure 1 in appendix F of this part.

(G) For sulfur dioxide, Procedure 1 in appendix F of this part.

(iv) If your monitoring system has a malfunction or out-of-control period, you must complete repairs and resume operation of your monitoring system as expeditiously as possible.

(4) During each relative accuracy test run of the continuous emissions monitoring system using the performance specifications in paragraph (b)(3)(ii) of this section, emission data for each regulated pollutant and oxygen (or carbon dioxide as established in (b)(5) of this section) must be collected concurrently (or within a 30- to 60-minute period) by both the continuous emissions monitoring systems and the test methods specified in paragraph (b)(4)(i) through (b)(4)(viii) of this section. Relative accuracy testing must be at representative operating conditions while the SSI unit is charging sewage sludge.

(i) For particulate matter, Method 5 at 40 CFR part 60, appendix A–3 or Method 26A or 29 at 40 CFR part 60, appendix A–8 shall be used.

(ii) For hydrogen chloride, Method 26 or 26A at 40 CFR part 60, appendix A–8, shall be used, as specified in Tables 1 and 2 to this subpart.

(iii) For carbon monoxide, Method 10, 10A, or 10B at 40 CFR part 60, appendix A–4, shall be used.

(iv) For dioxins/furans, Method 23 at 40 CFR part 60, appendix A–7, shall be used.

(v) For mercury, cadmium, and lead, Method 29 at 40 CFR part 60, appendix A–8, shall be used. Alternatively for mercury, either Method 30B at 40 CFR part 60, appendix A–8 or ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), may be used.

(vi) For nitrogen oxides, Method 7 or 7E at 40 CFR part 60, appendix A–4, shall be used.

(vii) For sulfur dioxide, Method 6 or 6C at 40 CFR part 60, appendix A–4, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) must be used. For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for the inlet of the sulfur dioxide continuous emissions monitoring system should be no greater than 20 percent of the mean value of the method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the method and the continuous emissions monitoring system, whichever is greater.

(viii) For oxygen (or carbon dioxide as established in (b)(5) of this section), Method 3A or 3B at 40 CFR part 60, appendix A–2, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(5) You may request that compliance with the emission limits be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (b)(5)(i)

through (b)(5)(iv) of this section. This relationship may be re-established during subsequent performance tests.

(i) The fuel factor equation in Method 3B at 40 CFR part 60, appendix A–2 must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A or 3B at 50 CFR part 60, appendix A–2, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, *see* § 60.17), as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor.

(ii) Samples must be taken for at least 30 minutes in each hour.

(iii) Each sample must represent a 1-hour average.

(iv) A minimum of three runs must be performed.

(6) You must operate the continuous monitoring system and collect data with the continuous monitoring system as follows:

(i) You must collect data using the continuous monitoring system at all times the affected SSI unit is operating and at the intervals specified in paragraph (b)(6)(ii) of this section, except for periods of monitoring system malfunctions that occur during periods specified in § 60.5200(a)(7)(i), repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments). Any such periods that you do not collect data using the continuous monitoring system constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(ii) You must collect continuous emissions monitoring system data in accordance with § 60.13(e)(2).

(iii) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities must not be included in calculations used to report emissions or operating levels. Any such periods must be reported in a deviation report.

(iv) Any data collected during periods when the monitoring system is out of control as specified in § 60.4880(a)(7)(i), repairs associated with periods when the monitoring system is out of control, or required monitoring system quality assurance or control activities conducted during out-of-control periods must not be included in calculations used to report emissions or operating levels. Any such periods that do not coincide with a monitoring system malfunction as defined in § 60.5250, constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(v) You must use all the data collected during all periods except those periods specified in paragraphs (b)(6)(iii) and (b)(6)(iv) of this section in assessing the operation of the control device and associated control system.

(7) If you elect to use a continuous automated sampling system instead of conducting annual performance testing, you must:

(i) Install, calibrate, maintain, and operate a continuous automated sampling system according to the site-specific monitoring plan developed in § 60.58b(p)(1) through (p)(6), (p)(9), (p)(10), and (q).

(ii) Collect data according to § 60.58b(p)(5) and paragraph (b)(6) of this section.

(c) *Air pollution control device inspections.* You must conduct air pollution control device inspections that include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation.

(2) Generally observe that the equipment is maintained in good operating condition.

(3) Develop a site-specific monitoring plan according to the requirements in § 60.5200. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i). (d) *Bypass stack.* Use of the bypass stack at any time that sewage sludge is being charged to the SSI unit is an emissions standards deviation for all pollutants listed in Table 2 or 3 to this subpart. The use of the bypass stack during a performance test invalidates the performance test.

**§ 60.5225 What are the monitoring and calibration requirements for compliance with my operating limits?**

(a) You must install, operate, calibrate, and maintain the continuous parameter monitoring systems according to the requirements in paragraphs (a)(1) and (2) of this section.

(1) Meet the following general requirements for flow, pressure, pH, and operating temperature measurement devices:

(i) You must collect data using the continuous monitoring system at all times the affected SSI unit is operating and at the intervals specified in paragraph (a)(1)(ii) of this section, except for periods of monitoring system malfunctions that occur during periods specified defined in § 60.5200(a)(7)(i), repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments). Any such periods that you do not collect data using the continuous monitoring system constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(ii) You must collect continuous parameter monitoring system data in accordance with § 60.13(e)(2).

(iii) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities must not be included in calculations used to report emissions or operating levels. Any such periods must be reported in your annual deviation report.

(iv) Any data collected during periods when the monitoring system is out of control as specified in § 60.5200(a)(7)(i) must not be included in calculations used to report emissions or operating levels. Any such periods that do not coincide with a monitoring system malfunction, as defined in § 60.5250, constitute a deviation from the monitoring requirements and must be reported in a deviation report.

(v) You must use all the data collected during all periods except those periods specified in paragraphs (a)(1)(iii) and (a)(1)(iv) of this section in assessing the operation of the control device and associated control system.

(vi) Record the results of each inspection, calibration, and validation check.

(2) Operate and maintain your continuous monitoring system according to your monitoring plan required under § 60.4880. Additionally:

(i) For carrier gas flow rate monitors (for activated carbon injection), during the performance test conducted pursuant to § 60.4885, you must demonstrate that the system is maintained within +/ − 5 percent accuracy, according to the procedures in appendix A to part 75 of this chapter.

(ii) For carrier gas pressure drop monitors (for activated carbon injection), during the performance test conducted pursuant to § 60.4885, you must demonstrate that the system is maintained within +/ − 5 percent accuracy.

(b) You must operate and maintain your bag leak detection system in continuous operation according to your monitoring plan required under § 60.4880. Additionally:

(1) For positive pressure fabric filter systems that do not duct all

compartments of cells to a common stack, a bag leak detection system must be installed in each baghouse compartment or cell.

(2) Where multiple bag leak detectors are required, the system's instrumentation and alarm may be shared among detectors.

(3) You must initiate procedures to determine the cause of every alarm within 8 hours of the alarm, and you must alleviate the cause of the alarm within 24 hours of the alarm by taking whatever corrective action(s) are necessary. Corrective actions may include, but are not limited to the following:

(i) Inspecting the fabric filter for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in particulate matter emissions.

(ii) Sealing off defective bags or filter media.

(iii) Replacing defective bags or filter media or otherwise repairing the control device.

(iv) Sealing off a defective fabric filter compartment.

(v) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system.

(vi) Shutting down the process producing the particulate matter emissions.

(c) You must operate and maintain the continuous parameter monitoring systems specified in paragraphs (a) and (b) of this section in continuous operation according to your monitoring plan required under § 60.4880.

(d) If your SSI unit has a bypass stack, you must install, calibrate (to manufacturers' specifications), maintain, and operate a device or method for measuring the use of the bypass stack including date, time, and duration.

## Model Rule—Recordkeeping and Reporting

### § 60.5230 What records must I keep?

You must maintain the items (as applicable) specified in paragraphs (a) through (n) of this section for a period of at least 5 years. All records must be available on site in either paper copy or computer-readable format that can be printed upon request, unless an alternative format is approved by the Administrator.

(a) *Date.* Calendar date of each record.

(b) *Increments of progress.* Copies of the final control plan and any additional notifications, reported under § 60.5235.

(c) *Operator Training.* Documentation of the operator training procedures and records specified in paragraphs (c)(1) through (c)(4) of this section. You must make available and readily accessible at the facility at all times for all SSI unit operators the documentation specified in paragraph (c)(1) of this section.

(1) Documentation of the following operator training procedures and information:

(i) Summary of the applicable standards under this subpart.

(ii) Procedures for receiving, handling, and feeding sewage sludge.

(iii) Incinerator startup, shutdown, and malfunction preventative and corrective procedures.

(iv) Procedures for maintaining proper combustion air supply levels.

(v) Procedures for operating the incinerator and associated air pollution control systems within the standards established under this subpart.

(vi) Monitoring procedures for demonstrating compliance with the incinerator operating limits.

(vii) Reporting and recordkeeping procedures.

(viii) Procedures for handling ash.

(ix) A list of the materials burned during the performance test, if in addition to sewage sludge.

(x) For each qualified operator and other plant personnel who may operate the unit according to the provisions of § 60.5155(a), the phone and/or pager number at which they can be reached during operating hours.

(2) Records showing the names of SSI unit operators and other plant personnel who may operate the unit according to the provisions of § 60.5155(a), as follows:

(i) Records showing the names of SSI unit operators and other plant personnel who have completed review of the information in paragraph (c)(1) of this section as required by § 60.5160(b), including the date of the initial review and all subsequent annual reviews.

(ii) Records showing the names of the SSI operators who have completed the operator training requirements under § 60.5130, met the criteria for qualification under § 60.5140, and maintained or renewed their qualification under § 60.5145 or § 60.5150. Records must include documentation of training, including the dates of their initial qualification and all subsequent renewals of such qualifications.

(3) Records showing the periods when no qualified operators were accessible for more than 8 hours, but less than 2 weeks, as required in § 60.5155(a).

(4) Records showing the periods when no qualified operators were accessible for 2 weeks or more along with copies of reports submitted as required in § 60.5155(b).

(d) *Air pollution control device inspections.* Records of the results of initial and annual air pollution control device inspections conducted as specified in §§ 60.5195 and 60.5220(c), including any required maintenance and any repairs not completed within 10 days of an inspection or the timeframe established by the Administrator.

(e) *Performance test reports.*

(1) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and standards and/or to establish operating limits, as applicable.

(2) Retain a copy of the complete performance test report, including calculations.

(3) Keep a record of the hourly dry sludge feed rate measured during performance test runs as specified in § 60.5220(a)(2)(i).

(4) Keep any necessary records to demonstrate that the performance test was conducted under conditions representative of normal operations, including a record of the moisture content measured as required in § 60.5220(a)(2)(ii) for each grab sample taken of the sewage sludge burned during the performance test.

(f) *Continuous monitoring data.* Records of the following data, as applicable:

(1) For continuous emissions monitoring systems, all 1-hour average concentrations of particulate matter, hydrogen chloride, carbon monoxide, dioxins/furans total mass basis, mercury, nitrogen oxides, sulfur dioxide, cadmium, and lead emissions.

(2) For continuous automated sampling systems, all average concentrations measured for mercury and dioxins/furans total mass basis at the frequencies specified in your monitoring plan.

(3) For continuous parameter monitoring systems:

(i) All 1-hour average values recorded for the following operating parameters, as applicable:

(A) Combustion chamber operating temperature (or afterburner temperature).

(B) If a wet scrubber is used to comply with the rule, pressure drop across each wet scrubber system and liquid flow rate to each wet scrubber used to comply with the emission limit in Table 2 or 3 to this subpart for particulate matter, cadmium, or lead, and scrubber liquid flow rate and scrubber liquid pH for each wet scrubber used to comply with an emission limit in Table 2 or 3 to this subpart for sulfur dioxide or hydrogen chloride.

(C) If an electrostatic precipitator is used to comply with the rule, secondary voltage of the electrostatic precipitator collection plates and secondary amperage of the electrostatic precipitator collection plates, and effluent water flow rate at the outlet of the wet electrostatic precipitator.

(D) If activated carbon injection is used to comply with the rule, sorbent flow rate and carrier gas flow rate or pressure drop, as applicable.

(ii) All daily average values recorded for the feed rate and moisture content of the sewage sludge fed to the sewage sludge incinerator, monitored and calculated as specified in § 60.5170(f).

(iii) If a fabric filter is used to comply with the rule, the date, time, and duration of each alarm and the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of operating time during each 6-month period that the alarm sounds, calculated as specified in § 60.5210.

(iv) For other control devices for which you must establish operating limits under § 60.5175, you must maintain data collected for all operating parameters used to determine compliance with the operating limits, at the frequencies specified in your monitoring plan.

(g) *Other records for continuous monitoring systems.* You must keep the following records, as applicable:

(1) Keep records of any notifications to the Administrator in § 60.4915(h)(1) of starting or stopping use of a continuous monitoring system for determining compliance with any emissions limit.

(2) Keep records of any requests under § 60.5220(b)(5) that compliance with the emission limits be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen.

(3) If activated carbon injection is used to comply with the rule, the type of sorbent used and any changes in the type of sorbent used.

(h) *Deviation Reports.* Records of any deviation reports submitted under § 60.5235(e) and (f).

(i) *Equipment specifications and operation and maintenance requirements.* Equipment specifications and related operation and maintenance requirements received from vendors for the incinerator, emission controls, and monitoring equipment.

(j) *Inspections, calibrations, and validation checks of monitoring devices.* Records of inspections, calibration, and validation checks of any monitoring devices as required under §§ 60.5220 and 60.5225.

(k) *Monitoring plan and performance evaluations for continuous monitoring systems.* Records of the monitoring plans required under § 60.5200, and records of performance evaluations required under § 60.5205(b)(5).(l) *Less frequent testing.* If, consistent with 60.5205(a)(3), you elect to conduct performance tests less frequently than annually, you must keep annual records that document that your emissions in the two previous consecutive years were at or below 75 percent of the applicable emission limit in Table 1 or 2 to this subpart, and document that there were no changes in source operations or air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past 2 years.

(m) *Use of bypass stack.* Records indicating use of the bypass stack, including dates, times, and durations as required under § 60.5225(d).

(n) If a malfunction occurs, you must keep a record of the information submitted in your annual report in § 60.5235(c)(16).

### § 60.5235 What reports must I submit?

You must submit the reports specified in paragraphs (a) through (i) of this section. See Table 6 to this subpart for a summary of these reports.

(a) *Increments of progress report.* If you plan to achieve compliance more than 1 year following the effective date of state plan approval, you must submit the following reports, as applicable:

(1) A final control plan as specified in §§ 60.5085(a) and 60.5110.

(2) You must submit your notification of achievement of increments of progress no later than 10 business days after the compliance date for the increment as specified in §§ 60.5095 and 60.5100.

(3) If you fail to meet an increment of progress, you must submit a notification to the Administrator postmarked within 10 business days after the date for that increment, as specified in § 60.5105.

(4) If you plan to close your SSI unit rather than comply with the state plan, submit a closure notification as specified in § 60.5125.

(b) *Initial compliance report.* You must submit the following information no later than 60 days following the initial performance test.

(1) Company name, physical address, and mailing address.

(2) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(3) Date of report.

(4) The complete test report for the initial performance test results obtained by using the test methods specified in Table 2 or 3 to this subpart.

(5) If an initial performance evaluation of a continuous monitoring system was conducted, the results of that initial performance evaluation.

(6) The values for the site-specific operating limits established pursuant to §§ 60.5170 and 60.5175 and the calculations and methods, as applicable, used to establish each operating limit.

(7) If you are using a fabric filter to comply with the emission limits, documentation that a bag leak detection system has been installed and is being operated, calibrated, and maintained as required by § 60.5170(b).

(8) The results of the initial air pollution control device inspection required in § 60.5195, including a description of repairs.

(9) The site-specific monitoring plan required under § 60.5200, at least 60 days before your initial performance evaluation of your continuous monitoring system.

(10) The site-specific monitoring plan for your ash handling system required under § 60.5200, at least 60 days before your initial performance test to demonstrate compliance with your fugitive ash emission limit.

(c) *Annual compliance report.* You must submit an annual compliance report that includes the items listed in paragraphs (c)(1) through (c)(16) of this section for the reporting period specified in paragraph (c)(3) of this section. You must submit your first annual compliance report no later than 12 months following the submission of the initial compliance report in paragraph (b) of this section. You must submit subsequent annual compliance reports no more than 12 months following the previous annual compliance report. (You may be required to submit these reports (or additional compliance information) more frequently by the title V operating permit required in § 60.5240.)

(1) Company name, physical address, and mailing address.

(2) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(3) Date of report and beginning and ending dates of the reporting period.

(4) If a performance test was conducted during the reporting period, the results of that performance test.

(i) If operating limits were established during the performance test, include the value for each operating limit and, as applicable, the method used to establish each operating limit, including calculations.

(ii) If activated carbon is used during the performance test, include the type of activated carbon used.

(5) For each pollutant and operating parameter recorded using a continuous monitoring system, the highest average value and lowest average value recorded during the reporting period, as follows:

(i) For continuous emission monitoring systems and continuous automated sampling systems, report the highest and lowest 24-hour average emission value.

(ii) For continuous parameter monitoring systems, report the following values:

(A) For all operating parameters except scrubber liquid pH, the highest and lowest 12-hour average values.

(B) For scrubber liquid pH, the highest and lowest 3-hour average values.

(6) If there are no deviations during the reporting period from any emission limit, emission standard, or operating limit that applies to you, a statement that there were no deviations from the emission limits, emission standard, or operating limits.

(7) Information for bag leak detection systems recorded under § 60.5230(f)(3)(iii).

(8) If a performance evaluation of a continuous monitoring system was conducted, the results of that performance evaluation. If new operating limits were established during the performance evaluation, include your calculations for establishing those operating limits.

(9) If you elect to conduct performance tests less frequently as allowed in § 60.5205(a)(3) and did not conduct a performance test during the reporting period, you must include the dates of the last two performance tests, a comparison of the emission level you achieved in the last two performance tests to the 75 percent emission limit threshold specified in § 60.5205(a)(3), and a statement as to whether there have been any process changes and whether the process change resulted in an increase in emissions.

(10) Documentation of periods when all qualified sewage sludge incineration unit operators were unavailable for more than 8 hours, but less than 2 weeks.

(11) Results of annual air pollution control device inspections recorded under § 60.5230(d) for the reporting period, including a description of repairs.

(12) If there were no periods during the reporting period when your continuous monitoring systems had a malfunction, a statement that there were no periods during which your continuous monitoring systems had a malfunction.

(13) If there were no periods during the reporting period when a continuous monitoring system was out of control, a statement that there were no periods during which your continuous monitoring systems were out of control.

(14) If there were no operator training deviations, a statement that there were no such deviations during the reporting period.

(15) If you did not make revisions to your site-specific monitoring plan during the reporting period, a statement that you did not make any revisions to your site-specific monitoring plan during the reporting period. If you made revisions to your site-specific monitoring plan during the reporting period, a copy of the revised plan.

(16) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction.

(d) *Deviation reports.*

(1) You must submit a deviation report if:

(i) Any recorded operating parameter level, based on the averaging time specified in Table 4 to this subpart, is above the maximum operating limit or below the minimum operating limit established under this subpart.

(ii) The bag leak detection system alarm sounds for more than 5 percent of the operating time for the 6-month reporting period.

(iii) Any recorded 24-hour block average emissions level is above the emission limit, if a continuous monitoring system is used to comply with an emission limit.

(iv) There are visible emissions of combustion ash from an ash conveying system for more than 5 percent of the hourly observation period.

(v) A performance test was conducted that deviated from any emission limit in Table 2 or 3 to this subpart.

(vi) A continuous monitoring system was out of control.

(vii) You had a malfunction (*e.g.,* continuous monitoring system malfunction) that caused or may have caused any applicable emission limit to be exceeded.

(2) The deviation report must be submitted by August 1 of that year for data collected during the first half of the calendar year (January 1 to June 30), and by February 1 of the following year for data you collected during the second half of the calendar year (July 1 to December 31).

(3) For each deviation where you are using a continuous monitoring system to comply with an associated emission limit or operating limit, report the items described in paragraphs (d)(3)(i) through (d)(3)(viii) of this section.

(i) Company name, physical address, and mailing address.

(ii) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(iii) The calendar dates and times your unit deviated from the emission limits, emission standards, or operating limits requirements.

(iv) The averaged and recorded data for those dates.

(v) Duration and cause of each deviation from the following:

(A) Emission limits, emission standards, operating limits, and your corrective actions.

(B) Bypass events and your corrective actions.

(vi) Dates, times, and causes for monitor downtime incidents.

(vii) A copy of the operating parameter monitoring data during each deviation and any test report that documents the emission levels.

(viii) If there were periods during which the continuous monitoring system malfunctioned or was out of control, you must include the following information for each deviation from an emission limit or operating limit:

(A) The date and time that each malfunction started and stopped.

(B) The date, time, and duration that each continuous monitoring system was inoperative, except for zero (low-level) and high-level checks.

(C) The date, time, and duration that each continuous monitoring system was out of control, including start and end dates and hours and descriptions of corrective actions taken.

(D) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of malfunction, during a period when the system as out of control, or during another period.

(E) A summary of the total duration of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period.

(F) A breakdown of the total duration of the deviations during the reporting

period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes.

(G) A summary of the total duration of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the SSI unit at which the continuous monitoring system downtime occurred during that reporting period.

(H) An identification of each parameter and pollutant that was monitored at the SSI unit.

(I) A brief description of the SSI unit.

(J) A brief description of the continuous monitoring system.

(K) The date of the latest continuous monitoring system certification or audit.

(L) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period.

(4) For each deviation where you are not using a continuous monitoring system to comply with the associated emission limit or operating limit, report the following items:.

(i) Company name, physical address, and mailing address.

(ii) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.

(iii) The total operating time of each affected source during the reporting period.

(iv) The calendar dates and times your unit deviated from the emission limits, emission standards, or operating limits requirements.

(v) The averaged and recorded data for those dates.

(vi) Duration and cause of each deviation from the following:

(A) Emission limits, emission standards, operating limits, and your corrective actions.

(B) Bypass events and your corrective actions.

(vii) A copy of any performance test report that showed a deviation from the emission limits or standards.

(viii) A brief description of any malfunction reported in paragraph (d)(1)(vii) of this section, including a description of actions taken during the malfunction to minimize emissions in accordance with § 60.11(d) and to correct the malfunction.

(e) *Qualified operator deviation.*

(1) If all qualified operators are not accessible for 2 weeks or more, you must take the two actions in paragraphs (e)(1)(i) and (e)(1)(ii) of this section.

(i) Submit a notification of the deviation within 10 days that includes the three items in paragraphs (e)(1)(i)(A) through (e)(1)(i)(C) of this section.

(A) A statement of what caused the deviation.

(B) A description of actions taken to ensure that a qualified operator is accessible.

(C) The date when you anticipate that a qualified operator will be available.

(ii) Submit a status report to the Administrator every 4 weeks that includes the three items in paragraphs (e)(1)(ii)(A) through (e)(1)(ii)(C) of this section.

(A) A description of actions taken to ensure that a qualified operator is accessible.

(B) The date when you anticipate that a qualified operator will be accessible.

(C) Request for approval from the Administrator to continue operation of the SSI unit.

(2) If your unit was shut down by the Administrator, under the provisions of § 60.5155(b)(2)(i), due to a failure to provide an accessible qualified operator, you must notify the Administrator within five days of meeting § 60.5155(b)(2)(ii) that you are resuming operation.

(f) *Notification of a force majeure.* If a force majeure is about to occur, occurs, or has occurred for which you intend to assert a claim of force majeure:

(1) You must notify the Administrator, in writing as soon as practicable following the date you first knew, or through due diligence, should have known that the event may cause or caused a delay in conducting a performance test beyond the regulatory deadline, but the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification must occur as soon as practicable.

(2) You must provide to the Administrator a written description of the force majeure event and a rationale for attributing the delay in conducting the performance test beyond the regulatory deadline to the force majeure; describe the measures taken or to be taken to minimize the delay; and identify a date by which you propose to conduct the performance test.

(g) *Other notifications and reports required.* You must submit other notifications as provided by § 60.7 and as follows:

(1) You must notify the Administrator 1 month before starting or stopping use of a continuous monitoring system for determining compliance with any emission limit.

(2) You must notify the Administrator at least 30 days prior to any performance test conducted to comply with the provisions of this subpart, to afford the Administrator the opportunity to have an observer present.

(3) As specified in § 60.5220(a)(8), you must notify the Administrator at least 7 days prior to the date of a rescheduled performance test for which notification was previously made in paragraph (g)(2) of this section.

(h) *Report submission form.*

(1) Submit initial, annual, and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(2) As of January 1, 2012 and within 60 days after the date of completing each performance test, as defined in § 63.2, conducted to demonstrate compliance with this subpart, you must submit relative accuracy test audit (*i.e.,* reference method) data and performance test (*i.e.,* compliance test) data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (*see http://www.epa.gov/ttn/chief/ert/ert_tool.html/*) or other compatible electronic spreadsheet. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

(i) *Changing report dates.* If the Administrator agrees, you may change the semiannual or annual reporting dates. See § 60.19(c) for procedures to seek approval to change your reporting date.

## Model Rule—Title V Operating Permits

### § 60.5240 Am I required to apply for and obtain a Title V operating permit for my existing SSI unit?

Yes, if you are subject to an applicable EPA-approved and effective CAA section 111(d)/129 state or tribal plan or an applicable and effective Federal plan, you are required to apply for and obtain a Title V operating permit for your existing SSI unit unless you meet the relevant requirements for an exemption specified in § 60.5065.

### § 60.5245 When must I submit a title V permit application for my existing SSI unit?

(a) If your existing SSI unit is not subject to an earlier permit application deadline, a complete title V permit application must be submitted on or before the earlier of the dates specified in paragraphs (a)(1) through (a)(3) of this section. (See sections 129 (e), 503(c), 503(d), and 502(a) of the Clean Air Act and 40 CFR 70.5(a)(1)(i) and 40 CFR 71.5(a)(1)(i)).

(1) 12 months after the effective date of any applicable EPA-approved Clean

Air Act section 111(d)/129 state or tribal plan.

(2) 12 months after the effective date of any applicable Federal plan.

(3) March 21, 2014.

(b) For any existing unit not subject to an earlier permit application deadline, the application deadline of 36 months after the promulgation of this subpart applies regardless of whether or when any applicable Federal plan is effective, or whether or when any applicable Clean Air Act section 111(d)/129 state or tribal plan is approved by EPA and becomes effective.

(c) If your existing unit is subject to title V as a result of some triggering requirement(s) other than those specified in paragraphs (a) and (b) of this section (for example, a unit may be a major source or part of a major source), then your unit may be required to apply for a title V permit prior to the deadlines specified in paragraphs (a) and (b). If more than one requirement triggers a source's obligation to apply for a title V permit, the 12-month timeframe for filing a title V permit application is triggered by the requirement which first causes the source to be subject to title V. (See section 503(c) of the Clean Air Act and 40 CFR 70.3(a) and (b), 40 CFR 70.5(a)(1)(i), 40 CFR 71.3(a) and (b), and 40 CFR 71.5(a)(1)(i).)

(d) A "complete" title V permit application is one that has been determined or deemed complete by the relevant permitting authority under section 503(d) of the Clean Air Act and 40 CFR 70.5(a)(2) or 40 CFR 71.5(a)(2). You must submit a complete permit application by the relevant application deadline in order to operate after this date in compliance with Federal law. (*See* sections 503(d) and 502(a) of the Clean Air Act and 40 CFR 70.7(b) and 40 CFR 71.7(b).)

## Model Rule-Definitions

### § 60.5250 What definitions must I know?

Terms used but not defined in this subpart are defined in the Clean Air Act and § 60.2.

*Administrator* means:

(1) For units covered by the Federal plan, the Administrator of the EPA or his/her authorized representative.

(2) For units covered by an approved state plan, the director of the state air pollution control agency or his/her authorized representative.

*Affected source* means a sewage sludge incineration unit as defined in § 60.5250.

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

*Auxiliary fuel* means natural gas, liquefied petroleum gas, fuel oil, or diesel fuel.

*Bag leak detection system* means an instrument that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.,* baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

*Bypass stack* means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

*Calendar year* means 365 consecutive days starting on January 1 and ending on December 31.

*Continuous automated sampling system* means the total equipment and procedures for automated sample collection and sample recovery/analysis to determine a pollutant concentration or emission rate by collecting a single integrated sample(s) or multiple integrated sample(s) of the pollutant (or diluent gas) for subsequent on- or off-site analysis; integrated sample(s) collected are representative of the emissions for the sample time as specified by the applicable requirement.

*Continuous emissions monitoring system* means a monitoring system for continuously measuring and recording the emissions of a pollutant from an affected facility.

*Continuous monitoring system (CMS)* means a continuous emissions monitoring system, continuous automated sampling system, continuous parameter monitoring system or other manual or automatic monitoring that is used for demonstrating compliance with an applicable regulation on a continuous basis as defined by this subpart. The term refers to the total equipment used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters.

*Continuous parameter monitoring system* means a monitoring system for continuously measuring and recording operating conditions associated with air pollution control device systems (*e.g.,* operating temperature, pressure, and power).

*Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limit, operating limit, or operator qualification and accessibility requirements.

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

*Dioxins/furans* means tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans.

*Electrostatic precipitator or wet electrostatic precipitator* means an air pollution control device that uses both electrical forces and, if applicable, water to remove pollutants in the exit gas from a sewage sludge incinerator stack.

*Existing sewage sludge incineration unit* means a sewage sludge incineration unit the construction of which is commenced on or before October 14, 2010.

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

*Fluidized bed incinerator* means an enclosed device in which organic matter and inorganic matter in sewage sludge are combusted in a bed of particles suspended in the combustion chamber gas.

*Malfunction* means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused, in part, by poor maintenance or careless operation are not malfunctions.

*Modification* means a change to an existing SSI unit later than September 21, 2011 and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the SSI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the SSI unit used to calculate these costs, see the definition of SSI unit.

(2) Any physical change in the SSI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

*Modified sewage sludge incineration unit* means an existing SSI unit that

undergoes a modification, as defined in this section.

*Multiple hearth incinerator* means a circular steel furnace that contains a number of solid refractory hearths and a central rotating shaft; rabble arms that are designed to slowly rake the sludge on the hearth are attached to the rotating shaft. Dewatered sludge enters at the top and proceeds downward through the furnace from hearth to hearth, pushed along by the rabble arms.

*Operating day* means a 24-hour period between 12:00 midnight and the following midnight during which any amount of sewage sludge is combusted at any time in the SSI unit.

*Particulate matter* means filterable particulate matter emitted from SSI units as measured by Method 5 at 40 CFR part 60, appendix A–3 or Methods 26A or 29 at 40 CFR part 60, appendix A–8.

*Power input to the electrostatic precipitator* means the product of the test-run average secondary voltage and the test-run average secondary amperage to the electrostatic precipitator collection plates.

*Process change* means a significant permit revision, but only with respect to those pollutant-specific emission units for which the proposed permit revision is applicable, including but not limited to:

(1) A change in the process employed at the wastewater treatment facility associated with the affected SSI unit (*e.g.,* the addition of tertiary treatment at the facility, which changes the method used for disposing of process solids and processing of the sludge prior to incineration).

(2) A change in the air pollution control devices used to comply with the emission limits for the affected SSI unit (*e.g.,* change in the sorbent used for activated carbon injection).

*Sewage sludge* means solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated during the firing of sewage sludge in a sewage sludge incineration unit or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

*Sewage sludge feed rate* means the rate at which sewage sludge is fed into the incinerator unit.

*Sewage sludge incineration (SSI) unit* means an incineration unit combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. Sewage sludge incineration unit designs include fluidized bed and multiple hearth. A SSI unit also includes, but is not limited to, the sewage sludge feed system, auxiliary fuel feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The SSI unit includes all ash handling systems connected to the bottom ash handling system. The combustion unit bottom ash system ends at the truck loading station or similar equipment that transfers the ash to final disposal. The SSI unit does not include air pollution control equipment or the stack.

*Shutdown* means the period of time after all sewage sludge has been combusted in the primary chamber.

*Solid waste* means any garbage, refuse, sewage sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1342), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014).

*Standard conditions,* when referring to units of measure, means a temperature of 68 °F (20 °C) and a pressure of 1 atmosphere (101.3 kilopascals).

*Startup* means the period of time between the activation, including the firing of fuels (*e.g.,* natural gas or distillate oil), of the system and the first feed to the unit.

*Toxic equivalency* means the product of the concentration of an individual dioxin isomer in an environmental mixture and the corresponding estimate of the compound-specific toxicity relative to tetrachlorinated dibenzo-p-dioxin, referred to as the toxic equivalency factor for that compound. Table 5 to this subpart lists the toxic equivalency factors.

*Wet scrubber* means an add-on air pollution control device that utilizes an aqueous or alkaline scrubbing liquid to collect particulate matter (including nonvaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

*You* means the owner or operator of an affected SSI unit.

TABLE 1 TO SUBPART MMMM OF PART 60—MODEL RULE—INCREMENTS OF PROGRESS AND COMPLIANCE SCHEDULES FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS

| Comply with these increments of progress | By these dates [a] |
|---|---|
| Increment 1—Submit final control plan. | (Dates to be specified in state plan) |
| Increment 2—Final compliance. | (Dates to be specified in state plan) [b] |

[a] Site-specific schedules can be used at the discretion of the state.

[b] The date can be no later than 3 years after the effective date of state plan approval or March 21, 2016 for SSI units that commenced construction on or before October 14, 2010.

TABLE 2 TO SUBPART MMMM OF PART 60—MODEL RULE—EMISSION LIMITS AND STANDARDS FOR EXISTING FLUIDIZED BED SEWAGE SLUDGE INCINERATION UNITS

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Particulate matter ..... | 18 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters sample per run). | Performance test (Method 5 at 40 CFR part 60, appendix A–3; Method 26A or Method 29 at 40 CFR part 60, appendix A–8). |
| Hydrogen chloride ..... | 0.51 parts per million by dry volume | 3-run average (Collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 26A at 40 CFR part 60, appendix A–8). |

TABLE 2 TO SUBPART MMMM OF PART 60—MODEL RULE—EMISSION LIMITS AND STANDARDS FOR EXISTING FLUIDIZED BED SEWAGE SLUDGE INCINERATION UNITS—Continued

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Carbon monoxide | 64 parts per million by dry volume | 3-run average (collect sample for a minimum duration of one hour per run). | Performance test (Method 10, 10A, or 10B at 40 CFR part 60, appendix A–4). |
| Dioxins/furans (total mass basis); or Dioxins/furans (toxic equivalency basis) [b] | 1.2 nanograms per dry standard cubic meter (total mass basis); or 0.10 nanograms per dry standard cubic meter (toxic equivalency basis). | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Mercury | 0.037 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008) [c], collect a minimum volume of 1 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A–8). | Performance test (Method 29 at 40 CFR part 60, appendix A–8; Method 30B at 40 CFR part 60, appendix A–8; or ASTM D6784–02 (Reapproved 2008).[c] |
| Oxides of nitrogen | 150 parts per million by dry volume | 3-run average (Collect sample for a minimum duration of one hour per run). | Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4). |
| Sulfur dioxide | 15 parts per million by dry volume | 3-run average (For Method 6, collect a minimum volume of 60 liters per run. For Method 6C, collect sample for a minimum duration of one hour per run). | Performance test (Method 6 or 6C at 40 CFR part 40, appendix A–4; or ANSI/ASME PTC–19.10–1981.[c] |
| Cadmium | 0.0016 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use GFAAS or ICP/MS for the analytical finish. |
| Lead | 0.0074 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters sample per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8. Use GFAAS or ICP/MS for the analytical finish. |
| Fugitive emissions from ash handling. | Visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 of appendix A–7 of this part). |

[a] All emission limits are measured at 7 percent oxygen, dry basis at standard conditions.
[b] You have the option to comply with either the dioxin/furan emission limit on a total mass basis or the dioxin/furan emission limit on a toxic equivalency basis.
[c] Incorporated by reference, *see* § 60.17.

TABLE 3 TO SUBPART MMMM OF PART 60—MODEL RULE—EMISSION LIMITS AND STANDARDS FOR EXISTING MULTIPLE HEARTH SEWAGE SLUDGE INCINERATION UNITS

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Particulate matter | 80 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 0.75 dry standard cubic meters per run). | Performance test (Method 5 at 40 CFR part 60, appendix A–3; Method 26A or Method 29 at 40 CFR part 60, appendix A–8). |
| Hydrogen chloride | 1.2 parts per million by dry volume | 3-run average (For Method 26, collect a minimum volume of 200 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Carbon monoxide | 3,800 parts per million by dry volume | 3-run average (collect sample for a minimum duration of one hour per run). | Performance test (Method 10, 10A, or 10B at 40 CFR part 60, appendix A–4). |
| Dioxins/furans (total mass basis). | 5.0 nanograms per dry standard cubic meter; or | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis) [b]. | 0.32 nanograms per dry standard cubic meter. | | |

TABLE 3 TO SUBPART MMMM OF PART 60—MODEL RULE—EMISSION LIMITS AND STANDARDS FOR EXISTING MULTIPLE HEARTH SEWAGE SLUDGE INCINERATION UNITS—Continued

| For the air pollutant | You must meet this emission limit [a] | Using these averaging methods and minimum sampling volumes or durations | And determining compliance using this method |
|---|---|---|---|
| Mercury | 0.28 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[c] collect a minimum volume of 1 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A–8). | Performance test (Method 29 at 40 CFR part 60, appendix A–8; Method 30B at 40 CFR part 60, appendix A–8; or ASTM D6784–02 (Reapproved 2008)).[c] |
| Oxides of nitrogen | 220 parts per million by dry volume | 3-run average (Collect sample for a minimum duration of one hour per run). | Performance test (Method 7 or 7E at 40 CFR part 60, appendix A–4). |
| Sulfur dioxide | 26 parts per million by dry volume | 3-run average (For Method 6, collect a minimum volume of 200 liters per run. For Method 6C, collect sample for a minimum duration of one hour per run). | Performance test (Method 6 or 6C at 40 CFR part 40, appendix A–4; or ANSI/ASME PTC 19.10–1981).[c] |
| Cadmium | 0.095 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Lead | 0.30 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Fugitive emissions from ash handling. | Visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 of appendix A–7 of this part). |

[a] All emission limits are measured at 7 percent oxygen, dry basis at standard conditions.
[b] You have the option to comply with either the dioxin/furan emission limit on a total mass basis or the dioxin/furan emission limit on a toxic equivalency basis.
[c] Incorporated by reference, *see* § 60.17.

TABLE 4 TO SUBPART MMMM OF PART 60—MODEL RULE—OPERATING PARAMETERS FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS [a]

| For these operating parameters | You must establish these operating limits | And monitor using these minimum frequencies | | |
|---|---|---|---|---|
| | | Data measurement | Data recording [b] | Data averaging period for compliance |
| **All sewage sludge incineration units** | | | | |
| Combustion chamber operating temperature (not required if afterburner temperature is monitored). | Minimum combustion chamber operating temperature or afterburner temperature. | Continuous | Every 15 minutes | 12-hour block. |
| Fugitive emissions from ash handling | Site-specific operating requirements | Not applicable | No applicable | Not applicable. |
| **Scrubber** | | | | |
| Pressure drop across each wet scrubber. | Minimum pressure drop | Continuous | Every 15 minutes | 12-hour block. |
| Scrubber liquid flow rate | Minimum flow rate | Continuous | Every 15 minutes | 12-hour block. |
| Scrubber liquid pH | Minimum pH | Continuous | Every 15 minutes | 3-hour block. |
| **Fabric Filter** | | | | |
| Alarm time of the bag leak detection system alarm. | Maximum alarm time of the bag leak detection system alarm (this operating limit is provided in § 60.4850 and is not established on a site-specific basis) | | | |
| **Electrostatic precipitator** | | | | |
| Secondary voltage of the electrostatic precipitator collection plates. | Minimum power input to the electrostatic precipitator collection plates. | Continuous | Hourly | 12-hour block. |
| Secondary amperage of the electrostatic precipitator collection plates. | | | | |

TABLE 4 TO SUBPART MMMM OF PART 60—MODEL RULE—OPERATING PARAMETERS FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS [a]—Continued

| For these operating parameters | You must establish these operating limits | And monitor using these minimum frequencies | | |
|---|---|---|---|---|
| | | Data measurement | Data recording [b] | Data averaging period for compliance |
| Effluent water flow rate at the outlet of the electrostatic precipitator. | Minimum effluent water flow rate at the outlet of the electrostatic precipitator. | Hourly | Hourly | 12-hour block. |
| **Activated carbon injection** | | | | |
| Mercury sorbent injection rate | Minimum mercury sorbent injection rate. | Hourly | Hourly | 12-hour block. |
| Dioxin/furan sorbent injection rate | Minimum dioxin/furan sorbent injection rate. | | | |
| Carrier gas flow rate or carrier gas pressure drop. | Minimum carrier gas flow rate or minimum carrier gas pressure drop. | Continuous | Every 15 minutes | 12-hour block. |
| **Afterburner** | | | | |
| Temperature of the afterburner combustion chamber. | Minimum temperature of the afterburner combustion chamber. | Continuous | Every 15 minutes | 12-hour block. |

[a] As specified in § 60.5190, you may use a continuous emissions monitoring system or continuous automated sampling system in lieu of establishing certain operating limits.

[b] This recording time refers to the minimum frequency that the continuous monitor or other measuring device initially records data. For all data recorded every 15 minutes, you must calculate hourly arithmetic averages. For all parameters, you use hourly averages to calculate the 12-hour or 3-hour block average specified in this table for demonstrating compliance. You maintain records of 1-hour averages.

TABLE 5 TO SUBPART MMMM OF PART 60—MODEL RULE—TOXIC EQUIVALENCY FACTORS

| Dioxin/furan isomer | Toxic equivalency factor |
|---|---|
| 2,3,7,8-tetrachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,7,8-pentachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin | 0.01 |
| octachlorinated dibenzo-p-dioxin | 0.0003 |
| 2,3,7,8-tetrachlorinated dibenzofuran | 0.1 |
| 2,3,4,7,8-pentachlorinated dibenzofuran | 0.3 |
| 1,2,3,7,8-pentachlorinated dibenzofuran | 0.03 |
| 1,2,3,4,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzofuran | 0.1 |
| 2,3,4,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzofuran | 0.01 |
| 1,2,3,4,7,8,9-heptachlorinated dibenzofuran | 0.01 |
| octachlorinated dibenzofuran | 0.0003 |

TABLE 6 TO SUBPART MMMM OF PART 60—MODEL RULE—SUMMARY OF REPORTING REQUIREMENTS FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS [a]

| Report | Due date | Contents | Reference |
|---|---|---|---|
| Increments of progress report | No later than 10 business days after the compliance date for the increment. | 1. Final control plan including air pollution control device descriptions, process changes, type of waste to be burned, and the maximum design sewage sludge burning capacity.<br>2. Notification of any failure to meet an increment of progress.<br>3. Notification of any closure. | § 60.5235(a). |
| Initial compliance report | No later than 60 days following the initial performance test. | 1. Company name and address<br>2. Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report.<br>3. Date of report.<br>4. Complete test report for the initial performance test.<br>5. Results of CMS [b] performance evaluation. | § 60.5235(b). |

TABLE 6 TO SUBPART MMMM OF PART 60—MODEL RULE—SUMMARY OF REPORTING REQUIREMENTS FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS [a]—Continued

| Report | Due date | Contents | Reference |
|---|---|---|---|
| | | 6. The values for the site-specific operating limits and the calculations and methods used to establish each operating limit.<br>7. Documentation of installation of bag leak detection system for fabric filter.<br>8. Results of initial air pollution control device inspection, including a description of repairs.<br>9. The site-specific monitoring plan required under § 60.5200.<br>10. The site-specific monitoring plan for your ash handling system required under § 60.5200. | |
| Annual compliance report ..... | No later than 12 months following the submission of the initial compliance report; subsequent reports are to be submitted no more than 12 months following the previous report. | 1. Company name and address .....<br>2. Statement and signature by responsible official.<br>3. Date and beginning and ending dates of report.<br>4. If a performance test was conducted during the reporting period, the results of the test, including any new operating limits and associated calculations and the type of activated carbon used, if applicable.<br>5. For each pollutant and operating parameter recorded using a CMS, the highest recorded 3-hour average and the lowest recorded 3-hour average, as applicable.<br>6. If no deviations from emission limits, emission standards, or operating limits occurred, a statement that no deviations occurred.<br>7. If a fabric filter is used, the date, time, and duration of alarms.<br>8. If a performance evaluation of a CMS was conducted, the results, including any new operating limits and their associated calculations.<br>9. If you met the requirements of § 60.5205(a)(3) and did not conduct a performance test, include the dates of the last three performance tests, a comparison to the 50 percent emission limit threshold of the emission level achieved in the last three performance tests, and a statement as to whether there have been any process changes.<br>10. Documentation of periods when all qualified SSI unit operators were unavailable for more than 8 hours but less than 2 weeks.<br>11. Results of annual pollutions control device inspections, including description of repairs.<br>12. If there were no periods during which your CMSs had malfunctions, a statement that there were no periods during which your CMSs had malfunctions.<br>13. If there were no periods during which your CMSs were out of control, a statement that there were no periods during which your CMSs were out of control.<br>14. If there were no operator training deviations, a statement that there were no such deviations.<br>15. Information on monitoring plan revisions, including a copy of any revised monitoring plan. | § 60.5235(c). |
| Deviation report (deviations from emission limits, emission standards, or operating limits, as specified in § 60.5235(e)(1)). | By August 1 of a calendar year for data collected during the first half of the calendar year; by February 1 of a calendar year for data collected during the second half of the calendar year. | *If using a CMS:* .....<br>1. Company name and address.<br>2. Statement by a responsible official.<br>3. The calendar dates and times your unit deviated from the emission limits or operating limits.<br>4. The averaged and recorded data for those dates.<br>5. Duration and cause of each deviation.<br>6. Dates, times, and causes for monitor downtime incidents.<br>7. A copy of the operating parameter monitoring data during each deviation and any test report that documents the emission levels.<br>8. For periods of CMS malfunction or when a CMS was out of control, you must include the information specified in § 60.5235(d)(3)(viii).<br>*If not using a CMS:.*<br>1. Company name and address.<br>2. Statement by a responsible official.<br>3. The total operating time of each affected SSI.<br>4. The calendar dates and times your unit deviated from the emission limits, emission standard, or operating limits.<br>5. The averaged and recorded data for those dates. | § 60.5235(d). |

TABLE 6 TO SUBPART MMMM OF PART 60—MODEL RULE—SUMMARY OF REPORTING REQUIREMENTS FOR EXISTING SEWAGE SLUDGE INCINERATION UNITS [a]—Continued

| Report | Due date | Contents | Reference |
|---|---|---|---|
| | | 6. Duration and cause of each deviation.<br>7. A copy of any performance test report that showed a deviation from the emission limits or standards.<br>8. A brief description of any malfunction, a description of actions taken during the malfunction to minimize emissions, and corrective action taken. | |
| Notification of qualified operator deviation (if all qualified operators are not accessible for 2 weeks or more). | Within 10 days of deviation ..... | 1. Statement of cause of deviation .....<br>2. Description of actions taken to ensure that a qualified operator will be available.<br>3. The date when a qualified operator will be accessible. | § 60.5235(e). |
| Notification of status of qualified operator deviation. | Every 4 weeks following notification of deviation. | 1. Description of actions taken to ensure that a qualified operator is accessible.<br>2. The date when you anticipate that a qualified operator will be accessible.<br>3. Request for approval to continue operation. | § 60.5235(e). |
| Notification of resumed operation following shutdown (due to qualified operator deviation and as specified in § 60.5155(b)(2)(i). | Within five days of obtaining a qualified operator and resuming operation. | 1. Notification that you have obtained a qualified operator and are resuming operation. | § 60.5235(e). |
| Notification of a force majeure | As soon as practicable following the date you first knew, or through due diligence should have known that the event may cause or caused a delay in conducting a performance test beyond the regulatory deadline; the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification must occur as soon as practicable. | 1. Description of the force majeure event .....<br>2. Rationale for attributing the delay in conducting the performance test beyond the regulatory deadline to the force majeure.<br>3. Description of the measures taken or to be taken to minimize the delay.<br>4. Identification of the date by which you propose to conduct the performance test. | § 60.5235(f). |
| Notification of intent to start or stop use of a CMS. | 1 month before starting or stopping use of a CMS. | 1. Intent to start or stop use of a CMS ..... | § 60.5235(g). |
| Notification of intent to conduct a performance test. | At least 30 days prior to the performance test. | 1. Intent to conduct a performance test to comply with this subpart. | |
| Notification of intent to conduct a rescheduled performance test. | At least 7 days prior to the date of a rescheduled performance test. | 1. Intent to conduct a rescheduled performance test to comply with this subpart. | |

[a] This table is only a summary, *see* the referenced sections of the rule for the complete requirements.
[b] CMS means continuous monitoring system.

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Part III

## Environmental Protection Agency

40 CFR Part 241

Identification of Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 241**

**[EPA–HQ–RCRA–2008–0329; FRL–9273–1]**

**RIN 2050–AG44**

## Identification of Non-Hazardous Secondary Materials That Are Solid Waste

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is publishing a final rule that identifies which non-hazardous secondary materials, when used as fuels or ingredients in combustion units, are "solid wastes" under the Resource Conservation and Recovery Act (RCRA). This RCRA solid waste definition will determine whether a combustion unit is required to meet the emissions standards for solid waste incineration units issued under section 129 of the Clean Air Act (CAA) or the emissions standards for commercial, industrial, and institutional boilers issued under section 112 of the CAA. In this action, EPA is also finalizing a definition of traditional fuels.

**DATES:** *This final rule is effective on* May 20, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–RCRA–2008–0329. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

**FOR FURTHER INFORMATION CONTACT:** George Faison, Program Implementation and Information Division, Office of Resource Conservation and Recovery, 5303P, Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0002; telephone number: 703–305–7652; fax number: 703–308–0509; e-mail address: *faison.george@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Does this action apply to me?

Categories and entities potentially affected by this action include:

| Generators | | Users | |
|---|---|---|---|
| Major generator category | NAICS* | Major boiler type and primary industry category | NAICS* |
| | | *Industrial Boilers:* | |
| Crop Production | 111 | Food Manufacturing | 311, 312, |
| Cattle Ranching and Farming | 1121 | Pulp and Paper Mills | 3221 |
| Hog and Pig Farming | 1122 | Petroleum Refining | 32411 |
| Poultry and Egg Production | 1123 | Chemical Manufacturing | 325 |
| Sheep and Goat Farming | 1124 | Primary Metal Manufacturing | 331 |
| Horses and Other Equine Production | 112920 | Fabricated Metal Manufacturing | 332 |
| Logging | 113310 | Other Manufacturing | 313, 339, 321, 333, 336, 511, 326, 316, 327 |
| Support Activities for Crop Production | 11511 | | |
| Bituminous Coal and Lignite Surface Mining. | 212111 | *Commercial Boilers:* | |
| Bituminous Coal Underground Mining | 212112 | Retail | 442–454 |
| Anthracite Mining | 212113 | Warehouse | 493 |
| Fossil Fuel Electric Power Generation | 221112 | Education | 611 |
| Sewage Treatment Facilities | 221320 | Health Care Facilities | 621 |
| Construction of Buildings | 236 | Social Assistance | 624 |
| Site Preparation Contractors | 238910 | Lodging, Restaurant | 721, 722 |
| Beverage and Tobacco Product Manufacturing. | 312 | Office | 813, 541, 921 |
| Sawmills and Wood Preservation | 32111 | Other | 922140, others |
| Veneer, Plywood, and Engineered Wood Product Manufacturing. | 32121 | | |
| Engineered Wood Member Manufacturing. | 321213 | *Common Non-Manufacturing Boilers:* | |
| Pulp, Paper, and Paperboard Mills | 3221 | Agriculture (crop & livestock production) | 111, 112, 115 |
| Solvents Made in Petroleum Refineries | 324110 | All Mining | 212 |
| Solvent Dyes Manufacturing | 325132 | Construction | 236 |
| Plastic Manufacturers | 325211 | | |
| All Other Miscellaneous Chemical Product and Preparation Manufacturing. | 325998 | *Other Boilers:* | |
| Packaging | 32611 | Electric Utility Boilers | 2211 |
| Other Rubber Product Manufacturing | 32629 | Non-Hazardous Waste Burning Cement Kilns. | 327310 |

| Generators | | Users | |
|---|---|---|---|
| Major generator category | NAICS* | Major boiler type and primary industry category | NAICS* |
| Glass and Glass Product Manufacturing | 3272 | ..... | |
| Cement Manufacturing ..... | 327310 | ..... | |
| Iron and Steel Mills ..... | 331111 | ..... | |
| Electrometallurgical Ferroalloy Product Manufacturing. | 331112 | ..... | |
| Metal-Casting Industry ..... | 331522 | ..... | |
| Recyclable Material Wholesalers ..... | 423930 | ..... | |
| Landscaping Services ..... | 561730 | ..... | |
| Solid Waste Collection and Solid Waste Landfill. | 562111, 562212 | ..... | |
| Automotive Repair and Replacement Shops. | 811111 | ..... | |

* NAICS—North American Industrial Classification System.

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

## B. Why is EPA taking this action?

Clean Air Act (CAA) section 129 states that the term "solid waste" shall have the meaning "established by the Administrator pursuant to [RCRA]." The purpose of this final rule is to provide a definition of "solid waste" in order to develop emission standards under sections 112 and 129 of the CAA. In particular, this rule codifies requirements and procedures that identify whether the definition of "solid waste" applies to non-hazardous secondary materials burned as fuels or used as ingredients in combustion units. In related actions in this **Federal Register**, EPA is concurrently finalizing air emission requirements under section 112 of the CAA for industrial, commercial, and institutional boilers and process heaters, as well as air emission requirements under section 129 of the CAA for commercial and industrial solid waste incineration units.

## Preamble Outline


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2. Scrap Tires: Scrap Tires That Are Legitimately Used as a Fuel That Are Removed From Vehicles and Managed Under the Oversight of Established Tire Collection Programs Are Not Solid Waste When Used in Combustion Units
3. Resinated Wood: Resinated Wood That Is Legitimately Used as a Fuel Is Not a Solid Waste When Used in Combustion Units
4. Ingredients: Non-Hazardous Secondary Materials That Are Legitimately Used as Ingredients Are Not Solid Waste When Used in Combustion Units
5. Discards: Discarded Non-Hazardous Secondary Materials That Have Undergone Processing To Produce Legitimate Fuel or Ingredient Products Are Not Solid Waste When Used in Combustion Units
6. Non-Waste Determination: Non-Hazardous Secondary Materials Used as a Fuel for Which a Non-Waste Determination Has Been Granted Are Not Solid Waste When Used in Combustion Units
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B. Why is the Court's decision affecting the CAA rules relevant to RCRA?
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2. Solid Waste Program, RCRA Subtitle D
3. Hazardous Waste Program, RCRA Subtitle C
4. Case Law on the Definition of Solid Waste Under RCRA Subtitle C
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J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. Statutory Authority

The U.S. Environmental Protection Agency (EPA or the Agency) is promulgating these regulations under the authority of sections 2002(a)(1) and 1004(27) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6912(a)(1) and 6903(27). Section 129(a)(1)(D) of the Clean Air Act (CAA) directs EPA to establish standards for Commercial and Industrial Solid Waste Incinerators (CISWI), which burn solid waste (section 129(g)(6) of the CAA, 42 U.S.C. 7429). Section 129(g)(6) provides that the term "solid waste" is to be established by EPA under RCRA. Section 2002(a)(1) of RCRA authorizes the Agency to promulgate regulations as are necessary to carry out its functions under the Act. The statutory definition of "solid waste" is provided in RCRA section 1004(27).

## II. List of Abbreviations and Acronyms

AASHTO American Association of State Highway and Transportation Officials
ANPRM Advanced Notice of Proposed Rulemaking
ASME American Society of Mechanical Engineers
ASTM American Society for Testing and Materials
Btu British Thermal Unit
CAA Clean Air Act
CAFO Concentrated Animal Feeding Operations
C&D Construction and Demolition
CBO Carbon Burn-Out Unit
CCA Chromated Copper Arsenate
CCR Coal Combustion Residuals
CFB Circulating Fluidized Bed
CFR Code of Federal Regulations
CISWI Commercial and Industrial Solid Waste Incinerator
CKD Cement Kiln Dust
CWA Clean Water Act
DSE Domestic Sewage Exemption
DSW Definition of Solid Waste Rule (2008)
EG Emission Guidelines
EGU Electric Utility Steam Generating Unit
EPA U.S. Environmental Protection Agency
GACT Generally Available Control Technology
GHG Greenhouse Gas
HAP Hazardous Air Pollutant
IWI Institutional Waste Incinerator
LCA Life Cycle Analysis
MACT Maximum Achievable Control Technology
MEK Methyl Ethyl Ketone
NESHAP National Emission Standards for Hazardous Air Pollutants
NHSM Non-Hazardous Secondary Material
NSPS New Source Performance Standards
OCC Old Corrugated Cardboard
OSWI Other Solid Waste Incinerator
PC Portland Cement
PIC Product of Incomplete Combustion
POTW Publicly Owned Treatment Works
PVC Polyvinyl Chloride
RCRA Resource Conservation and Recovery Act
RFS Renewable Fuel Standards
SSI Sewage Sludge Incinerator
SWDA Solid Waste Disposal Act
TCLP Toxicity Characteristic Leaching Procedure
TDF Tire-Derived Fuel
U.S.C. United States Code
USGS U.S. Geological Survey
VSMWC Very Small Municipal Waste Combustor

## III. Introduction—Summary of Regulations Being Finalized

In today's rule, EPA is finalizing standards and procedures to be used to identify whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. "Secondary material" is defined for the purposes of this rulemaking as any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap (codified in § 241.2).[1] "Non-hazardous secondary material" is a secondary material that, when discarded, would not be identified as a hazardous waste under 40 CFR part 261 (codified in § 241.2).

The Agency first solicited comments on how the RCRA definition of solid waste should apply to non-hazardous secondary materials used as fuels or ingredients in combustion units are solid wastes under RCRA in an Advanced Notice of Proposed Rulemaking (ANPRM), which was published in the **Federal Register** on January 2, 2009 (74 FR 41). We then published a proposed rule on June 4, 2010 (75 FR 31844).

Today's preamble is organized as follows: This section of the preamble (Section III) describes the principal regulatory provisions that are finalized in this rule; Section IV describes the background of this final rule, including a brief history of this rulemaking in conjunction with the relevant rules being finalized under sections 112 and 129 of the CAA; Section V contains a discussion of the major public comments received on the June 4, 2010 proposal, along with the Agency's response to these comments; Section VI explains the ways in which the June 2010 proposal differs from today's final rule; Section VII provides a detailed explanation of and rationale for the regulations being promulgated today; Section VIII describes the effect of today's final rule on other programs; Section IX discusses how today's rule affects the states' authority over solid waste pursuant to subtitle D of RCRA; Section X describes the costs and benefits associated with today's rule; and Section XI describes this rule's

[1] For the purpose of this definition, all commercial products from a manufacturing process would be considered "primary products." Processes that are designed for the production of multiple products could have more than one primary product.

compliance with the appropriate statutory and executive orders reviews.

Below is a summary of the principal elements of the regulations being promulgated today.

*A. Identifying Which Non-Hazardous Secondary Materials Are or Are Not Solid Wastes When Used in a Combustion Unit*

In our determination, most non-hazardous secondary materials burned in combustion units are defined as solid wastes under RCRA. However, this rule provides exceptions to that determination. The following non-hazardous secondary materials are not solid waste when used legitimately as a fuel or an ingredient in a combustion unit:

(1) Those that remain within the control of the generator and used as fuel (discussed further below—codified in § 241.3(b)(1));

(2) Scrap tires managed by established tire collection programs and used as fuel (discussed further below—codified in § 241.3(b)(2)(i));

(3) Resinated wood used as fuel (discussed further below—codified in § 241.3(b)(2)(ii));

(4) Those that are used as ingredients (discussed further below—codified in § 241.3(b)(3));

(5) Discards that have undergone processing to produce fuel or ingredient products (discussed further below—codified in § 241.3(b)(4)); or

(6) Those that are used as fuels for which a non-waste determination has been granted (discussed further below—codified in § 241.3(c)).

Materials are considered legitimate fuels or ingredients if they conform to the criteria codified in § 241.3(d), which this action refers to as "legitimacy criteria." These criteria are designed to ensure that the fuel or ingredient is not being "sham" recycled for the sole purpose of avoiding being considered a waste. The legitimacy criteria for non-hazardous secondary materials used as fuels and ingredients in combustion units are discussed below in the "Codification of the Legitimacy Criteria" section.

Materials designated as "traditional" fuels are not wastes when used in combustion units. We are finalizing a definition of traditional fuels (codified in § 241.2) that applies to this subpart. Traditional fuels means materials that are produced as fuels and are unused products that have not been discarded and therefore, are not solid wastes, including: (1) Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials, including fossil fuels (*e.g.,* coal, oil and natural gas), their derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas) and cellulosic biomass (virgin wood); and (2) alternative fuels developed from virgin materials that can now be used as fuel products, including used oil which meets the specifications outlined in 40 CFR 279.11, currently mined coal refuse that previously had not been usable as coal, and clean cellulosic biomass. These fuels are not secondary materials or solid wastes unless discarded before they are used.

1. Within the Control of the Generator: Non-Hazardous Secondary Materials That Are Legitimately Used as Fuels Within the Control of the Generator Are Not Solid Waste When Used in Combustion Units

Except as otherwise provided, under this provision—40 CFR 241.3(b)(1)—EPA would consider non-hazardous secondary materials used as fuels in combustion units which remain within the control of the generator and that meet the specified legitimacy criteria (as codified in § 241.3(d)(1)) as not being a solid waste. The legitimacy criteria for non-hazardous secondary materials used as fuels in combustion units are discussed below in the "Codification of the Legitimacy Criteria" section. Non-hazardous secondary materials would be considered "within the control of the generator" under the following circumstances:

(1) They are generated and burned in combustion units at the generating facility (as codified in § 241.2); or

(2) They are generated and burned in combustion units at different facilities, if the facility combusting the non-hazardous secondary material is controlled (as codified in § 241.2) by the generator; or

(3) Both the generating facility and the facility combusting the material are under control of the same person (as codified in § 241.2).

2. Scrap Tires: Scrap Tires That Are Legitimately Used as a Fuel That Are Removed From Vehicles and Managed Under the Oversight of Established Tire Collection Programs Are Not Solid Waste When Used in Combustion Units

Under this provision—40 CFR 241.3(b)(2)(i)—EPA would consider scrap tires used as a fuel in a combustion unit that are removed from vehicles and collected and managed under the oversight of established tire collection programs as not being a solid waste, provided these materials satisfy the specified legitimacy criteria (as codified in § 241.3(d)(1)). This provision would not differentiate between scrap tires that are used as a fuel within the control of the generator from those that are not. For the purposes of this rule, the term "vehicle" is defined as any mechanical means of conveyance that employs the use of tires. "Established tire collection program" (as codified in § 241.2) means a comprehensive collection system that ensures scrap tires are not discarded and are handled as valuable commodities in accordance with § 241.3(d)(1)(i) from the point of removal from the vehicle through arrival at the combustion facility. The legitimacy criteria for non-hazardous secondary materials used as fuels in combustion units are discussed below in the "Codification of the Legitimacy Criteria" section.

3. Resinated Wood: Resinated Wood That Is Legitimately Used as a Fuel Is Not a Solid Waste When Used in Combustion Units

Under this provision—40 CFR 241.3(b)(2)(ii)—EPA would consider resinated wood used as a fuel in a combustion unit as not being a solid waste, provided these materials satisfy the specified legitimacy criteria (as codified in § 241.3(d)(1)). This provision would not differentiate between resinated wood that is used as a fuel within the control of the generator from those that are not. Resinated wood (as codified in § 241.2) means wood products (containing resin adhesives) derived from primary and secondary wood products manufacturing and comprised of such items as board trim, sander dust, and panel trim. The legitimacy criteria for non-hazardous secondary materials used as fuels in combustion units is discussed below in the "Codification of the Legitimacy Criteria" section.

4. Ingredients: Non-Hazardous Secondary Materials That Are Legitimately Used as Ingredients Are Not Solid Waste When Used in Combustion Units

Under this provision—40 CFR 241.3(b)(3)—EPA would consider non-hazardous secondary materials used as ingredients in combustion units and that meet the specified legitimacy criteria as not being solid waste. This provision does not differentiate between ingredients that are used within the control of the generator from those that are not. Ingredient (as codified in § 241.2) means a non-hazardous secondary material that is a component in a compound, process or product. A discussion of the legitimacy criteria (as

codified in § 241.3(d)(2)) for non-hazardous secondary materials used as ingredients in combustion units is included below in the "Codification of the Legitimacy Criteria" section.

5. Discards: Discarded Non-Hazardous Secondary Materials That Have Undergone Processing To Produce Legitimate Fuel or Ingredient Products Are Not Solid Waste When Used in Combustion Units

Under this provision—40 CFR 241.3(b)(4)—EPA would consider discarded non-hazardous secondary materials that have been sufficiently processed into fuel or ingredient products and used in a combustion unit as not being a solid waste, provided these materials satisfy the specified legitimacy criteria (as codified in § 241.3(d)(1) for fuels and (d)(2) for ingredients). Processing (as codified in § 241.2) means any operations that transform the discarded non-hazardous secondary material into a legitimate fuel or ingredient product, and includes, but is not limited to, operations that remove or destroy contaminants; operations that significantly improve the fuel characteristics of the material, *e.g.,* sizing or drying the material in combination with other operations; operations that chemically improve the as-fired energy content; and operations that improve the ingredient characteristics. Minimal operations that result only in modifying the size of the material by shredding do not constitute processing for the purposes of this definition. Prior to any processing, the discarded non-hazardous secondary material would be considered a solid waste and would be subject to the appropriate federal, state, and local laws and regulations.

6. Non-Waste Determination: Non-Hazardous Secondary Materials Used as a Fuel for Which a Non-Waste Determination Has Been Granted Are Not Solid Waste When Used in Combustion Units

Under this provision—40 CFR 241.3(c)—EPA would consider non-hazardous secondary materials used as fuels that have been transferred to a third party, but have been granted a non-waste determination from EPA, to not be a solid waste when used in combustion units.[2] This provision establishes a non-waste determination case-by-case process that provides persons with an administrative process for receiving a formal determination from EPA that their non-hazardous secondary material fuel that has not been managed within the control of the generator (as codified in § 241.2), has not been discarded, and is indistinguishable in all relevant aspects from a fuel product, is not a solid waste when used as a fuel in combustion units. Any petition that is submitted to EPA requesting a non-waste determination must demonstrate that the non-hazardous secondary material has not been discarded in the first instance, satisfies the specified legitimacy criteria for fuels (as codified in § 241.3(d)(1)), and satisfies the following five criteria: (1) Whether market participants treat the non-hazardous secondary material as a fuel rather than a solid waste; (2) whether the chemical and physical identity of the non-hazardous secondary material is comparable to commercial fuels; (3) whether the non-hazardous secondary material will be used in a reasonable time frame given the state of the market; (4) whether the constituents in the non-hazardous secondary material are released to the air, water or land from the point of generation to the point just prior to combustion of the non-hazardous secondary material at levels comparable to what would otherwise be released from traditional fuels; and (5) other relevant factors. These criteria are codified in § 241.3(c)(1).

The process for receiving a non-waste determination is codified in § 241.3(c)(2). In order to obtain a non-waste determination, a facility that is interested in using non-hazardous secondary materials as fuel in combustion units that would otherwise be regulated as a solid waste must apply to the Regional Administrator per the procedures described in § 241.3(c). The application must address the relevant criteria discussed above. The Regional Administrator will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will also be provided by newspaper advertisement or radio broadcast in the locality where the combustion unit is located. The Regional Administrator will accept comments on the tentative decision for at least 30 days, and may also hold a public hearing upon request or at his discretion. The Regional Administrator will issue a final decision after receipt of comments and after the hearing (if any).

*B. Codification of the Legitimacy Criteria*

This provision—40 CFR 241.3(d)—codifies the legitimacy criteria for fuels and ingredients. In order to be considered a non-waste fuel, non-hazardous secondary materials used as a fuel in combustion units must meet the legitimacy criteria codified in § 241.3(d)(1). To meet the fuel legitimacy criteria, the non-hazardous secondary material must be managed as a valuable commodity, have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy, and contain contaminants at levels comparable to or lower than those in traditional fuels which the combustion unit is designed to burn.

In order to be considered a non-waste ingredient, non-hazardous secondary materials used as an ingredient in combustion units must meet the legitimacy criteria codified in § 241.3(d)(2). To meet the ingredient legitimacy criteria, the non-hazardous secondary material must be managed as a valuable commodity, provide a useful contribution to the production or manufacturing process, be used to produce a valuable product or intermediate, and must result in products that contain contaminants at levels that are comparable to or lower than those found in traditional products that are manufactured without the non-hazardous secondary material.

Non-hazardous secondary materials that are discarded in the first instance (abandoned, disposed of, or thrown away) would still be a solid waste even if they satisfy the legitimacy criteria, unless they were processed into legitimate non-waste fuel or ingredient products or, in the case of fuels, have received a non-waste determination from EPA.

## IV. Background

The discussion below is a summary of what was included in the ANPRM and in the preamble to the proposed rule. However, because it continues to be relevant to several of the key concepts being finalized today, it is provided here as background for the benefit of the reader. (For a more detailed discussion of what was included in the ANPRM and the proposed rule, we refer the reader to the ANPRM (74 FR 41, January 2, 2009) and the proposed rule (75 FR 31843, June 4, 2010).) The records and documents comprising the ANPRM and proposed rule are included in the administrative record for this rulemaking. To the extent there are any

[2] As noted previously, scrap tires and resinated wood would not be considered a solid waste even if transferred to a third party provided these secondary materials meet the legitimacy criteria. Also, as indicated in Section V.A.1, the Agency will in the future solicit comment on other non-hazardous secondary materials in addition to scrap tires and resinated wood that can be used as a non-waste fuel both by the generator and outside the control of the generator.

inconsistencies or differences between the ANPRM, the proposed rule, and this final rule, the statements in this final rule govern.

*A. What is the history of CISWI, CISWI definitions, and boiler rulemakings?*

CAA section 112 requires EPA to promulgate regulations to control emissions of 187 hazardous air pollutants (HAP) from sources in source categories listed by EPA under section 112(c), while CAA section 129 CISWI standards include numeric emission limitations for the nine pollutants, plus opacity (as appropriate), that are specified in CAA section 129(a)(4).[3] Pursuant to CAA section 129, EPA promulgated a final rule setting forth performance emissions standards for Commercial and Industrial Solid Waste Incineration Units (referred to as the "CISWI Rule"). 65 FR 75338 (December 1, 2000). Under CAA section 129, the term "solid waste incineration unit" is defined, in pertinent part, to mean "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments * * *" 42 U.S.C. § 7429(g)(1). The CAA also specifically excludes the following types of units from the definition of "solid waste incineration unit": (1) Incinerators or other units required to have a permit under section 3005 of RCRA; (2) material recovery facilities (including primary and secondary smelters) which combust waste for the primary purpose of recovering metals; (3) qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act, or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act, which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy or steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or (4) air curtain incinerators, provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with the opacity limitations to be established by the Administrator by rule. *Id.* CAA section 129 further states that the term "solid waste" shall have the meaning "established by the Administrator pursuant to the Solid Waste Disposal Act." *Id* at 7429(g)(6).[4]

The CISWI Rule established emission limitations for new and existing CISWI units for the following pollutants: cadmium, carbon monoxide, dioxins/furans, hydrogen chloride, lead, mercury, oxides of nitrogen ($NO_X$), particulate matter (PM), sulfur dioxide ($SO_2$), and opacity. In addition, the rule established certain monitoring and operator training and certification requirements.

The CISWI Rule was challenged in *Sierra Club* v. *EPA* (No. 01–1048) (DC Cir.). However, after promulgation of the CISWI Rule, the DC Circuit issued its decision in a challenge to EPA's MACT standards for the cement kiln industry. *See Cement Kiln Recycling Coalition* v. *EPA,* 255 F. 3d 855 (DC Cir. 2001) ("Cement Kiln"). As a result, EPA requested, and was granted, a voluntary remand without vacatur, of the CISWI rule, in order to address the concerns related to the issues that were raised by the court in *Cement Kiln.* Because the CISWI rule was not vacated, its requirements remain in effect. *See Sierra Club* v. *EPA,* 374 F. Supp. 2d 30, 32–33 (D.DC 2005).

On September 22, 2005, EPA issued revised definitions of "solid waste," "commercial or industrial solid waste incineration unit," and "commercial or industrial waste" (the "CISWI Definitions Rule"). *See* 70 FR 55568. In the CISWI Definitions Rule, EPA defined "commercial and industrial solid waste" to exclude solid waste that is combusted at a facility in a combustion unit whose design provides for energy recovery or which operates with energy recovery. Therefore, a unit combusting solid waste with energy recovery was not considered a CISWI unit.

The CISWI Definitions Rule was vacated by the DC Circuit in *NRDC* v. *EPA* (489 F.3d 1250 (DC Cir. 2007)) ("NRDC"). The court stated that the statute unambiguously requires any unit that combusts "any solid waste material at all"—regardless of whether the material is being burned for energy recovery—to be regulated as a "solid waste incineration unit." *Id.* at 1260. In the same decision, the court also vacated and remanded EPA's 2005 emissions standards for commercial, industrial, and institutional major source boilers and process heaters (the Boiler MACT Rule), concluding that "the universe of boilers subject to its [section 112] standards will be far smaller and more homogenous after all CISWI units, as the statute unambiguously defines them, are removed from its coverage." 489 F.3d at 1260.

In response to the D.C. Circuit's decision, EPA proposed revised emissions standards for boilers, process heaters, and CISWI units. Specifically, on June 4, 2010, the Agency proposed new National Emissions Standards for Area Source Industrial, Commercial, and Institutional Boilers (75 FR 31896), National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (75 FR 32006), and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units (75 FR 31938). These proposed emissions standards were established based on the criteria proposed in the Identification of Non-Hazardous Secondary Materials Rule that are Solid Waste proposed rule (75 FR 31844).

*B. Why is the Court's decision affecting the CAA rules relevant to RCRA?*

In responding to the court's vacatur and remand of the CISWI Definitions Rule and the Boiler MACT Rule, EPA is establishing, under RCRA, which non-hazardous secondary materials[5] are "solid waste." This is necessary because, under the court's decision, any unit combusting any "solid waste" at all must be regulated as a "solid waste incineration unit," regardless of the function of the combustion device. If a non-hazardous secondary material (also referred to as a "secondary material" in this rulemaking) is not a "solid waste" under RCRA, then a unit combusting that material must be regulated pursuant to CAA section 112 if it is a source of HAP. Alternatively, if such secondary material is classified as a "solid waste" under RCRA, then a unit combusting that material must be regulated under

[3] CAA section 129(a)(4) requires that specific numeric emission limitations must be established for the following nine pollutants, plus opacity (as appropriate): cadmium, carbon monoxide, dioxins/furans, hydrogen chloride, lead, mercury, NOx, particulate matter (total and fine), and $SO_2$. Of these nine pollutants, cadmium, dioxins/furans, hydrogen chloride, lead, and mercury are also regulated HAP pursuant to CAA section 112.

[4] The Solid Waste Disposal Act, as amended, is commonly referred to the Resource Conservation and Recovery Act or RCRA.

[5] A secondary material is any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, post-industrial material, and scrap. Many types of secondary materials have Btu or material value, and can be reclaimed or reused in industrial processes. For purposes of this notice, the term secondary materials include only non-hazardous secondary materials. *See* also *American Mining Congress* v. *EPA,* 824 F.2d 1177 (DC Cir. 1987) in which the U.S. Court of Appeals for the District of Columbia Circuit discussed secondary materials.

CAA section 129, unless it is within the scope of one of the exclusions from the definition of "solid waste incineration unit" in section 129(g)(1) of the CAA.

In addition to this final rule, EPA is concurrently finalizing air emission requirements under CAA section 112 for industrial, commercial, and institutional boilers and process heaters, as well as air emission requirements under CAA section 129 for CISWI units. For a discussion of what requirements are being promulgated today pursuant to the relevant CAA rules, please see the respective final actions included in today's **Federal Register**. These include: National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers (EPA–HQ–OAR–2006–0790); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (EPA–HQ–OAR–2002–0058); and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units (EPA–HQ–OAR–2003–0119).

*C. What is the history of the definition of solid waste?*

1. Statutory Definition of Solid Waste

RCRA defines "solid waste" as "* * * any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* * * * resulting from industrial, commercial, mining, and agricultural operations, and from community activities * * *" (RCRA section 1004 (27) (emphasis added)). The key concept is that of "discard" and, in fact, this definition turns on the meaning of the phrase, "other discarded material," since this term encompasses all other examples provided in the definition.

2. Solid Waste Program, RCRA Subtitle D

The regulations that pertain to non-hazardous solid waste (RCRA subtitle D) contain five definitions of the term "solid waste." (*See* 40 CFR 240.101(y); 40 CFR 243.101(y); 40 CFR 246.101(bb); 40 CFR 257.2; and 40 CFR 258.2.) These regulatory definitions largely mirror the statutory definition of solid waste with some clarifications applicable to the specific regulatory section. The RCRA statutory definition of solid waste has also been repeated in the CAA emission guidelines for other solid waste incineration units (*e.g., see* 40 CFR 60.2977 and 60.3078).

Under RCRA subtitle D, EPA has promulgated criteria for municipal solid waste landfills and approves state solid waste landfill permitting programs; however, it is the states that fully implement these programs. EPA does not have the same role in these programs as it does in the hazardous waste programs established under RCRA subtitle C. As a result, EPA has not promulgated detailed regulations defining "solid waste" for purposes of the subtitle D (non-hazardous) programs. States have promulgated their own laws and regulations for what constitutes solid waste and have interpreted those laws and regulations to determine what types of non-hazardous secondary materials management activities constitute discard (and therefore involve the management of a solid waste).

The Agency is now determining at the national level the requirements and procedures for identifying non-hazardous secondary materials that are solid waste under RCRA subtitle D so that we can establish appropriate emissions standards under CAA sections 112 and 129. We emphasize that we are articulating a narrow definition in this final rule and are not making solid waste determinations that cover other possible secondary material end uses.

3. Hazardous Waste Program, RCRA Subtitle C

Under RCRA subtitle C, EPA is responsible for designing and implementing a cradle to grave disposal system for hazardous wastes. The RCRA subtitle C hazardous waste federal program has a long regulatory history in defining "solid waste" for purposes of the hazardous waste regulations.[6] However, the 40 CFR 261.2 regulatory definition of solid waste explicitly applies only to wastes that also are hazardous for purposes of the subtitle C regulations (*see* 40 CFR 261.1(b)(1)). EPA emphasizes that it is not reopening any of its subtitle C regulations in today's final rule.

Under subtitle C of RCRA, EPA promulgated a final rule on October 30, 2008, which revised the requirements regulating hazardous secondary materials when they are recycled via reclamation (The 2008 Definition of Solid Waste (DSW) Final Rule).[7] On January 29, 2009, the Sierra Club filed a lawsuit challenging the rule in the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), Docket No. 09–1041. In addition, Sierra Club submitted to the Administrator of EPA an administrative petition under RCRA section 7004(a), 42 U.S.C. 6974(a). The administrative petition requested that the Agency repeal the October 2008 revisions to the 2008 DSW Final Rule and stay the implementation of the rule.[8] EPA reviewed the administrative petition, held a public meeting[9] and requested written comments on the petition. As a result of settlement in the litigation, Sierra Club has withdrawn its administrative petition, but EPA has agreed to issue a proposal to consider the issues raised in the petition. As a result, EPA plans to develop a proposed rule asking for comment on potential revisions to the October 2008 DSW Final Rule. Under the settlement agreement with the Sierra Club in the DC Circuit litigation, EPA has committed to a proposed rule on or before June 30, 2011 and to take final action on the proposed rulemaking on or before December 31, 2012.[10] The DC Circuit approved the settlement agreement by order dated January 11, 2011. This subsequent proposed rule will apply to the regulation of reclamation of hazardous secondary materials under subtitle C of RCRA and is not affecting today's final rule.

4. Case Law on the Definition of Solid Waste Under RCRA Subtitle C

Partly because the interpretation of what constitutes a solid waste is the

[6] For example, *see* 45 FR 33066 (May 19, 1980; solid waste defined; interim final); 48 FR 14472 (April 4, 1983; Amendments to the Definition of Solid Waste; proposed rule); 50 FR 614 (January 4, 1985; Amendments to the Definition of Solid Waste; final rule); 53 FR 519 (January 8, 1988; Amendments to the Definition of Solid Waste, excludes in-process recycled secondary materials from petroleum industry; proposed rule); 59 FR 38536 (July 28, 1994; Amendments to the Definition of Solid Waste, excludes in-process recycled secondary materials from petroleum industry; final rule); 67 FR 11251 (March 13, 2002; Response to court Vacaturs; final rule); 68 FR 61557 (October 28, 2003; Revisions to the Definition of Solid Waste; proposed rule); 72 FR 14172 (March 26, 2007; Revisions to the Definition of Solid Waste; supplemental proposed rule); 73 FR 64668 (October 30, 2008; Revisions to the Definition of Solid Waste; final rule).

[7] *See* "Revisions to the Definition of Solid Waste," Final Rule, October 30, 2008, at 73 FR 64667.

[8] A copy of Sierra Club's Petition to the U.S. EPA to Reconsider and Repeal the Definition of Solid Waste Final Rule (DSW Rule) can be found in the docket for the 2008 DSW Final Rule. *See* Docket ID: EPA–HQ–RCRA–2009–0315; Document ID No. EPA–HQ–RCRA–2009–0315–0002.

[9] The public meeting was announced in a May 27, 2009 **Federal Register** notice, which also described possible actions and optional paths forward. *See* 74 FR 25200. The transcript of the public hearing can also be found in the docket for the DSW Final Rule. *See* Docket ID: EPA–HQ–RCRA–2009–0315, Document ID No. EPA–HQ–RCRA–2009–0315–0024.

[10] A copy of the settlement agreement, entitled "EPA's and Sierra Club's Lodging of Settlement and Motion to Sever and Hold Case in Abeyance," can be found at *http://www.epa.gov/osw/hazard/dsw/sierraclubdsw.pdf.*

foundation of the hazardous waste regulatory program (*i.e.,* secondary material must qualify as "solid waste" before it can be classified as "hazardous waste"), there have been a number of court opinions discussing the meaning of "solid waste" in litigation challenges to rules issued under RCRA subtitle C. From these cases, a few key principles emerge which guide our thinking on the definition of solid waste in today's final rule.

First, the ordinary plain-English meaning of the term, "discard," controls. *See American Mining Congress* v. *EPA,* 824 F.2d 1177 (DC Cir. 1987) ("AMC I"). The ordinary plain-English meaning of the term discarded means "disposed of," "thrown away," or "abandoned." The court specifically rejected a more expansive meaning for discard that would encompass any materials "no longer useful in their original capacity" even if they were not destined for disposal. 824 F.2d at 1185–87. The Court further held that the term "discarded materials" could not include materials "* * * destined for beneficial reuse or recycling in a continuous process by the generating industry itself" (824 F.2d at 1190).

Subsequent to AMC I, the court discussed the meaning of discard in particular cases. In *American Petroleum Institute* v. *EPA,* 906 F.2d 729 (DC Cir. 1990) ("API I"), the court rejected EPA's decision not to regulate recycled air pollution control equipment slag based on an Agency determination that waste "ceases to be a 'solid waste' when it arrives at a metals reclamation facility because at that point it is no longer 'discarded material.' " 906 F.2d at 740. Instead, the court stated that these materials are part of a mandatory waste treatment plan for hazardous wastes prescribed by EPA and continued to be wastes even if recycled. 906 F.2d at 741. Further, "once material qualifies as 'solid waste,' [footnote omitted] something derived from it retains that designation even if it might be reclaimed and reused at some future time." *Association of Battery Recyclers* v. *EPA,* ("ABR") 208 F.3d 1047, 1056 (DC Cir. 2000) (referring to API I and the later decided case, *American Mining Congress* v. *EPA,* ("AMC II") 907 F.2d 1179 (DC Cir. 1990)).

One of the more important holdings of a number of court decisions is that simply because a hazardous waste has, or may have, value does not mean the material loses its status as a solid waste. *See* API I, 906 F.2d at 741 n.16; *United States* v. *ILCO Inc.,* 996 F.2d 1126, 1131–32 (11th Cir. 1993) ("ILCO"); *Owen Steel* v. *Browner,* 37 F.3d 146, 150 (4th Cir. 1994) ("Owen Steel"). *ILCO* and *Owen Steel,* however, seem to recognize that legitimate products made from wastes are, themselves, products and not wastes.

The ABR case reiterated the concepts discussed in the previous cases of AMC I and II and API I. The Court held that it had already resolved the issue presented in *ABR* in its opinion in *AMC I,* where it found that "* * * Congress unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away" (208 F.2d at 1051). It repeated that materials that are reused within an ongoing industrial process are neither disposed of nor abandoned (208 F.3d at 1051–52). It explained that the intervening *API I* and *AMC II* decisions had not narrowed the holding in *AMC I* (208 F.3d at 1054–1056).

Notably, the Court did not hold that storage before reclamation automatically makes materials "discarded." Rather, it held that "* * * at least some of the secondary material EPA seeks to regulate as solid waste (in the mineral processing rule) is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away" (208 F.3d at 1056). In this regard, the court criticized all parties in the case—industry, as well as EPA—because they "presented this aspect of the case in broad abstraction, providing little detail about the many processes throughout the industry that generate residual material of the sort EPA is attempting to regulate. * * *" (*Ibid*).

*American Petroleum Institute* v. *EPA,* 216 F.3d 50, 55 (DC Cir. 2000) ("API II"), decided shortly after *ABR* and considered by the court at the same time, provides further guidance for defining solid waste, but in the context of two specific waste streams in the petroleum refining industry. The court overturned EPA's determination that certain recycled oil-bearing wastewaters are wastes (216 F.3d at 55–58) and upheld conditions imposed by the Agency in excluding petrochemical recovered oil from the definition of solid waste (216 F.3d at 58–59). In the case of oil-bearing wastewaters, EPA had determined that the first phase of treatment, primary treatment, results in a waste being created. 216 F.3d at 55. The court overturned this decision and remanded it to EPA for a better explanation, neither accepting EPA's view nor the contrary industry view. The court noted that the ultimate determination that had to be made was whether primary treatment "is simply a step in the act of discarding [* * *][o]r is it the last step in a production process before discard?" 216 F.3d at 57. In particular, the court rejected EPA's argument that primary treatment was required by regulation, and instead stated that EPA needed to "set forth why it has concluded that the compliance motivation predominates over the reclamation motivation" and "why that conclusion, even if validly reached, compels the further conclusion that the wastewater has been discarded." 216 F.3d at 58.

The court also considered whether material is discarded in *Safe Food and Fertilizer* v. *EPA,* 350 F.3d 1263 (DC Cir. 2003) ("Safe Food"). In that case, among other things, the court rejected the argument that, as a matter of plain meaning, recycled material destined for immediate reuse within an ongoing industrial process is never considered "discarded," whereas material that is transferred to another firm or industry for subsequent recycling must always be solid wastes. 350 F.3d at 1268. Instead, the court evaluated "whether the agency's interpretation of * * * 'discarded' * * * is, reasonable and consistent with the statutory purpose. * * *" *Id.* Thus, EPA has the discretion to determine if material is not a solid waste, even if it is transferred between industries.

We also note that the Ninth Circuit has specifically found that non-hazardous secondary materials may, under certain circumstances, be burned and not constitute a solid waste under RCRA. *See Safe Air For Everyone* v. *Waynemeyer* ("Safe Air"), 373 F.3d 1035 (9th Cir., 2004). In this case, the Court found that Kentucky bluegrass stubble may be burned to return nutrients to the soil and not be a solid waste.

5. Concept of Legitimacy

Under RCRA subtitle C, some hazardous secondary materials that would otherwise be subject to regulation under RCRA's "cradle to grave" hazardous waste system are not considered solid wastes if they are "legitimately recycled" or legitimately reused as an ingredient or substitute for a commercial product. The principal reasoning behind this construct is that use/reuse or recycling of such secondary materials often closely resembles normal industrial production, rather than waste management. Although today's final rule does not address the Agency's hazardous waste regulations, EPA finds the concept of legitimacy to be an important one in determining when a secondary material (whether hazardous or non-hazardous) is genuinely recycled and not discarded under the guise of recycling.

However, since there can be considerable economic incentive to manage recyclable materials outside of the RCRA hazardous waste regulatory system, there is a clear potential for, and historical evidence of, some handlers claiming they are recycling, when in fact they are conducting waste treatment and/or disposal in the guise of recycling. EPA considers such "sham" recycling to be, in fact, discard and these secondary materials being sham recycled are solid wastes (or hazardous waste if the material is listed as, or exhibits a characteristic of, hazardous waste pursuant to 40 CFR part 261).

To guard against hazardous secondary materials being discarded in the guise of recycling, EPA has long articulated the need to distinguish between "legitimate" (*i.e.,* true) recycling or other use and "sham" (*i.e.,* fake) recycling; see the preamble to the 1985 hazardous waste regulations that established the definition of solid waste under RCRA subtitle C (50 FR 638; January 4, 1985). A similar discussion that addressed legitimacy as it pertains to burning hazardous secondary materials for energy recovery (considered a form of recycling under RCRA subtitle C) was presented in the January 9, 1988 proposed amendments to the definition of solid waste (53 FR 522).

Then on April 26, 1989, the Office of Solid Waste [11] issued a memorandum that consolidated the various preamble and other statements concerning legitimate recycling into a list of questions to be considered in evaluating the legitimacy of hazardous secondary materials recycling (OSWER directive 9441.1989(19)). This memorandum (known to many as the "Lowrance Memo," a copy of which is included in the Docket to today's rule) has been a primary source of information for the regulated community and for overseeing agencies in distinguishing between legitimate and sham recycling.

In the October 30, 2008 DSW Final Rule, EPA finalized several exclusions from the definition of solid waste for hazardous secondary materials being reclaimed and a non-waste determination process for persons to receive a formal determination that their hazardous secondary materials are not solid wastes when legitimately reclaimed. In that action, EPA codified in 40 CFR 260.43 the requirement that materials be legitimately recycled as a condition for the exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator (40 CFR 261.2(a)(2)(ii) and 40 CFR 261.4(a)(23)) and as a condition of the exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation (40 CFR 261.4(a)(24) and 40 CFR 261.4(a)(25)). As part of that final rule, EPA also codified the legitimate recycling provision specifically as a requirement for the non-waste determination process (40 CFR 260.34).

As discussed above, the Agency has agreed to prepare a notice of proposed rulemaking, which will solicit comment regarding potential revisions to the 2008 DSW Final Rule. The definition of "legitimacy" is one of the issues that will be reconsidered in this subsequent proposed rule. This subsequent DSW proposed rule is, by necessity, in a different proceeding from the rule we are promulgating today. EPA cannot presuppose the results of the DSW rule, but still needs to issue a final rule dealing with legitimacy criteria in today's separate rule affecting non-hazardous secondary materials. The same concept—legitimacy—applies to both rules, but, at this point, EPA cannot reconcile the differences between the legitimacy criteria in each rule, if there are indeed any substantive differences. As a result, each rule will have its own definition of legitimate recycling. Although the Agency is revisiting the definition of legitimacy in the context of regulations promulgated pursuant to RCRA subtitle C, EPA continues to find the principle of "legitimacy" to be an important element in the recycling of both hazardous and non-hazardous secondary materials. That is, the concept of legitimate recycling is crucial to determining whether a hazardous or non-hazardous secondary material being recycled is truly being recycled or is, in fact, being discarded through sham recycling and thus, is a solid waste.

*D. Summary of the ANPRM*

In the ANPRM, the Agency considered various guiding principles, including the concept of discard, and if discarded, whether the secondary material has been processed to produce a non-waste fuel or ingredient product, and the concept of legitimacy,[12] in determining if secondary materials used in combustion units are solid wastes. Based on these guiding principles, the Agency identified a number of scenarios in evaluating the usage of secondary materials (*e.g.,* as fuels or ingredients) and whether these secondary materials should be considered solid wastes under RCRA when used in combustion devices, such that units burning these secondary materials would be subject to regulation under CAA section 129, rather than subject to CAA section 112. The ANPRM identified several cases where such secondary materials are not solid wastes when combusted, and thus, subject to CAA section 112. These scenarios were: (1) Traditional fuels, (2) non-hazardous secondary materials used as legitimate "alternative" fuels that have not been previously discarded, (3) non-hazardous secondary materials used as legitimate "alternative fuels" resulting from the processing of discarded secondary materials, (4) non-hazardous secondary materials used as legitimate ingredients, and (5) hazardous secondary materials that may be excluded from the definition of solid waste under RCRA subtitle C because they are more like commodities than wastes. All other cases where non-hazardous secondary materials are combusted would be considered "solid wastes" and subject to CAA section 129. Specifically:

- *Traditional Fuels:* EPA identified in the ANPRM fossil fuels (*e.g.,* coal, oil, and natural gas) and their derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas), as well as cellulosic biomass (*e.g.,* wood) as traditional fuels. Such traditional fuels have been used historically as fuels and have been managed as valuable products, such that they are considered unused products that have not been discarded and therefore, are not solid wastes. In addition, EPA also identified as traditional fuels wood collected from forest fire clearance activities and tree and uncontaminated wood found in hurricane debris if not discarded, if managed properly, and if burned as a legitimate fuel.
- *Non-Hazardous Secondary Materials Used as Legitimate "Alternative Fuels" That Have Not Been Previously Discarded:* The ANPRM indicated that, in addition to traditional fuels, there may be a category of non-

[11] On January 9, 2009, the Office of Solid Waste was renamed the Office of Resource Conservation and Recovery.

[12] The Agency discussed various criteria regarding the concept of legitimacy. Specifically, with respect to secondary materials used as a fuel, they should be handled as a valuable commodity, have a meaningful heating value, and contain contaminants that are not significantly higher in concentration than traditional fuel products. For those secondary materials used as an ingredient, they should be handled as a valuable commodity, the secondary material provides a useful contribution, the recycling results in a valuable product, and the product does not contain contaminants that are significantly higher in concentration than traditional products. If these criteria are not met, then sham recycling may be indicated and the secondary material may be a solid waste.

hazardous secondary materials that are legitimate alternative non-waste fuels, even though they may not have been traditionally used as fuels, because of changes in technology and in the energy market. Biomass was discussed as one large category of these alternatives fuels. EPA also discussed that scrap tires used as tire-derived fuel (TDF), which includes whole or shredded tires, that have not been previously discarded, could also be considered legitimate fuels that meet the legitimacy criteria (see Materials Characterization Paper on Scrap Tires in the docket for today's rule for a complete discussion on contaminants in TDF [EPA–HQ–RCRA–2008–0329]). We noted that in many cases, scrap tires are collected pursuant to state tire oversight programs (*e.g.,* used tires from tire dealerships that are sent to used tire processing facilities) are handled as valuable commodities, and, therefore, have not been abandoned, disposed of, or thrown away. We noted that because states typically regulate these programs under their state solid waste authorities, it was not the Agency's intent to undercut the state's authority in this area. We, therefore, requested comment on whether scrap tires collected pursuant to state tire oversight programs should be considered a non-waste fuel when combusted, and whether an EPA designation specifying that scrap tires, for example, managed pursuant to state collection programs would adversely impact a state's ability to manage such a program. Other non-traditional alternative fuels that EPA identified in the ANPRM included construction and demolition materials, scrap plastics, non-hazardous solvents and lubricants, and wastewater treatment sludge. The Agency solicited comment on this category.

• *Non-Hazardous Secondary Materials Used as Legitimate "Alternative Fuels" Resulting from the Processing of Discarded Secondary Materials:* The Agency also discussed the concept of processing of discarded non-hazardous secondary materials, such that legitimate fuel products may be extracted, processed, or reclaimed from a non-hazardous secondary material that has been discarded in the first instance and that such products would generally not be considered solid wastes. The principle behind this idea of processing a solid waste to produce a product is common to industrial processes. We noted in the ANPRM that until a legitimate product has been extracted, processed, or reclaimed, the non-hazardous secondary material has been discarded and is a solid waste. The ANPRM identified a number of non-hazardous materials that can be processed into a legitimate fuel, including biomass, coal fines, used oil, tires and landfill ash. Of course, the degree of processing necessarily will vary depending on the specific material, but the objective is the same—that is, the product from processing must be a legitimate fuel (*i.e.,* a material with a meaningful heating value, with contaminants that are not present at significantly higher concentrations than those of traditional fuel products, and managed as a valuable commodity).

• *Non-Hazardous Secondary Materials Used as Ingredients:* In addition to legitimate fuel products, the ANPRM also recognized that non-hazardous secondary materials that have not been discarded can be used as legitimate ingredients, and identified cement kiln dust (CKD), bottom ash, boiler slag, blast furnace slag, foundry sand, and secondary glass material as secondary materials that could be considered as legitimate ingredient products. If, on the other hand, such non-hazardous secondary materials have been discarded, the ANPRM identified such secondary materials as solid wastes, unless they are sufficiently processed into a legitimate product, as would be the case for discarded materials that could become products after being processed.

• *Hazardous Secondary Materials That May Be Excluded From the Definition of Solid Waste Under RCRA Subtitle C Because They Are More Like Commodities Than Wastes:* The final category identified in the ANPRM are hazardous secondary materials that are recycled and are specifically identified in the subtitle C hazardous waste rules as secondary materials that may be burned under certain conditions, but are not considered solid wastes, at least for purposes of the hazardous waste regulations. The ANPRM indicated that EPA was interested in extending this determination so that these materials also are not considered solid wastes under RCRA subtitle D. The Agency indicated that it believed that it had sufficient information in the rulemaking records for the various hazardous secondary materials—that is, black liquor and spent sulfuric acid,[13] and comparable fuels [14] to conclude that these subtitle C exclusions are broadly applicable to the definition of solid waste under subtitle D of RCRA when these secondary materials are used as a fuel or ingredient.

The ANPRM indicated that in all other cases where secondary materials were combusted, they would be considered "solid wastes" under RCRA subtitle D and thus, subject to CAA section 129. However, the Agency solicited comment on many aspects of these scenarios. In addition, the ANPRM also solicited comment on the following four issues: (1) Whether there are circumstances where discarded secondary materials—once recovered from the environment—that can be directly used as a legitimate fuel or ingredient product without processing should not be considered a solid waste; (2) whether there are other approaches for determining that non-hazardous secondary materials when used as a legitimate fuel is not a solid waste, and specifically took comment on an approach presented to EPA by industry representatives; [15] (3) whether to consider non-hazardous secondary materials that receive a state beneficial use determination for use as a fuel or ingredient in a combustion unit as not being a solid waste; and (4) how to address biofuels and byproducts from the production of biofuels—that is, whether such secondary materials should be considered a waste or not when combusted. (For a more detailed discussion of the ANPRM, *see* 74 FR 41, January 2, 2009.)

*E. Summary of the Proposed Rule*

The proposal maintained many of the concepts and provisions discussed in the ANPRM, including the concept of discard and the legitimacy criteria. However, the basic framework differed from the ANPRM based partly on the

[13] A determination was made that black liquor reclaimed in a pulping liquor recovery furnace and then reused in the pulping process and spent sulfuric acid used to produce virgin sulfuric acid were not solid wastes because these hazardous secondary materials were determined to be an integral part of the manufacturing process.

[14] A determination was made with respect to comparable fuels that certain hazardous secondary materials meet specific requirements to ensure that the materials toxic constituents and physical properties are similar to commercial (benchmark) fuels, and therefore, are products and not solid wastes.

[15] Industry representatives suggested that non-hazardous secondary materials should be evaluated, on a case-by-case basis, to identify which criteria have been satisfied and determine whether the material is legitimately handled as a fuel. Criteria identified by industry stakeholders include: Handling and storage of materials to minimize loss, use of materials within a reasonable period of time, material value (e.g., whether there is a market for the material as a fuel, internal or external to the company), material managed and treated as a commodity, and processing of material to enhance fuel value. *See* 74 FR 60 for the ANPRM's description of this approach. A copy of this industry-recommended approach entitled, "Outline of Regulatory Approach to Determine Materials Considered Fuels—not Solid Wastes—under RCRA," is also included in the docket for this rulemaking.

approach taken in the Definition of Solid Waste final rule promulgated on October 30, 2008 (*see* 73 FR 64668), based partly on the comments received on the ANPRM, as well as EPA's interpretation of whether these secondary materials were discarded. For example, comments received on the ANPRM from some states suggested that non-hazardous secondary material fuels that are transferred to a third party have entered what is traditionally considered to be the "waste stream" (and have been regulated by the states as wastes) and therefore should appropriately be considered wastes (*e.g.,* scrap tires, regardless of whether they were collected and managed pursuant to state programs or recovered from legacy waste piles).

As a result of comments like these and the Agency's re-examining our interpretation of the application of the discard concept to various non-hazardous secondary materials, the Agency altered its position in the proposed rule. Whereas the ANPRM had indicated that there may be a number of non-hazardous secondary materials that would not be considered discarded even if the original generator sent them to another entity outside of its control, the proposed rule assumed that non-hazardous secondary materials that are used as fuels and are managed outside the control of the generator are solid wastes, unless they were processed into non-waste fuel products or the Agency grants a non-waste determination (through a case-by-case petition process) that such non-hazardous secondary materials are not solid wastes because they have not been discarded and are indistinguishable in all relevant aspects from a fuel product.

In the proposal, EPA stated that when non-hazardous secondary material fuels are transferred to another party, the Agency generally believed that the material is discarded, since the generator has relinquished control of the secondary material and the entity receiving such materials may not have the same incentives to manage them as a useful product, which results in the materials being discarded. The Agency noted that this lack of incentive to manage as a useful product has been well-documented in the context of hazardous secondary material recycling as evidenced by the results of the environmental problems study performed in support of the 2008 DSW Final Rule and believed that this finding also held true for non-hazardous secondary materials that are used as fuel.

The proposed rule considered non-hazardous secondary materials used as ingredients that are used in combustion units to not be solid waste if they were not discarded in the first instance and if they met the legitimacy criteria, irrespective of whether they have been transferred to a third party. The Agency stated that it was not proposing to differentiate ingredients that are used within the control of the generator from those that are not since we believed the use of non-hazardous secondary materials as ingredients is considered to be more integral or akin to use in a commercial manufacturing process and thus, these non-hazardous secondary materials would not be considered discarded provided they satisfy the legitimacy criteria.

The proposed rule also included a petition process for receiving non-waste determinations, which was an additional area for comment in the ANPRM, but not included as an approach or scenario that was specifically presented. One of the differences between the ANPRM and the proposed rule was the classification of "clean" biomass and on-specification used oil as traditional fuels. In addition, the proposed rule did not address hazardous secondary materials excluded from the definition of solid waste under subtitle C of RCRA, concluding that it does not need to address this exclusion in this rulemaking since these secondary materials have already been excluded from the definition of solid waste as hazardous secondary materials and therefore, should not be addressed in the proposed rule, which deals with the definition of solid waste for non-hazardous secondary materials used in combustion units.

Finally, the proposed rule also revised the contaminant legitimacy criterion, stating that non-hazardous secondary materials used as fuels in combustion units must contain contaminants at levels "comparable to or less than" those in traditional fuels which the combustion unit is designed to burn, whereas the ANPRM had stated that non-hazardous secondary materials used as fuel could not contain contaminants that were "significantly higher" than traditional fuel products. In the proposed rule, EPA explained its rationale for making this change, stating that the requirement that non-hazardous secondary materials have contaminants at levels comparable to or less than traditional fuels would ensure that the burning of any secondary materials in combustion units will not result in discard of materials or their contaminants and thus, will not result in increased releases to the environment that could adversely impact the health and environment of the local community. A similar change was made to the contaminant legitimacy criterion for ingredients, with the comparison being made between products manufactured with and without non-hazardous secondary materials.

Thus, in the proposed rule, the Agency considered all non-hazardous secondary materials burned in combustion units as solid wastes *except* for the following circumstances: (1) Non-hazardous secondary materials used as a fuel that remains within the control of the generator (whether at the site of generation or another site within the generator's control) that meets the legitimacy criteria; (2) non-hazardous secondary materials used as an ingredient in a manufacturing process (whether by the generator or a third party) that meets the legitimacy criteria; (3) legitimate fuel or ingredient products that are produced from the processing of discarded non-hazardous secondary materials; [16] and (4) non-hazardous secondary materials handled outside the control of the generator, but has been determined through a case-by-case non-waste determination petition process to not have been discarded and to be indistinguishable in all relevant aspects from a fuel product.

### *F. Use of Secondary Materials*

#### 1. Introduction

The U.S. is pursuing an approach to sustainable materials management that employs the concepts of life cycle assessment [17] and full cost accounting.[18] Within the context of RCRA,[19] this final rule aims to facilitate materials management to the extent allowed by the statute, through the establishment of a regulatory framework that guides the beneficial use of various secondary materials, while ensuring that such use is protective of human health and the

[16] As we state throughout the preamble, prior to the production of the legitimate fuel or ingredient product, the non-hazardous secondary material is considered a solid waste and would be subject to the appropriate federal, state, and local requirements.

[17] The terms "life cycle analysis" and "life cycle assessment" are commonly used interchangeably. Life cycle assessment is a system-wide analytical technique for assessing the environmental (and sometimes economic) effects of a product, process, or activity across all life stages.

[18] Full cost accounting is an accounting system that incorporates economic, environmental, health, and social costs of a product, action, or decision.

[19] RCRA section 6901(c)—Materials: The Congress finds with respect to materials, that—(1) millions of tons of recoverable material which could be used are needlessly buried each year; (2) methods are available to separate usable materials from solid waste; and (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

environment. EPA, in conjunction with the states, seeks to further facilitate this objective through research, analysis, incentives, and communication. The Agency recognizes that secondary materials are widely used today as fuels and/or ingredients in industrial processes. We expect these uses will continue and expand in future years as effective materials management becomes more critical to a sustainable society. The use of secondary materials from a variety of non-traditional sources, including the use of energy-containing secondary materials, is expected to play an important role in future resource conservation efforts.

The use of secondary materials as alternative fuels and/or ingredients in manufacturing processes using combustion not only recovers valuable resources, it is known to contribute to emission reductions. For example, both greenhouse gas (GHG) and particulate matter (PM) emissions have been reduced as a co-benefit of the use of secondary materials.[20] The use of secondary materials, such as use as a fuel in industrial processes may also result in other benefits, including reduced fuel imports, reduced negative environmental impacts caused by previous dumping (*e.g.,* tires), and reduced methane gas generation from landfills.

Secondary materials may, in some cases, be more appropriately defined as "by-products,"[21] reflecting their inherent resource recovery value in the generation and production of heat, energy, and/or marketable products or intermediates. Secondary materials can provide microeconomic (firm level) and macroeconomic benefits when legitimately used as effective substitutes for, or supplement to virgin materials. Economic efficiencies can be improved with the use of secondary materials, when substituted for increasingly scarce virgin materials, because the use of such secondary materials often results in an equivalent level of outputs at lower overall resource use, or in turn, greater outputs could be generated using the same amount of resource inputs. When this occurs, monetary savings resulting from reduced resources and expenditures would, theoretically, be applied to a higher and better use in the economy. This helps advance economic growth as a result of improved industrial efficiency,[22] which, in turn, helps move the country toward material sustainability and energy self sufficiency, while protecting human health and the environment.

2. Secondary Materials Use and Benefits

A wide and diverse range of secondary materials are currently used as fuels and/or ingredients in manufacturing or service processes. Based on our research conducted in support of the January 2, 2009 ANPRM, we identified eight non-hazardous secondary material fuels or fuel groups and six non-hazardous ingredients, or ingredient groups. The eight fuel source materials were: The biomass group (pulp and paper residuals, forest derived biomass, agricultural residues, food scraps, animal manure, and gaseous fuels); construction and demolition materials (building related, disaster debris, and land clearing debris); scrap tires; scrap plastics; spent solvents; coal refuse; waste water treatment sludge, and used oil. The six secondary material ingredients were: blast furnace slag; CKD; the coal combustion residuals (fly ash, bottom ash, and boiler slag); foundry sand; silica fume; and secondary glass material. The ANPRM discussed and described these key secondary materials. In addition, we developed Materials Characterization Papers for each of these fuel and ingredient materials. These papers were included in the docket for the ANPRM, as well as the docket for the proposed rule.

In preparing the proposed rule, we developed three additional Materials Characterization Papers for auto shredder residue, purification process byproducts, and resinated wood products. For today's final rule, we have updated and revised all of the existing Materials Characterization Papers for which we received additional data and information. We have included these updated Materials Characterization Papers in the docket for this final rule. We have determined that the non-hazardous secondary fuels and ingredients discussed in this series of Materials Characterization Papers account for the vast majority of all non-hazardous secondary materials used in combustion processes in the U.S.

## V. Comments on the Proposed Rule

Under the approach outlined in the proposed rule, non-hazardous secondary materials were defined as a solid waste unless: (1) The non-hazardous secondary material is used as a fuel and remains within the control of the generator that meets the legitimacy criteria; (2) the non-hazardous secondary material is used as an ingredient that meets the legitimacy criteria; (3) the discarded non-hazardous secondary material has been sufficiently processed to produce a non-waste fuel or ingredient product that meets the legitimacy criteria; or (4) through a case-by-case non-waste determination petition process, EPA has determined that the non-hazardous secondary material has not been discarded and is indistinguishable in all relevant aspects from a fuel product.

The Agency also took comment on two other approaches regarding the combustion of non-hazardous secondary materials. Under the first approach, identified in the proposal as the "Alternative Approach," all non-hazardous secondary materials and ingredients that were used in combustion facilities that were not within the control of the generator were considered a solid waste. Thus, only those non-hazardous secondary materials or ingredients that were used in combustion facilities within control of the generator that meet the legitimacy criteria would be considered a non-waste. However, like the proposed rule, traditional fuels also would not be considered a solid waste, regardless of the generator.

The second alternative that EPA took comment on was a broader definition of solid waste, in which only traditional fuels are not solid wastes and all non-hazardous secondary materials burned for energy recovery or used as an ingredient are considered discarded, and therefore, solid wastes.[23] This

[20] For example, the GHG emissions rate associated with the combustion of scrap tires is approximately 0.081metric tons of carbon dioxide equivalents ($MTCO_2E$) per million metric British thermal units (MMBtu) of scrap tires combusted, while the GHG emissions rate for coal is approximately 0.094 $MTCO_2E$ per MMBtu. Combined with the avoided extraction and processing emissions 0.006 $MTCO_2E$/MMBtu for coal, the total avoided GHG is 0.019 $MTCO_2E$ per MMBtu. Substituting tire-derived fuel for coal would also avoid an estimated 0.246 Lbs/MMBtu of PM associated with the extraction and processing of the coal. Please see the Materials Characterization Papers in the docket for further details on these estimates, and other estimates of avoided emissions associated with burning tires and other secondary materials as fuel.

[21] For purposes of this action, we define by-product as a secondary or incidental material derived from the primary use or production process that retains value in the marketplace or to an end user.

[22] Opportunities for improved economic efficiency are recognized through the Action Statement of the *U.S. Business Council For Sustainable Development:* "Promoting Sustainable Development by Creating Value Through Action Establishing Networks and Partnerships, and Providing a Voice for Industry."

[23] On August 18, 2009, EPA received a letter signed by nearly one hundred community groups and citizens that urged for an expansive definition of solid waste for the purposes of combustion and argued against the general approach of the ANPRM. A copy of this letter has been placed in the docket to today's final rule. The letter highlights stakeholder concerns regarding the differences

Continued

section discusses the comments that EPA received, as well as our response to those comments.

*A. Proposed Approach*

1. Definition of the Term Discard

Under the proposed rule, non-hazardous secondary materials that are discarded are considered to be a solid waste. On the other hand, secondary materials that have not been discarded, for example, secondary materials that are managed within the control of the generator and meet the specified legitimacy criteria would not be considered a solid waste. Many of the comments discussed the definition of the term "discard" and instances in which the term should or should not apply.

As discussed below, environmental groups argue, generally, that any secondary material burned for energy recovery is a solid waste. These commenters object to allowing control by the generator to be relevant to rendering material a non-waste, even if burned under the legitimacy criteria, claiming that these materials are wastes.

Industry commenters, on the other hand, assert that the secondary materials used in their operations exhibit value as evidenced by their purchase price, their use as inputs and products, their role in ongoing recycling programs, their use as fuels, and/or their use in "routine transactions" or processing operations. Based on these characteristics, industry commenters maintain that such secondary materials should not be considered discarded. Industry commenters also assert that EPA cannot define something as "discarded" when transferred to a third party and express concern that the concept of discard is ambiguous or incorrectly interpreted by EPA in the proposed rule.

In addition, while industry commenters favor allowing the generator to burn secondary materials as non-wastes, they also argue that materials are not wastes so long as they are combusted legitimately even if the material has been discarded in the first instance. They argue that the proposed rule effectively makes the act of moving materials from one party to another the equivalent of "discard," regardless of intent. These commenters claim that EPA's definition of solid waste is overly restrictive and yields little environmental gain. Certain comments maintain that as long as a non-hazardous secondary material meets the legitimacy criteria for use as a fuel, and it is combusted as a fuel, it is not a waste. These comments state that secondary materials cannot be assumed to be part of the solid waste disposal problem merely because the original generator of the materials transfers them to another entity. In fact, depending on the nature of the transaction, this transfer may indicate that the company values the material.

a. Comments From Environmental Groups

*Comment:* Case law prevents EPA from finding that secondary materials burned for energy recovery are not solid wastes. The DC Circuit holding in *AMC I* that material "recycled and reused in an ongoing manufacturing or industrial process" is not "discarded" does not apply to secondary materials burned for energy recovery even if legitimately recycled and reused. *AMC I* only addresses reclamation of secondary materials. Moreover, EPA incorrectly relies on case law to give it discretion to define "discard." According to the comment, EPA is wrongly implying that, under case law, the meaning of "discard" is ambiguous and that the Agency has discretion to define burning for energy recovery as either discard or not.

*EPA's Response:* EPA disagrees with this comment. To reply to this commenter, EPA is relying on its explanations in the ANPRM and the proposal, as well as the discussion reiterated in this preamble. See especially discussions of the law in the proposed rule at 75 FR 31850–52 (section titled, "Case Law on Definition of Solid Waste"); 31858–59 (Comment/Response section titled "Meaning of Discard"); and 31885–87 (section titled "Alternative Approach"). That is, EPA sees nothing in the comment that would change the legal basis for this rule. However, the Agency would like to clarify the more obvious inaccuracies in the comment.

First, EPA freely admits, as stated in the proposal, that the secondary materials at issue in *AMC I* were not burned for energy recovery. See, for example, 75 FR 31887. However, the plain logic of the court's opinion and the plain meaning of the statute are unmistakable. EPA does not have the discretion to cover as solid waste secondary materials recycled in a continuous industrial process, even if they are used in a combustion unit. Indeed, if EPA were to assert jurisdiction for secondary materials recycled in a continuous process for energy recovery, it appears highly likely that the Agency's rule would be invalidated in a litigation challenge.

In addition, EPA has not at any time since the ANPRM in this proceeding stated that the term "discard" is ambiguous. It is clear that EPA's jurisdiction under RCRA applies unambiguously to materials that are discarded and the definition is unambiguous in that it means thrown away, disposed of or abandoned. It is the application of the definition to particular instances that gives rise to ambiguity. The ABR court plainly stated that the term may be ambiguous as applied to some situations, but not as applied to others. 208 F.3d at 1056, *See* also 75 FR 31887. The comment simply begs the question when it claims EPA is relying on an ambiguous meaning to claim discretion. EPA has no discretion in certain cases. For example, the Agency may not regulate under RCRA secondary materials recycled in a continuous industrial process. On the other hand, EPA may have to exercise discretion to determine whether particular materials are recycled in a continuous process and whether such materials recycled in other ways are solid wastes. Agency discretion applies to the application of the discard definition.

*Comment:* EPA's proposal acknowledges that burning a secondary material for energy recovery is not "traditional" recycling. Thus, EPA may not consider burning for energy recovery as recycling because the term, "recycling," is not given its ordinary meaning. *See* 75 FR at 31872.

*EPA's Response:* EPA disagrees with the conclusion of the comment, but needs to correct the record. EPA received a comment in response to the ANPRM that requested the Agency to apply the legitimacy criteria to situations where the recycling does not include burning for energy recovery. The commenter referred to these other situations as "traditional" recycling. EPA's response noted that this regulation specifically applies to whether non-hazardous secondary materials in a combustion unit are legitimately recycled or not. This is the general policy in this regulation, since states may regulate non-hazardous secondary materials recycled in ways not involving combustion units, but EPA is required to determine which non-hazardous secondary materials are solid waste when combusted for purposes of CAA sections 112 and 129.

In its response to the comment wrongly referring to "traditional" recycling, the Agency used the same term as the commenter. This was a mistake, since the Agency makes clear virtually everywhere else in the rulemaking record that recycling

between CAA sections 112 and 129 and argues against an overly narrow definition of solid waste.

includes legitimate burning for energy recovery and this is very clearly understood by almost all of the commenters. The Agency views the comment's distinction as a semantic matter, not as a practical application of the term "traditional." This mistake is hereby corrected for purposes of the final rule. "Traditional" recycling may include burning for energy recovery of secondary materials.

*Comment:* EPA effectively concedes that the "ordinary everyday" meaning of "discarded material" includes "secondary materials" when they are burned—no matter who burns them and regardless of whether energy is recovered from the combustion process. The comment cites the preamble to the proposed rule in several places where EPA notes that combustion of secondary materials is "commonly" associated with disposal. *See* 75 FR at 31859, 31877.

The comment states, further, EPA's sense of what constitutes discard is not the ordinary sense of the term by citing the Agency's discussion of the benefits of burning secondary materials. 75 FR at 31849. In addition, according to the comment, EPA is unlawfully seeking to exclude from the definition of solid waste by its discussion of the benefits of burning the following materials: Pulp and paper residuals, agricultural residues, food scraps, animal manure, construction and demolition waste, disaster debris, land clearing debris, scrap plastics, spent solvents, coal refuse, waste water treatment sludge and used oil. 75 FR at 31850.

*EPA's Response:* Other responses deal with the legal arguments made by this particular comment on how the statute and case law deal with the definition of solid waste. However, the Agency believes it necessary to address some of the comment's specific inaccuracies separately.

First, EPA in no way "concedes" that all materials burned for energy recovery are discarded in the ordinary sense of the term. To the extent that the Agency notes certain public perceptions, it plainly states (on the same pages cited in the comment) that these are misconceptions because they do not take into account that a secondary material may often be used to produce a safe fuel product that is a valuable commodity or that a secondary material that is burned in a combustion unit does not necessarily have high levels of contaminants. 75 FR 31859.

In addition, EPA refers to the same misconceptions when it discusses whether product fuels may be processed or extracted from materials once discarded. EPA notes that fuel processed or extracted from discarded non-hazardous secondary materials should not necessarily be considered solid waste, just as recycled newspapers, recycled aluminum, re-refined oil, to name but a few, are not considered solid waste. Moreover, the misperception that contaminant levels are high in combusted secondary materials affects the perception that there needs to be a very high threshold with respect to the level of processing that must take place to render a discarded material into a non-waste product. 75 FR 31877.

Finally, EPA does not understand the comment's citation to 75 FR 31849–50 as containing statements regarding the Agency's "sense" of discard or the fact that the Agency is seeking to exclude various materials from the definition of solid waste. These pages only discuss the benefits of secondary material combustion without opining on whether the combusted materials would or would not be a waste. EPA cannot understand the comment's motivation in making these statements.

*Comment:* RCRA's statutory language shows that Congress did not intend EPA to exclude secondary materials that are burned for energy recovery from the definition of solid waste. In particular, section 3004(q) directs EPA to issue regulations both for facilities that produce fuels from hazardous waste and for facilities that burn "for purposes of energy recovery" any fuel that is produced from hazardous waste or any fuel that contains any hazardous waste. Thus, EPA may not declare that hazardous wastes and hazardous waste derived fuels are not discarded when burned for energy recovery. The comment concedes that section 3004(q) addresses hazardous waste, but maintains that the provision is strongly indicative of Congress' intent that burning a material for energy recovery does not transform that material into a non-waste.

*EPA's Response:* EPA disagrees with this comment. Section 3004(q) only applies to specific provisions of the statute and in no way can it be considered to present a sweeping bar to the Agency's ability to interpret the statute. In fact, since Congress only addressed these provisions in the hazardous waste subtitle of RCRA, the more logical interpretation is that such provisions would not be applicable to other parts of the statute. Section 3004(q) very clearly provides that a material must be a hazardous waste, first, before its provisions apply. EPA needs to make the determination that material is a hazardous waste before even dealing with the restrictions under 3004(q). Thus, it does not apply to the present rule where EPA must first determine whether the material is a solid waste and there is no question that the materials subject to this rule are not hazardous wastes. EPA accepts the comment's concession that 3004(q) only applies to hazardous waste.

*Comment:* One comment states that "exemptions" in EPA's rule from the definition of solid waste violate the CAA. EPA interprets this comment to mean that the commenter sees violations of the CAA for any non-hazardous secondary material the Agency has decided is not a solid waste. The comment states the following: "Congress was not concerned either about the ownership of a waste material that was being burned or about whether energy was recovered from the combustion process; it simply wanted to ensure that all waste combustion units were subject to the protective control, monitoring, siting, training, and reporting requirements that it found necessary and appropriate for these units."

The comment makes four points to support its contention:

1. The proposed rule is a transparent attempt to exempt facilities that recover energy from the section 129 standards and would shrink the population of facilities covered to 175, a number far less than Congress intended.

2. Section 129(g)(1) makes clear that Congress viewed refuse-derived fuel as waste and EPA includes "refuse-derived" fuel as a non-waste.

3. Section 129(h)(5) shows that Congress viewed the universe of "fuel" to consist of "waste" on the one hand and "fossil fuel" on the other. Congress's definition of "municipal waste" expresses the intent that facilities that burn non-fossil fuels and are not covered by the express exclusions in section 129(g)(1) must meet the section 129 incinerator standards.

4. Because EPA would allow energy recovery facilities controlled by the generator to burn non-hazardous secondary materials under section 112, EPA's regulations would improperly allow hospital-owned medical waste incinerators to burn medical and infectious wastes and would not be incinerators subject to the section 129 incinerator standards.

*EPA's Response:* EPA disagrees that these provisions of the CAA are relevant to this regulation. EPA is not creating exemptions to section 129 for facilities that recover energy. Rather, EPA is establishing a definition of non-hazardous solid waste, which, as specified by CAA section 129(g)(6), governs the meaning of "solid waste" under section 129. Because Congress

specifically directed that "solid waste" have the meaning established by the Administrator under RCRA, instead of defining the term under RCRA, the CAA definition of "municipal waste" is not relevant to this action.

If any or all of the commenter's contentions are correct, section 129 would not provide that the term "solid waste" shall have the meaning promulgated by EPA under RCRA. There would simply be no reason for EPA to consider the RCRA definition, since section 129 would take care of the issue. Section 129(g)(6) would be meaningless.

The commenter further argues that EPA should consider the CAA when defining solid waste under RCRA. The CAA does not direct the Agency to consider the language of section 129 when establishing a RCRA definition. So long as EPA's rule is consistent with the RCRA definition of "solid waste," it must stand. That is, as long as the definition of solid waste is consistent with RCRA, and the Agency issues emissions standards for all units that burn commercial and industrial solid waste in the CISWI rule, the standards under section 129 are valid. Therefore, we believe the commenter's general argument is without merit.

With respect to each of the supporting points:

1. Contrary to the commenter's assertion, EPA is not "exempting" energy recovery facilities from the section 129 standards. The Agency is simply interpreting the term "solid waste" under RCRA. The number of facilities that are combusting solid waste is not relevant to this interpretation. Moreover, there is no indication in the CAA of the number of facilities Congress intended to be covered under section 129 of the Act.

2. The comment is incorrect that section 129, by excluding "refuse-derived fuel" from the exclusion in 129(g)(1)(B) was somehow defining the term as being included in the term, "solid waste," under RCRA. Again, if that were the case, section 129(g)(6) would be superfluous. Nevertheless, today's rule identifying which non-hazardous secondary materials that are solid wastes when combusted does not include fuel derived from municipal waste refuse under 129(g)(5). Some fuels may be processed from solid waste, but that determination by the Agency stands or falls based on the RCRA statute and case law, not the CAA. EPA is not defining "refuse derived fuel" in this RCRA rule. The validity of EPA's interpretation on whether commodity fuels may be processed, or extracted, from a waste must stand or fall based on the RCRA definition, not provisions of the CAA.

3. EPA disagrees with the statement that the CAA considers "the universe of 'fuel' to consist of 'waste' on the one hand and 'fossil fuel' on the other." Again, the CAA is not defining solid waste. Solid waste is defined under RCRA as material that is "discarded." There is no distinction anywhere in RCRA that would indicate that anything other than a fossil fuel must be a waste.

4. This rule does not address whether or not medical waste is a solid waste under RCRA. EPA issued regulations under section 129 of the CAA establishing emission standards for hospital and medical waste, and today's action does not affect those regulations. [74 FR 51367].

*Comment:* EPA's distinction between materials burned for energy recovery and those burned for destruction has already been rejected as irrelevant in *NRDC.* 489 F.3d at 1257–1258.

*EPA's Response:* EPA agrees that the DC Circuit has rejected for purposes of combusting materials under CAA section 129 a distinction between materials burned for energy recovery and solid wastes. However, EPA is not making that distinction in this rule. EPA agrees that units combusting solid waste are generally subject to the emission standards issued under section 129 of the CAA whether those wastes are fuels or not. Moreover, nothing in the *NRDC* case addresses EPA's discretion to interpret the term "solid waste" under the RCRA rulemaking. This issue was not before the Court in *NRDC,* and thus the Court did not speak to it. Therefore, we disagree with that portion of the comment.

It is clear that wastes may have fuel value. EPA, in this rule, is making a distinction between materials that are discarded and those that are not. One of the considerations is whether a secondary material is really being burned for destruction and is, therefore, a waste. If it is not being burned for destruction, other factors need to be considered to determine whether the non-hazardous secondary material is a waste.

Another way of describing our evaluation process to determine if a secondary material is a waste, is that EPA evaluates, first, whether such material is discarded in the first instance. If not, the Agency needs to consider whether that material is legitimately burned for energy recovery.

There are different ways of explaining the legitimacy criteria and the factors are not necessarily considered in any particular order and one or more of the factors may render the material a waste. For example, one of the legitimacy criteria is the consideration of whether the non-hazardous secondary material has meaningful fuel value or is simply being burned for destruction—that is, incinerated. If there is no meaningful fuel value, the non-hazardous secondary material is simply being destroyed.

If there is meaningful fuel value, other factors must be considered, including whether the non-hazardous secondary material is managed as a commodity and whether contaminants indicate that incineration (destruction) is the real reason for burning. A decision as to whether a non-hazardous secondary material is a waste, thus, depends on a number of factors, all of which need to be considered by the Agency before it decides whether such secondary material is a waste or not.

*Comment:* It is irrelevant whether non-hazardous secondary materials are burned at a facility controlled by the generator. Even EPA does not believe its argument because it admits that a secondary material could still be a waste even if it is recycled on-site or within the control of the generator and cites the court's holding in *API II.* Instead of defending its condition as relevant to whether a non-hazardous secondary material is or is not discarded, the Agency merely says that the secondary material must both be within the control of the generator and must pass the legitimacy criteria. By punting to its legitimacy criteria, EPA effectively concedes that its "'on-site' problem" renders irrelevant the condition that non-hazardous secondary materials be burned at a facility within control of the generator.

*EPA's Response:* EPA disagrees with this comment. If the non-hazardous secondary material remains within the control of the generator, it is more likely to be a material that is saved and not thrown away or abandoned. The Agency has explained that case law would not allow it to determine that secondary materials are wastes if they are recycled as fuels within a continuous industrial process. EPA cannot evaluate every non-hazardous secondary material, but believes this standard would cover all secondary materials that are recycled as a fuel within a continuous process. EPA, however, acknowledges that this may capture non-hazardous secondary materials which may be a waste, but this is unlikely. There may also be non-hazardous secondary materials transferred to another party that may not be a waste and EPA is attempting to deal with those categories of non-hazardous secondary materials on a case-by-case basis. However, EPA believes that it is a reasonable interpretation of the

statutory definition of discard and the case law to consider that a non-hazardous secondary material within the control of its generator that is legitimately burned as a fuel is not a solid waste.

EPA is careful to note that "legitimacy" is shorthand for referring to non-hazardous secondary materials that are not thrown away, are saved and are reused by being burned for their value as a fuel. The legitimacy criteria are the factors needed to be examined to make this determination. Thus, for example, it is relevant how the non-hazardous secondary materials is managed and the extent to which contaminants in the secondary material may indicate that the real reason for burning the secondary material is simply its destruction—referred to as "sham" recycling. The Agency is not simply "punting" to its legitimacy criteria, but believes they provide a valid basis for showing that a non-hazardous secondary material is more commodity-like than waste-like.

b. Comments From Industry Groups

*Comment:* A number of industry comments object to EPA's explanation for determining the extent to which transfer of secondary materials between companies for use as a fuel renders the non-hazardous secondary materials discarded. According to the comments, EPA not only makes the transfer of secondary materials an indication of discard, but transfer becomes the primary and controlling condition for determining whether secondary materials will be classified as fuel commodities or solid waste. One commenter in this general category claims that EPA is forbidding economic reuse of such materials by anyone other than the generator without prior government permission.

Moreover, the commenters claim that EPA cannot make a sweeping and arbitrary assumption in categorizing these transferred materials as "discarded" and then place the burden on the regulated community to challenge the assumption through submission of a petition to declare the material a non-waste. According to the commenters, it is incumbent upon EPA to explain why a material is discarded before the Agency can put the burden on companies to submit non-waste petitions if the companies want to claim the secondary material is not a waste.

The *Safe Food* case states that firm-to-firm transfers "are hardly good indicia" of discard. If a fuel can meet all of the legitimacy criteria (managed as a valuable commodity, have meaningful heating value, not contain elevated levels of contaminants), it cannot reasonably be said to be discarded just because it is sold or otherwise transferred to an entity separate from the generator. Assuming all relevant legitimacy criteria are met, the transfer of secondary materials between companies is simply not relevant for determining whether such materials have been discarded. In fact, depending on the nature of the transaction, this transfer may be a good indicator that a company values the material.

EPA cannot support its position by referring to over-accumulation of scrap tires resulting in massive piles of discarded tires. Those materials did not meet the legitimacy criteria and should be treated as discarded. Such a reference does not rehabilitate EPA's presumption that mere transfer of a non-hazardous secondary material could cause the mismanagement that resulted in the tire piles.

Nor can EPA support its position that state agencies consider materials wastes when transferred to third parties for use as fuels. States can make mistakes, as they did regarding used oil, which they classified as a waste, but changed direction after EPA promulgated its used oil regulations at 40 CFR part 279.

One comment states, on the basis of case law on abandonment, that to be abandoned there must be a clear and unequivocal intent to abandon on the part of the owner and that the burden is on whoever alleges abandonment to establish that intent. Of particular significance is the principle in the common law that abandonment does not occur where a direct transfer of ownership to another party occurs. Where a generator conveys title to a secondary material to a third-party, no abandonment occurs, whether there is payment for the material or not. Nor, if the material is actually recycled (*i.e.,* used, reused, or reclaimed), would such material ordinarily be deemed to be "disposed of" or "thrown away." Materials legitimately burned for energy recovery or used as ingredients in combustion units are neither disposed of nor abandoned and do not meet the 'plain-English meaning' of * * * 'discard.'

Merely because one party has relinquished control of a secondary material does not make it a waste nor does the fact that a receiving party may not have the same incentives to manage them as a useful product. EPA cannot indict all parties that in fact do manage these secondary materials as a useful product. Indeed, a generator's use of a secondary material does not guarantee its proper use, yet EPA allows the legitimacy criteria to suffice in situations in which the generator retains control of the non-hazardous secondary material and legitimately recycles it.

Further, EPA seems to contradict itself because it does not presume discard of ingredients transferred to other companies and gives no reason as to why fuels should be treated differently. EPA only states, without giving a reason, that it believes that the use of non-hazardous secondary materials as ingredients is considered to be more integral or akin to use in a commercial manufacturing process and thus, these non-hazardous secondary materials should not be considered discarded provided they meet the legitimacy criteria. After all, commercial manufacturing processes require both ingredients and energy (*e.g.,* fuels).

*EPA's Response:* EPA disagrees with these comments to the extent they argue that the Agency has arbitrarily determined that secondary materials transferred between companies are wastes. Instead, EPA has evaluated whether certain categories of materials are discarded or not. The Agency has not adopted the extremes of saying that all burning of secondary material, regardless of ultimate use, is waste treatment or that any secondary material that is recycled for legitimate fuel value is a commodity and not a waste. Wastes may have value, but are still wastes.

Between these broad parameters, EPA has examined a number of specific materials, recycled within the control of the generator and transferred to a third party for recycling, and determined whether they would be appropriately placed within the waste or non-waste categories. EPA would consider transferred materials not to be wastes if it could make the appropriate findings for those categories. In fact, the Agency does so with respect to scrap tires removed from vehicles and managed under the oversight of established tire collection programs and resinated wood residuals.

Consideration of over-accumulation of scrap tires resulting in massive piles of discarded tires is not being cited as support for the proposition that all transfers of secondary materials result in waste treatment, but only for the proposition that the Agency needs to be careful in examining whether secondary materials may be transferred as commodity fuels or as wastes. Further, EPA is not relying on state determinations regarding whether secondary materials are wastes, specifically tires, but is instead allowing state tire programs that meet certain parameters to affect an EPA determination that transferred scrap tires are not wastes.

Any of EPA's decisions regarding specific materials, if challenged, must stand or fall based on its individual merit. For example, resinated wood residuals are routinely transferred between either intra- or inter-company facilities and used as either "furnish" (*i.e.,* raw materials) or fuel at the receiving facilities. The material being transferred off-site is used and handled in the same manner that resinated wood residuals are used when generated on-site (such that it is impossible to distinguish between materials that are being used as a raw material and those that are being used as a fuel). Accordingly, these materials are not solid wastes whether used within the same company or transferred to another company. See below, at sections V.B.6 for discussion of EPA's response to comments and the Agency rationale for how resinated wood should be treated for purposes of this rule.

Other materials would be wastes based on the Agency's analysis of the industry in general or, based on a lack of data or knowledge, an effective presumption that recycling materials for a fuel is primarily conducted within the control of the generator. For example, use of old corrugated cardboard (OCC) rejects (clay, starches, other filler and coating materials, as well as fiber) are not discarded when used within the control of the generator, since these secondary materials are part of the industrial process. OCC rejects can include, and are usually burned in conjunction with, other fuels (such as bark) at pulp and paper mills that recycle fibers. These materials are not generally transferred outside the control of the generator.

Still other non-hazardous secondary materials may be processed or extracted from wastes to produce fuel commodities. Examples include tire-derived fuel processed from scrap tires retrieved from waste tire piles, and coal refuse retrieved from legacy piles that have been processed through the use of grizzlies, screens, and blending to improve the quality, remove metal objects, and reduce the concentrations of various constituents. To the extent that EPA has indicated that particular categories of non-hazardous secondary materials are wastes when transferred off-site to a third party, the Agency provides companies with the opportunity to petition EPA for a non-waste determination; we believe a petition process is essential because many non-hazardous secondary materials are recycled and managed in many different ways, and the Agency may lack the specific details in certain cases to know whether or not such non-hazardous secondary materials are or are not solid wastes.

Thus, EPA is not making a sweeping arbitrary assumption in categorizing transferred secondary materials as discarded. In addition, EPA is not, in any sense, forbidding economic reuse of such materials by anyone other than the generator without prior government permission (through the petition process). The effect of this regulation would simply be to require the non-hazardous secondary materials designated as wastes to be combusted only in facilities regulated under section 129 of the CAA, while non-waste fuels could be combusted under section 112 of the CAA.

EPA also disagrees with the comment's narrow citation to the Safe Food case. Safe Food does not stand for the narrow proposition that transferring material to another industry is not relevant for determining whether material is discarded. The court in that case noted that "the term 'discarded' cannot encompass materials that 'are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.'" 35 F.3d at 1268. Further, "materials destined for future recycling by another industry may be considered 'discarded.'" *Id.* With respect to transferring material, the court only said "we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Id.* Rather, the key to understanding the importance of *Safe Food* is the question "'whether the agency's interpretation of * * * 'discarded' [is] permissible, that is, reasonable and consistent with the statutory purpose.'" 35 F.3d at 1269 (citations omitted).

The point of *Safe Food* is that the courts are to examine EPA's interpretation based on whether it is reasonable. No one factor will be determinative.

Thus, the comment is wrong to try to argue that a quotation in *Safe Food* regarding "vertical integration" somehow means that the transfer of a secondary material to another party is irrelevant for determining whether a secondary material is a waste. Aside from the fact that EPA finds no evidence of the relevance of "vertical integration" to this regulation and no commenter has indicated its relevance, it is plain from any reasonable analysis that transfer to another party, where a generator of a secondary material relinquishes all control of the material is certainly relevant to any determination whether a material is a waste.

EPA is in no way claiming that such transfer is the definitive criterion for discard. Instead, EPA has examined the issue of company-to-company transfers in the context of specific secondary materials and to the extent the Agency has found either discard or no legitimate recycling, it is requiring companies to file a non-waste petition in order to allow the Agency to review the specifics of their cases. Further, the Agency will in the future solicit comment on additional non-hazardous secondary materials that can be used as a non-waste fuel both by the generator and outside the control of the generator. Under today's rule, only scrap tires managed under established tire collection programs and resinated wood are non-wastes when used both within and outside generator control (*see* § 241.3(b)(2). In addition, citations to case law on abandonment issues between private parties are not relevant to this case of government regulation. The cases do not consider the factors that are relevant to EPA's determination under this rule. In this rule, EPA needs to decide whether secondary material is discarded in the first instance, and whether the transfer represents a legitimate non-waste activity. To represent a legitimate non-waste activity, if the material has not been discarded in the first instance, it must be handled as a valuable commodity, must have meaningful heating value, and must not have contaminant levels that show the material is transferred to destroy unwanted constituents instead of for its fuel value. A waste owner may not be "abandoning" a waste when it sends it to another company, but the non-hazardous secondary material is still a solid waste if the receiver is not burning the secondary material legitimately as a fuel (construction debris highly contaminated with lead paint).

EPA also disagrees with the comment that the Agency is inconsistent by allowing the legitimacy criteria to suffice for generators, but not for the transferred material. The issue is not whether legitimacy suffices for materials under the control of the generator as opposed to material transferred to another party. Rather, EPA is using the legitimacy standard for generators in order to comply with the holdings in the case law that secondary material recycled within a continuous industrial process is not a waste. As stated in the preamble to the proposed rule, secondary materials recycled or reused legitimately under the control of the generator will cover all, or almost all, secondary materials recycled or reused

in a continuous industrial process. See 75 FR 31886–87. EPA thus, rejects the environmental groups' argument that any combustion of secondary material is a waste. EPA has only decided that there is greater likelihood that material will not be a waste if it is under the control of the generator. If the generator keeps the material it would indicate presumptive non-discard. However, the legitimacy criteria serve as a check to make sure discard would not occur. For material transferred to another party, as noted above, EPA has greater concern since different incentives come into play for the generator as well as the recipient, as evidenced by past careless treatment of secondary materials.

*Comment:* EPA has no authority under section 129 of the CAA to regulate the use of non-hazardous secondary materials as ingredients. EPA's section 129 authority is limited to "solid waste incineration units," which the statute defines as units that "combust" solid waste. This statutory definition does not say EPA can regulate units that "treat" solid waste (as provided in RCRA subtitle C). Nor does it say that EPA can regulate units that "use" solid waste. For example, the feedstock for clinker that is placed into a Portland Cement kiln is not "combusted"—rather, it is incorporated into the clinker product. Similarly, non-hazardous secondary materials that may be used as substitutes for mined or virgin feedstock become incorporated into the clinker product and are not "combusted."

*EPA's Response:* This comment is not relevant to this regulation, which determines whether a secondary material is a solid waste, or not a solid waste as defined by RCRA. Clearly, EPA has the authority to interpret RCRA to decide whether non-hazardous secondary materials are solid wastes or not. Whether EPA may cover ingredients used in combustors under section 129 of the CAA is a matter for regulations under that statute.

*Comment:* EPA asserts in its preamble that any material that is discarded must be considered forever discarded (and therefore remain a solid waste) no matter what value or use it may have to another person who may retrieve the material. This logical leap defies common sense, and is not in any manner compelled by the statutory language or judicial precedent.

It is illogical and nonsensical to hold that a material must be considered forever "discarded" if Party B comes upon the material, removes it from its "discarded" venue, and takes it with him or her for a bona fide use. Suppose a woman walks by a town dump and spies a chest-of-drawers that has been thrown away (*i.e.,* abandoned, discarded). The piece of furniture is old, but it is perfectly usable for a room in her house. She takes the chest of drawers and places it in a guest bedroom and it now sits there full of clothes. To say the chest sitting in that room is now a "discarded" material simply defies the plain meaning of the word.

According to the comment, the RCRA subtitle C case *API I,* which deals with hazardous waste under RCRA, in no way impairs EPA's ability to craft a subtitle D rule that could allow for materials once deemed to have been discarded to cease to be a solid waste when reused. The comment acknowledges that in *API I,* the court disapproved of the concept that a material that may have once been thrown away could nevertheless "cease to be a solid waste" if it were being beneficially reused, as it would no longer at that point be considered a "discarded material." The comment goes on to say, however, that the court only stated that it believed it would be "unlikely" that EPA could successfully maintain the position that a discarded material could cease to be a solid waste when recycled. The court reasoned that for EPA to reach such a conclusion, the Agency would have to reconcile this position with RCRA's acknowledged objective to establish a *cradle-to-grave* regulatory structure for the safe handling of *hazardous* wastes.

The comment argues that this language of the opinion is a "critical" element of the decision and only applies to hazardous wastes. Therefore, it does not apply to non-hazardous waste. The comment goes on to say that EPA cites no case law, and they are aware of none, in which a court has ruled that a discarded non-hazardous secondary material must forever be deemed discarded no matter what beneficial use it may subsequently be put to.

*EPA's Response:* EPA disagrees with this comment. In the first place, the Agency is not saying that wastes are "forever" discarded. Wastes may be processed into materials that are not wastes. The important point, here, is that a waste does not automatically lose its waste designation *solely* because some person has found value in the material. Something has to happen to that waste to make it a non-waste.

Judicial interpretations of the statutory definition of discard very plainly hold that a material that has become a waste—because it is discarded—may not lose its waste status "just because a reclaimer has purchased or finds value" in the waste. *ILCO* at 1131; *OWEN STEEL* at 150. Furthermore, in *ABR,* the court stated, "The point of AMC II, and for that matter API, is that once material qualifies as 'solid waste," something derived from it retains that designation even if it might be reclaimed and reused at some future time." *ABR* at 1056.

EPA notes in a response to a comment elsewhere in this preamble that these cases do not prevent the Agency from considering that wastes may be processed in some way into non-waste products. Nevertheless, the cases unmistakably hold that secondary materials do not lose their waste status simply because they have value.

The commenter's reference to the *API I* case's mention of the purposes behind the hazardous waste regulation's "cradle to grave" regime is not "critical" to the court's holding. The court only was opining on a hypothetical situation should EPA return to the court in a future case. It certainly was not necessary to the holding in the case and must only be considered dicta. EPA believes it has crafted a valid interpretation of the statute based on other relevant case law on the subject.

EPA also acknowledges that persons may find value in materials that have been thrown away, such as the chest of drawers to which the comment refers. However, this regulation deals with fuels and ingredients that are used in combustors, and EPA is not evaluating other materials when beneficially used. In fact, EPA has specifically indicated that the Agency is not making a determination that non-hazardous secondary materials are, or are not, solid wastes for other possible beneficial end uses. Such beneficial use determinations are generally made by the states for these other end uses, and EPA will continue to look to the states in making such determinations. Thus, EPA does not need to resolve the hypothetical situation as to when the chest of drawers becomes a non-waste.

*Comment:* In the proposed rule, the Agency indicated that the 2008 DSW Final Rule included a third part in the definition of "under the control of the generator." Specifically, the 2008 DSW Final Rule also applies to hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and a toll manufacturer and legitimately reclaimed by the tolling contractor. For purposes of that exclusion, a tolling contractor is a person who arranges for the production of a product or intermediate made from specified raw or virgin materials through a written contract with a toll manufacturer. The

Agency requested comment on whether to include this option in the final rule.

Few comments were received on tolling contractors. One commenter stated that to the extent that such arrangements facilitate the recycling or use of non-hazardous secondary materials and benefit the environment by reusing such secondary materials that might otherwise be disposed of, it should be included. A state commented, however, only that tolling contracts should not be considered under the control of the generator.

*EPA's Response:* We did not include tolling arrangements as being "within the control of the generator" as we viewed this as a specific type of arrangement used in the production of secondary materials that are not being used as fuels, and were unaware of these types of contractual arrangements where both products and secondary material fuels are sent to what we are calling tolling contractors, nor has any comment informed the Agency of such arrangements for fuels.

*Comment:* In implementing RCRA, EPA must balance the statute's two primary goals of (1) protecting human health and the environment and (2) encouraging reuse and recycling. The second goal is particularly critical in the RCRA subtitle D context. EPA's proposal, along with the CISWI proposal, draws many lines that would impose major impediments on recycle/reuse. Yet EPA never attempts to justify these choices dealing with non-hazardous secondary materials on the grounds of protecting human health and the environment.

EPA's failure to take both of these factors into account produces results that impede reuse and recycling of non-hazardous secondary materials with no benefit to health and the environment. The commenters claim this is arbitrary and capricious and a failure of reasoned decision making.

*EPA's Response:* EPA disagrees that these policy goals provide the legal basis for the Agency's determination whether secondary materials are solid wastes—discarded within the ordinary meaning of the term. Broad policy goals stated in the statute do not substitute for the substantive statutory requirements which the Agency must follow. In the *NRDC* case, the DC Circuit admitted that EPA may have legitimate policy reasons for its decision. However, the Agency must still follow the statute.

Yes, the Agency should encourage recycling, but it may not encourage that use by allowing discarded materials to be considered non-wastes. The overall congressional policies are limited by the substantive statutory requirements. Yes, the Agency must protect human health the environment, but its ability to do that is limited to its ability to regulate material that is discarded—material that is a solid waste. The Agency is establishing standards for determining if a secondary material is a solid waste, in order to clearly identify which combustion units are subject to CAA section 129 standards. We do note that as part of the Agency's legitimacy criteria, we consider whether there are excessive contaminants in the secondary material that is combusted. This analysis delves into matters regarding whether the secondary material is actually a waste.

*Comment:* In a similar vein, another industry comment argues that the statutory definition of solid waste sets the outer limits of EPA's regulatory authority under RCRA. However, EPA is neither required nor authorized to go to the limits of that definition in each of its regulatory programs. Each such program, according to this comment, is aimed at specific dangers that the wastes it addresses may pose, and each such program must take account other statutory purposes, such as encouraging the beneficial reuse of secondary materials. EPA, therefore, should exercise its authority to establish a definition of waste that is tailored to address the problems at issue, and that does not impermissibly infringe on other statutory goals.

*EPA's Response:* EPA disagrees with this comment. First, general congressional policies that refer to encouraging recycling have no place in EPA's determination as to whether a secondary material is a waste or not. For purposes of this rule, EPA is evaluating which non-hazardous secondary materials are discarded under the statute. CAA section 129 requires that units burning solid waste, as defined by the Administrator, are subject to emissions standards under that section.

In deciding which non-hazardous secondary materials are in fact wastes, the Agency evaluated a number of circumstances and exercised discretion to decide on how the definition of solid waste applies in various circumstances. However, EPA cannot decide to develop a narrower interpretation of what constitutes a waste simply because it does not want to have the non-hazardous secondary materials burned under CAA section129 instead of CAA section 112. EPA may not say material is not discarded if, in fact, it is.

In this case, EPA is determining which non-hazardous secondary materials are solid wastes. EPA has no authority to grant waivers simply because it wishes to encourage recycling by making the combustion of secondary materials less expensive.

With respect to RCRA subtitle C regulations, as has been noted throughout this proceeding, EPA is not reopening any decisions. Any commenter's subjective evaluation of whether a particular hazardous waste regulation is more stringent than this regulation has no relevance to whether a non-hazardous secondary material is discarded for purposes of this regulation.

EPA has stated that secondary materials excluded from the definition of solid waste under the subtitle C regulations will remain non-wastes under this rule. We are not reopening the RCRA subtitle C rules. EPA also notes that some comments have argued that the legitimacy criteria do not apply to the subtitle C rules and, therefore, should not apply to this rule. EPA disagrees with that concept. In fact, the legitimacy criteria in some form apply to all recycling, regardless of how it is formulated, even if there is a specific exclusion under RCRA subtitle C.

2. Processing Requirements

Under the proposal, fuels or ingredients that are produced from the processing of discarded non-hazardous secondary materials are not a solid waste provided they meet the specified legitimacy criteria. Comments from environmental groups rejected in its entirety any processing requirement at all. According to these comments, a discarded material remains a waste and cannot be rehabilitated to become a commodity fuel. Any fuel derived from a waste must be combusted under section 129 of the CAA.

On the other hand, industry commenters in general found the proposed definitions of "processing" and "sufficient processing" unclear and the processing requirements generally too restrictive. Several comments requested that EPA offer further explanation as to why processing is necessary in the first instance. In particular, they claimed that the degree of processing required by the proposed rule is inappropriate and illogical, arguing that there is no reason to impose an artificial and arbitrary requirement that materials first be "transformed" into something different.

Other commenters argued that secondary materials suitable for use as a fuel or ingredient without processing are not solid wastes when combusted, even if they have been previously discarded. In other words, if previously discarded, non-hazardous secondary materials can be used as is, as fuels or as ingredients, then such non-hazardous

secondary materials are not solid waste. As long as the fuel or ingredient meets the legitimacy criteria, affected parties should not have to process the material, as doing so would be burdensome and unnecessary. Other commenters asserted that minimal processing should be sufficient for a fuel not to be considered a solid waste.

a. Comments From Environmental Groups

*Comment:* EPA is incorrect in defining discarded materials to be considered non-waste product fuels if they have been "sufficiently processed." In the view of this commenter, the DC Circuit has held plainly and repeatedly that the term solid waste unambiguously includes fuels made from processed secondary materials. The comment refers to dicta in the DC Circuit opinions of *AMC I* and *ABR,* in which the court states that EPA may regulate used oil recyclers that collect discarded used oils, distill them, and sell the resulting material for use as fuel in boilers. In addition, the comment cites cases in other circuits—*ILCO* and *Owen Steel*—to the effect that wastes may be recycled and that their recycling is irrelevant to the determination as to whether they are wastes. In particular, the comment cites the facts in *ILCO* where the court found used batteries to be discarded within the everyday use of the term and that their secondary character as recyclable material is irrelevant to that determination. In addition, the comment cites the *Owen Steel* facts where steel slag recycling activities were considered waste treatment even though the recycled slag was used commercially. According to the comment, a material is discarded and the fact of discard is not changed just because a reclaimer has purchased or finds value in the components of such secondary materials.

*EPA's Response:* EPA disagrees with the comment, and finds that the commenter reads too much into these cases. EPA has repeatedly stated in this rulemaking that it agrees that wastes may be recycled and that the fact of discard does not change solely because the waste may have value. As stated earlier, EPA has specifically indicated that the Agency is not making a determination that non-hazardous secondary materials are, or are not, solid wastes for other possible beneficial end uses. These cases do not, however, stand for the proposition that any product resulting from the recycling must be a waste. Such a view would make almost every aluminum can from which we drink our sodas or newspapers on which we read the news "solid wastes."

With respect to *AMC I* and *ABR,* the reference to regulating used oil processing into fuels that are sold is, first, not necessary to the decisions. Those cases overturned rules where EPA was overly broad in its regulation. The cases were not deciding which situations constitute proper regulation by EPA. Nevertheless, the DC Circuit, by the terms of its dicta, was only referring to regulating the processing activity for the used oil. The court was not referring to regulation of the resulting material that was sold to boilers as a fuel. In fact, the court acknowledges that the fuel is sold to boilers and in no way opines on whether the resulting fuel is a waste. In this rule, also, EPA is not saying that the processing of discarded material is excluded from regulation as a waste activity, but only that the resulting fuel is not a waste if it has been sufficiently processed and meets the criteria of fuels that are not wastes—referred to as meeting the legitimacy criteria.

As for the other recycling cases, EPA has admitted that the mere fact of recycling does not change the nature of a secondary material that has been discarded. Again, *AMC I* and *ABR* cases are not directly on point for deciding whether non-waste products can be extracted from discarded material because the courts were not called upon to decide that issue. In both cases, however, the courts refer to resulting products that were sold commercially.

In the *ILCO* case, the issue was whether reclaimed lead plates from discarded batteries were recycled wastes or raw materials used to produce steel ingots. The court found that the lead plates were wastes, but only noted that the lead ingots made from the wastes were sold commercially and did not opine as to whether the ingots were wastes. EPA argues that the ingots were not wastes, since they were processed into valuable commodities.

In *Owen Steel,* the court found that slag from steel production was a waste and the area where the slag was processed was a waste treatment facility. The cured slag was sold for various commercial processes, including roadbed construction. The court was not asked to opine, nor did it, on whether the roadbed material was a waste. Again, EPA argues that the cured slag could be a product produced from the waste, even though the processing activity involved waste treatment.

EPA does admit that the cases are not directly on point regarding the Agency's determination that discarded materials may be processed into legitimate product fuels. The cases do seem to recognize, however, that products made from wastes may be products and not wastes.

More importantly, the cases do not refute EPA's essential logic that fuel or ingredients processed or extracted from discarded secondary material is analogous to many products that are processed or extracted from non-hazardous wastes, such as aluminum cans or recycled paper made from recycled secondary materials. The cases indicate that the same logic could apply to fuel processed from used oil, lead ingots made from battery lead plates, or roadbed construction material made from steel slag. This applies even though the processing or extraction activities involve waste treatment. EPA believes that, at a minimum, there are circumstances in which the resulting materials are not wastes.

EPA's task in the current rule is to decide when such processing results in a product or a waste. To resolve the issue, EPA has identified conditions on the extent of processing that has been conducted. That is, the processed discarded material may become a non-waste fuel or ingredient if certain conditions are met—that is sufficient processing has occurred. If so, and if the material meets the legitimacy criteria, the fuel or ingredient product would be considered a non-waste material.

b. Comments From Industry Groups

*Comment:* A number of industry commenters object to the processing requirement for discarded non-hazardous secondary materials to become non-waste fuels or ingredients. These comments contrast with the argument of environmental groups that no processing would transform discarded non-hazardous secondary materials into non-waste fuels or ingredients, a contention to which the Agency responds to earlier in this preamble.

Industry commenters argue that the legitimacy criteria are sufficient and that there should be no processing requirement for non-hazardous secondary materials that were discarded and could now be used as fuels or ingredients. The general argument is that the very act of retrieving a previously discarded material for use as a fuel or an ingredient proves that the material is once again wanted by the consumer, regardless of the type or extent of processing which the secondary material must undergo. According to these comments, the mere act of removing the previously discarded material from the environment for use "conclusively" demonstrates that the non-hazardous

secondary material has value as a product or intermediate—otherwise, no one would invest the significant costs associated with the recovery of these materials.

Various activities were specifically mentioned—recovery of coal combustion byproducts from landfills, extraction of coal refuse from mine sites and used whole tires retrieved from tire piles. With respect to these non-hazardous secondary materials, commenters argue that the excessive threshold level of processing makes no sense and that EPA should allow only a minimal amount of processing to convert a waste into a product fuel or ingredient.

In particular, the comments argue that normal processing of coal refuse (mining rejects) should be sufficient to constitute processing needed to convert previously discarded materials to legitimate fuels/ingredients. The same material mined to be used in today's combustion technology is processed in that way and there is no difference between the mined materials.[24] Also, whole tires retrieved from waste tire piles may need only minimal processing for use in cement kilns, such as removal of excess water and dirt, mud, and debris. Whole tires from newer stacks or piles often need no physical processing whatsoever. In contrast, EPA argues that scrap tires cannot be considered sufficiently "processed" unless they are physically shredded and undergo metals removal processing.

Establishment of a threshold level of processing that must take place before a discarded non-hazardous material is considered a legitimate fuel or ingredient would also have the perverse effect of applying different standards to identical materials. For example, there is no difference in the coal refuse or coal combustion byproducts that are recovered from landfills for use in a fluidized bed combustion unit or in the cement manufacturing process.

Some comments claim that under EPA's hazardous waste regulations, only minimal processing, such as baling or sorting, is required for scrap metal to be excluded from the definition of solid waste. The scrap metal, which would otherwise be a hazardous waste, may be sent into high-temperature environments, such as electric arc furnaces at steel mills and aluminum smelters. EPA had stated that this is a good example of where the level of processing necessary to convert a waste material to a non-waste material is dependent on the material itself. The comments claim that this is inconsistent with requiring used tires that have been discarded to not to be considered sufficiently "processed," unless they are physically shredded and undergo metals removal processing.

*EPA's Response:* As discussed in the case law elsewhere in this preamble, EPA is constrained by the statutory definition of solid waste under RCRA and the fact that case law holds that a discarded material does not lose its status as a waste solely because it has value or may be beneficially reused. Allowing certain non-hazardous secondary materials to be combusted as a fuel under the section 112 standards of the CAA may have beneficial policy objectives. However, EPA may not base its decision on the policy, but must evaluate whether a secondary material is a solid waste under RCRA. Specifically, the DC Circuit in *NRDC* would not allow EPA to establish a policy basis for determining whether section 112 or 129 applies. Thus, non-hazardous secondary materials that are wastes and are used as a fuel/ingredient in a combustion unit must be used in section 129 units, whereas non-hazardous secondary materials that are not wastes and are used as a fuel/ingredient in a combustion unit may be used in section 112 units. The court stated that "the distinction EPA draws may well be reasonable" referring to EPA's distinguishing between section 112 combustors designed to recover energy and section 129 incinerators meant to destroy materials. *NRDC* at 1260. The court, however, was very clear that this is not the line drawn by Congress, which intends that any waste material, even if burned for energy recovery, must be burned in section 129 combustion units.

The Agency, however, believes that the case law would not prohibit the processing or extracting of products from non-hazardous secondary materials that were once wastes. This latter view is controversial as evidenced by the comments from environmental groups, which claim that no amount of processing can convert a waste into a legitimate fuel or ingredient product. EPA, however, does not believe it may interpret the statute or the case law to allow a clearly discarded secondary material to become a non-waste *solely* because it has value.

EPA sympathizes with the commenters' concern that the processing requirement could have the effect of applying different standards to identical materials, such as scrap tires. The Agency, however, is constrained by the statute and case law. If the non-hazardous secondary material is not discarded in the first instance and is legitimately recycled—that is, meets the legitimacy criteria, it is not discarded. Once the material has been discarded—thrown into waste piles or on stacks—there is no choice. Something other than mere recycling must happen to the material before it may lose its waste designation. The mere fact that secondary materials may have value after being discarded is not sufficient to rehabilitate it.

Accordingly, EPA is not making any changes to the processing requirements for discarded scrap tires, although the Agency is providing that tires harvested from vehicles do not need to be processed if they are harvested off of the vehicles and are managed under the oversight of an established tire collection program and are legitimately used as a fuel in a combustion unit (refer to Section V.B.5 Scrap Tires) to be considered a non-waste fuel.

For coal refuse, however, EPA has decided that for the final rule, to make some modifications to its determinations regarding sufficient processing. In the proposal, EPA was still considering that the coal refuse that was abandoned would require additional processing, even though they were the same material as coal refuse currently generated and used in fluidized bed combustors as traditional mined coal. EPA has modified its view to provide that the discarded coal refuse that is processed in the same way as coal is today would not be considered a waste when combusted. For more information on the rationale for this decision, see Section V.B.8 for a discussion of the comments received on coal refuse and our response to those comments.

Finally, in response to the point that minimal processing is permitted to exclude scrap metal from the definition of solid waste in EPA's hazardous waste regulation, the Agency first states that it is not reopening the hazardous waste regulations, including the reasoning in those regulations. Besides, the reference to scrap metal in the hazardous waste regulation was only used in the preamble to note the fact that the extent of processing in general depends on the nature of the material, as we have noted elsewhere in the preamble to today's rule. Any comparison, other than the very general one that processing depends on the material, is not being considered by EPA. Whatever the reasoning provided in those regulations, EPA did not cite the scrap metal regulation as support for the processing

[24] As discussed later in this preamble, the Agency has changed its view regarding coal refuse that was previously abandoned, such that if the discarded coal refuse is processed in the same way as coal is today, the Agency would not consider the processed coal refuse a solid waste.

definition. The Agency also points out that the scrap metal is not combusted.

*B. Comments on Specific Materials Used as Fuel*

1. Traditional Fuels [25]

The following discussion describes how EPA has analyzed what is a traditional fuel in the ANPRM and the proposal. Next, the Agency shows how it considered various comments on the concept of traditional fuels. Section VII.A, based on these analyses and all information in the rulemaking record, explains the Agency's decision on what constitutes a traditional fuel.

EPA does wish to clarify, however, that it is using the term, "traditional," more in the sense that we have a product that is created for its use as a fuel. Some traditional fuels have been used for a long time, while others are "traditional" only in the sense that they are created in the "traditional" way that a product is created (or mined), even though they may be newly developed fuels. For example, coal refuse that was formerly not able to be used as a fuel may now be used in fluidized bed systems. Perhaps, more obvious is the fact that petroleum, itself, would not have been considered a traditional fuel in the early 1800s, nor would uranium.

The ANPRM categorized as traditional fuels cellulosic biomass (*e.g.,* wood) and fossil fuels (*e.g.,* coal, oil, natural gas), as well as fossil fuel derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas). Traditional fuels are those that have been burned historically as fuels and have been managed as valuable products. They are unused products that have not been discarded. The ANPRM also stated that unadulterated or clean wood collected from forest fire clearance activities and trees and such wood found in disaster debris, likewise, constitute traditional fuels. This basic concept of traditional fuels was discussed at 74 FR 53.

The ANPRM also discussed other legitimate "alternative" fuels that have not been previously discarded generally noting that what constitutes a new "fuel" reflects the availability of the fuel materials generally, the demand for the fuel, and technology developments. Thus, there is a category of materials that are legitimate alternative fuels that may not have been historically used as fuels, but that are nonetheless legitimate fuels today because of changes in technology and in the energy market. In cases where these legitimate alternative fuels have not been discarded, EPA said that it would not consider them to be solid wastes. This is explained in the ANPRM at 74 FR 56.

The ANPRM stated that much of the biomass currently used as alternative fuels are not solid waste since they have not been discarded in the first instance and are legitimate fuel products. It noted that biomass can include a wide range of alternative fuels, and can be broken down into two different categories—cellulosic biomass and non-cellulosic biomass. Cellulosic biomass was described to include forest-derived biomass (*e.g.,* green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, and tree harvesting residuals from logging and sawmill materials), food scraps, pulp and paper mill wood residuals (*e.g.,* hog fuel, such as clean and unadulterated bark, sawdust, trim screenings; and residuals from tree harvesting),[26] and agricultural residues (*e.g.,* straw, corn husks, peanut shells, and bagasse). Non-cellulosic biomass was described to include manures and gaseous fuels (*e.g.,* from landfills and manures) (74 FR 56).

The ANPRM stated that biomass, especially cellulosic biomass, has a comparable composition to traditional fuel products due to the nature of the plants and animals (*i.e.,* they would not be considered to have additional "contaminants"). Thus, if they are managed as valuable commodities and have meaningful heating value, they would not be considered solid wastes.

The ANPRM distinguished the traditional fuels from non-traditional alternative fuels to decide whether they are discarded, or whether they are legitimate alternative fuels. These fuels are those in use today that the Agency was evaluating, and continues to evaluate, to determine whether they have been discarded and whether they are legitimate alternative fuels (*e.g.,* construction and demolition materials, scrap plastics, non-hazardous non-halogenated solvents and lubricants, and wastewater treatment sludge) (74 FR 56).

The ANPRM also described secondary materials EPA considered to be questionable as to whether they are legitimate fuels because they lack adequate heating value (wet biomass), or because they may contain contaminants that are significantly higher in concentration than those in traditional fuel products to the degree that sham recycling is indicated. The secondary materials that were described in the ANPRM that could fall into this category include polyvinyl chloride (PVC), halogenated plastics, chromated copper arsenate (CCA) lumber, creosote lumber, copper-based treated lumber, lead-based treated lumber, and secondary mill residues, such as board, trim and breakage from the manufacture of reconstituted wood/panel products.

The proposed rule continued to recognize that traditional fuels, as noted above, are not solid wastes, but added to that group clean cellulosic biomass and on-specification used oil (75 FR 31856). Specifically, in the proposal, "clean" biomass material was defined as a non-hazardous secondary material that has not been altered (either chemically or through some type of production process), such that it contains contaminants at concentrations normally associated with virgin biomass materials (the description of "clean" is being modified slightly for today's rule, see discussion below). Clean cellulosic biomass was described to include forest-derived biomass (*e.g.,* green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, and tree harvesting residuals from logging and sawmill materials), corn stover and other biomass crops used specifically for energy production (*e.g.,* energy cane, other fast growing grasses), bagasse and other crop residues (*e.g.,* peanut shells), wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, and clean biomass from land clearing operations (75 FR 31856). Essentially, "clean" biomass was that biomass material that was simply picked up from its environment and burned for fuel. EPA requested comment on whether other types of cellulosic biomass should be designated as clean biomass, and thus a traditional fuel (75 FR 31856).

EPA also proposed to add on-specification used oil to the list of "traditional" fuels based on the argument that it meets the Agency's view of fuels that have been managed as valuable fuel products rather than being managed as waste materials. 75 FR 31864. The Agency stated that under 40 CFR part 279, once used oil is determined to be on-spec, it is no longer regulated under the used oil management standards. This means that once the marketer complies with the

[25] Traditional fuels are not considered secondary materials and therefore, are not considered a solid waste unless they themselves have been discarded. However, because the Agency received comments regarding "traditional fuels," including whether certain materials should be considered a traditional fuel, the Agency is addressing those comments in this section.

[26] The ANPRM description of cellulosic biomass inadvertently repeated the same material—"tree harvesting residuals from logging" and "residuals from tree harvesting." Descriptions of cellulosic biomass in the proposed rule and this final rule deleted the second reference to residuals from tree harvesting.

requirements for analysis and record retention, notification, and record tracking shipment to on-specification burners, the oil is no longer subject to other management standards. Moreover, the on-specification used oil contains contaminants at levels below the maximum concentration limits established in the standards, such that they are either at the same concentration or a lower concentration than virgin refined fuel oil.

EPA acknowledged in the proposal that changes in technology and in the energy market over time may result in additional materials being economically viable to be used as alternative "traditional" fuels. It also may not always be clear whether a fuel material is a traditional fuel. We agreed with commenters to the ANPRM that this rulemaking should be flexible to account for increasing use and changes in commodities, technologies, markets, and fuel prices. We, therefore, requested comment on whether other fuels in use today should be classified as traditional fuels, as well as whether to provide a petition process that would allow a facility or person to request that EPA determine whether the fuel that they burn qualifies as a traditional fuel.

As also discussed in Section VII, the definition of traditional fuels has been modified in today's rule. The new definition encompasses two categories of fuels: (1) "Historically managed" fuels, as identified in the proposed rule, and (2) "alternative" fuels, as discussed in the ANPRM. Through this revised definition, EPA is recognizing that changes in technology and in the energy market over time have resulted in additional materials being economically viable to be used as alternative "traditional" fuels. The definitions of traditional fuels and clean cellulosic biomass are codified in today's rule (§ 241.2). "Traditional fuels" is defined in today's final rule as materials that are produced as fuels and are unused products that have not been discarded and therefore, are not solid waste including: (1) Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials, including fossil fuels (*e.g.,* coal, oil and natural gas), their derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas) and cellulosic biomass (virgin wood); and (2) alternative fuels developed from virgin materials that can now be used as fuel products, including used oil which meets the specifications outlined in 40 CFR 279.11, currently mined coal refuse that previously had not been usable as coal, and clean cellulosic biomass. Clean cellulosic biomass is also codified in today's rule (§ 241.2) and includes those residuals that are akin to traditional cellulosic biomass, such as forest-derived biomass (*e.g.,* green wood, forest thinnings, clean and unadulterated bark), sawdust, trim, and tree harvesting residuals from logging and sawmill materials), corn stover and other biomass crops used specifically for energy production (*e.g.,* energy cane, other fast growing grasses), bagasse and other crop residues (*e.g.,* peanut shells), wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. "Clean" cellulosic biomass is cellulosic biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials. As indicated above, this description of clean is modified slightly in today's rule. The previous description included non-hazardous secondary material that has not been altered (either chemically or through some type of production process), such that it contains contaminants at concentrations normally associated with virgin biomass materials.

Traditional fuels as described above are not secondary materials or solid wastes.

*Comment:* Several industry commenters suggested that EPA include off-spec used oil, scrap tires, resinated wood products, treated wood, pulp and paper mill residues, and recycling process residuals in its definition of traditional fuels. They claim that these materials have histories of use as valuable fuel products. Another commenter suggested that secondary materials from new processes to meet Renewable Fuel Standards (RFS) should be defined as traditional fuels. According to the commenter, not defining those materials as traditional fuels could lead to reduced beneficial use, could negatively impact the economics of these newly developing processes, and could increase the use of conventional fossil fuels. This could significantly harm the prospects of reaching RFS goals.

*EPA's Response:* For a discussion of comments and EPA responses related to each of the individual materials listed above and their use as traditional fuels, see their respective subsections within Section V.B. Regarding the RFS program, the Agency disagrees with the commenter that materials from processes to meet the RFS standard should be defined as traditional fuels. Under the RFS program, EPA is responsible for developing and implementing regulations to ensure that transportation fuel sold in the U.S. contains a minimum volume of renewable fuel. Today's rule addresses only the use of non-hazardous secondary materials as a fuel or ingredient in stationary source combustion units (regulated under CAA section 112 and 129), and does not impact other end uses of these materials, including their use as a transportation fuel.

*Comment:* There are many other materials that might be considered as secondary materials, but because of their energy content, have been identified as viable fuels, particularly as the cost of fossil fuels have increased over time. Citing phrases from the proposed rule, one commenter stated that "Changes in * * * the energy market," as well as systems designed and installed by cement plants in order to manage these materials ("changes in technology"), would suggest that materials, such as plastics, paper and paper residues, and tires should qualify under this definition of "traditional fuels."

*EPA's Response:* As indicated in the discussion above, EPA agrees that there is a category of materials that are legitimate alternative fuels that have not been discarded and may not have been traditionally used as fuels (*i.e.,* a product that is created for its use as a fuel), but that are nonetheless legitimate fuels today because of changes in technology and in the energy market. Such alternative fuels would include clean cellulosic biomass, currently mined coal refuse, and on-specification used oil. See the respective subsections within Section V.B for a further discussion of each of these materials. As discussed in the proposed rule, the Agency believes materials, such as plastics, paper and paper residues and tires that have not been removed from vehicles and managed under an established tire collection program typically have been discarded, and thus would not be considered traditional fuels or legitimate alternative fuels.

*Comment:* Another commenter stated that EPA does not say why it regards certain fuels as "traditional" and, indeed, stresses that the term "traditional" "should be flexible to account for increasing use and changes in commodities, technologies, markets, and fuel prices." Thus, EPA makes clear that the term "traditional fuels" will accommodate fuels that are anything, but "traditional." EPA provides no basis at all for assuming that none of the fuels

it labels "traditional" are not actually waste.

*EPA's Response:* EPA disagrees with the commenter. As described in the ANPRM and proposed rule, traditional fuels, such as fossil fuels have been burned historically as fuels and have been managed as valuable products. They are considered unused products and are not secondary materials and are not solid wastes unless discarded. We added "alternative fuels" to the definition of traditional fuel in today's rule to recognize that changes in technology and in the energy market have resulted in additional materials being economically viable to be used as alternative "traditional" fuels. The definition is codified in § 241.2 in response to comments received on the proposal and to provide clarity in the application and the meaning of traditional fuel.

*Comment:* Other commenters suggested that, in order to further clarify the definition of traditional fuel, if a fuel was on record as being used before a specific year, *e.g.,* 1980, that it be categorized as a traditional fuel. Still other commenters suggested that additional rule text is needed to clarify that non-hazardous secondary materials used traditionally as fuels are not solid wastes. Finally, to address any ambiguity about which materials are traditional fuels, another commenter stated that EPA should include a petition process in the rule that would allow sources to seek a determination on whether a material may be considered a traditional fuel.

*EPA's Response:* As described in the ANPRM and proposed rule, traditional fuels, such as fossil fuels have been burned historically as fuels and have been managed as valuable products. They are considered unused products and are not secondary materials unless discarded. We do not agree that a specific year should be identified to define historically managed traditional fuels. First, it is not clear what year should be selected and why and what the basis for picking a particular year would be. In addition, as we noted in the proposal, the wide variability of historic use and management of this category of fuels does not lend itself to identification of a specific year. As discussed above, EPA does wish to clarify that it is using the term, "traditional," more in the sense that we have a product that is created for its use as a fuel. Some traditional fuels have been used for a long time, while others are "traditional" only in the sense that they are created in the "traditional" way that a product is created (or mined), even though they may be newly developed fuels.

The Agency received only a few comments that supported a petition process for traditional fuels. In light of the time and resource intensive nature of such a process for the petitioner, the Agency believes that the revised codified definition in today's rule together with the preamble discussion should provide the basic guidance needed for the regulated facility to determine whether the material qualifies as a traditional fuel. Therefore, today's rule does not include a petition process for an Agency determination that a material is, or is not, a traditional fuel. However, any person can petition EPA under the Administrative Procedure Act (APA), section 7004 of RCRA, and general principles of administrative law for modifications to its regulations. Thus, if a person believes that additional materials should be included as a traditional fuel or alternative fuel, they may petition EPA to request such a change through rulemaking. In addition to the specific changes requested, the petition would also need to include a justification and rationale for the change.

*Comments:* "Hogged fuel" should be added to the list of "clean" biomass materials. Hogged fuel is bark and other wood removed from the tree that cannot be chipped and used in making pulp, paper, and wood products.

*EPA's Response:* We believe that the materials described by the commenter as "hogged fuel" are currently covered by the terms "clean and unadulterated bark" and "tree harvesting residuals from logging and sawmill materials" within the definition of traditional fuel. However, we are aware that there are varying definitions of "hogged fuel" and point the readers to the sections describing traditional fuel and secondary materials to determine if their hogged fuel would be considered a type of traditional fuel or a non-hazardous secondary material.

2. Manure

The proposed rule explained that the Agency lacked sufficient data to evaluate whether manure burned for energy recovery is a waste. As a result, we did not take a position one way or the other, but rather requested comment, information and data on the legitimacy criteria, which are designed to determine whether a non-hazardous secondary material when combusted is a waste. Specifically, these criteria deal with the levels of the various contaminants in manure, the energy content of the manure, and on how manure is handled from its point of generation to the point it is used as a fuel.

The proposal also stated, however, that if manure is processed into biofuels (for example, by anaerobic digesters), such biofuels would be considered a legitimate non-waste fuel that has been processed from a non-hazardous secondary material provided "the biofuel" meets the legitimacy criteria—that is, provided it is managed as a valuable commodity, has a meaningful heating value and contains contaminants at levels that are comparable to or lower than those in traditional fuels. The proposal again acknowledged, however, that we had limited data on biofuels that are produced from animal manures, and requested that commenters provide additional data on the extent to which manures are currently processed into biofuels, as well as data to support whether biofuels produced from manure meet our legitimacy criteria. See 75 FR at 31863.

*Comment:* The Agency received comments both supporting and opposing the designation of manure as a waste. Specifically, two commenters asserted that poultry litter that is burned as a fuel poses health hazards (*e.g.,* from arsenic that is added to poultry feed), but provided no data to support this position. Another comment submitted in response to the ANPRM stated that, due to the nature of manure, there is the possibility of widespread environmental harm due to the release of pathogens from animal manure, and that concentrated animal feeding operation (CAFO) wastes are known to contain heavy metals, halogens, dioxins, and other hazardous compounds. They assert chicken litter has elevated arsenic levels and that swine waste has high amounts of ammonia, nitrogen, and phosphorous. Still another commenter suggested that poultry litter that is burned in power plants emit more pollutants per million Btus when compared to coal fired power plants. Another commenter referenced a 2008 report that described the risks associated with CAFOs.[27] This report stated that CAFOs are sited in rural communities that bear the brunt of the harm caused by CAFOs, including the frequent presence of foul odors and water contaminated by nitrogen and pathogens, and that the use of antibiotics in CAFOs, especially for non-therapeutic purposes, such as growth promotion, contributes to the

[27] Gurian-Sherman, Doug, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations,* Union of Concerned Scientists (April 2008).

development of anti-biotic resistant pathogens that are more difficult to treat. Finally, one Midwest state commented that when manure supply significantly exceeds demand for manure as a fertilizer, the excess is treated as a waste and should be regulated as a waste under this rule.

On the other hand, a commenter argued that EPA should not classify poultry litter as a solid waste and provided some contaminant data on poultry litter generated in the United Kingdom.[28] Another commenter described how their company collects poultry litter from growers for use as a fuel in dedicated (off-site) biomass power plants. The commenter asserts that the poultry litter satisfies all the legitimacy criteria. Specifically, this commenter describes operations (and argues) that the poultry litter is managed as a valuable product by the poultry litter generators and transporters, as well as by the power plants. The commenter describes poultry litter generators as collecting the litter on a continual basis and storing it in enclosed poultry barns. The poultry litter is then transported in completely covered trucks to the power plant where it is unloaded in a fully enclosed fuel hall and is tested for fuel quality to ensure contractual obligations are being met by the growers. After sampling, the trucks dump the litter into a concrete reception pit within the fuel hall. Then, before being combusted, the commenter indicates that the biomass fuel is processed (*e.g.,* processed in a "de-lumper" followed by a disc screen) to breakdown the clumps of material and remove incidental non-combustible tramp materials. The commenter also asserts that poultry litter satisfies the contaminant legitimacy criterion, but only provided data on sulfur and chlorine levels, noting the reported chlorine levels averaged 0.7 percent (on a dry basis). They also provided data on the heating values of poultry litter that ranged from 3–4,000 Btu/lb, explaining that this material is a self-sustaining fuel (requiring no supplemental fuel), although they also note in their comments that the poultry litter is mixed with other biomass before being used as a fuel. The developer of this plant has indicated that they have proposals to build similar type plants in North Carolina, Virginia, and Georgia, but has not received approval from local authorities. Another firm has a proposal for a plant in Connecticut, designed to run on litter from an egg farm, but funding for this plant dried up as a result of the U.S. financial crisis. Additionally, two power plants (one in Texas and one in California), each currently mothballed, but scheduled to reopen in 2011, would use cattle manure as feedstock.

Finally, two states commented that manure is excluded from the definition of solid waste under their laws and regulations. One of these states excludes manure from being defined as a solid waste when it is returned to the soil as fertilizer or as a soil conditioner, while the other exempts it from its statutory definition of solid waste.

Regarding our request for comment on the extent to which manures are currently processed into biofuels, as well as data to support whether biofuels meet the legitimacy criteria, one state referenced a June 2009 Report to Congress[29] that reviewed the current commercial use of manure to energy systems, and found that few exist, and that it is unlikely in the near term future for more to be developed due to technological and economic barriers. Another state commented that they were aware of one gasification system that has been built on a pilot scale that uses chicken and poultry litter as a feedstock. Another commenter stated that about 120 dairy farms and 30 hog farms use manure as a feedstock for anaerobic digesters which are designed to capture the methane gas in manure. Most farms then burn the gas as a feedstock for on-farm electrical generation, which can be used to off-set the farm's purchases and to sell electricity to the power grid. This commenter also noted that one very large farm in the Phoenix area further cleans the methane and sells it to a natural gas company whose pipeline runs next to the farm.

A Tribe requested that EPA finalize legitimacy criteria that does not discourage the development of biogas technology since it is a clean carbon-neutral fuel needed to help address climate change. This Tribe explained that its renewable energy plans focus, in part, on production of biogas from animal, cheese, and other organic material, and requested that EPA either exempt biogas from the contaminant legitimacy criterion or require that, overall, contaminants in gaseous fuels not be "significantly higher" in concentration than contaminants found in traditional fuel products that the combustion unit is designed to burn. The Tribe is concerned that a direct numerical comparison of contaminant levels of biogas to natural gas that requires all contaminants in biogas to be equivalent or below the concentrations found in natural gas would discourage the development of biogas technology.

*EPA's Response:* First, based on the information provided to us, we could not make a blanket determination that all manure is a traditional fuel or that it is a solid waste. However, upon reviewing the few comments and data received, we conclude that animal manure that is used as a fuel "as generated" does not satisfy the legitimacy criteria, and thus, if combusted "as generated," is a solid waste. However, as we discuss in other parts of today's preamble, there are circumstances where manure would not be considered a solid waste when burned as a fuel for energy recovery. We discuss these circumstances below. In addition, we recognize that manure can have other beneficial uses and emphasize that we are not making a solid waste determination on those other uses through this rulemaking.

Specifically, we find that the levels of certain pollutants, such as nitrogen and chlorine, in certain types of manure, as generated, may not be comparable to those levels found in traditional fuels that otherwise would be burned. This is based on limited data found in a North Carolina State University[30] study that indicate some types of manure have higher levels of nitrogen and chlorine when compared to traditional fuels that otherwise would be burned in the energy recovery device.[31] Regarding the commenter's reference to pathogens, pathogens are not included as a contaminant in today's rule, since that definition focuses on those constituents identified in the CAA that EPA will be evaluating to determine whether to establish emission standards (*see* also the discussion in V.D.3).

We also find that manure, as generated, that is used as a fuel does not satisfy our meaningful heating value criteria, since the limited data we received shows that manure, as generated, has heating values lower than 5,000 Btus/lb, as-fired. In fact, one commenter noted that for manure to be

[28] This commenter reported poultry litter as having sulfur, chlorine, and nitrogen levels of 0.35%, 0.16%, and 3.3%, respectively, and a net heating value of 4,900 Btu/lb.

[29] USDA, June 2009. *Manure Use for Fertilizer and for Energy Report to Congress.* Economic Research Service. June 2009, pp. 32–39. *http://www.ers.usda.gov/publications/ap/ap037/ap037.pdf.*

[30] Animal and Poultry Manure Production & Characterization. North Carolina State University Cooperative Extension Service. Raleigh, NC. *http://www.bae.ncsu.edu/programs/extension/manure/awm/program/barker/a&pmp&c/.*

[31] Some manures were listed as having the following mean levels for chlorine and nitrogen: Cl—1% by weight and N—3.5% by weight reported as total Kjeldahl nitrogen as N. By comparison, coal contains chlorine levels ranging from as low as 0.01% to as high as 0.74 percent and nitrogen levels ranging from 0.6% to 1.9%.

considered to have fuel value, that it typically should have a moisture content of less than 25 percent, and manure, as generated, typically has a higher moisture content. We also note that to satisfy the legitimacy criteria, today's final rule requires that facilities that burn non-hazardous secondary materials with a heating value of less than 5,000 Btus/lb would need to demonstrate that such non-hazardous secondary materials have meaningful heating values by describing whether the energy recovery unit can cost-effectively recover meaningful energy from the manure (*see* Section V.D.2).[32] While one commenter provided data to show that a power plant that is dedicated to burning poultry litter would meet the meaningful heating value criteria, even though the Btu content of the poultry litter is less than 5,000 Btu/lb, as-fired, we believe that these limited data can't be used to suggest that all or most manure that has a heating value of less than 5,000 Btu/lb, as-fired, could meet this demonstration.

We acknowledge, however, that farms or other facilities may manage manure as a valuable fuel commodity and that this manure could also satisfy EPA's contaminant and heating value legitimacy criteria. Our limited data suggests that manure that is combusted has typically been collected, stored, and processed. Thus, today's final rule also says that manure would not be considered a solid waste when burned in a combustion unit as a fuel for energy recovery under the following circumstances:

- *Within the Control of the Generator:* Manure that is burned in a combustion unit as a fuel for energy recovery would not be a solid waste if the manure is burned in a combustion unit that is within the control of the generator and the manure meets the legitimacy criteria.
- *Processing of Manure:* Manure that is "sufficiently processed"[33] would not be considered a solid waste (after processing) when burned in a combustion unit as a fuel for energy recovery provided the processed manure meets the legitimacy criteria. This is a self-implementing provision, such that a petition would not need to be submitted to EPA and is not limited to "within the control of the generator." Thus, for example, a farm or third party could process the manure to remove or destroy contaminants that are not at levels comparable to those contained in traditional fuels or improve the materials heating value, and after processing, to the extent the processed manure meets the legitimacy criteria, the processed manure would not be a solid waste when burned as a fuel for energy recovery.[34] Also, as we discussed in the proposed rule, we expect that manure can be processed into a non-waste gaseous fuel (*e.g.,* via anaerobic digestion or gasification processes), as suggested by commenters. This gaseous fuel would also have to satisfy the legitimacy criteria, and while we did not receive data on contaminant levels of gaseous fuels that are, or could be, produced, we generally expect that a system could be designed to produce a clean gaseous fuel that would satisfy all of our legitimacy criteria.
- *Non-Waste Determination Petition Process:* Manure, as generated, that has been transferred to a third party for combustion as a fuel for energy recovery, but has been granted a non-waste determination from EPA would not be considered a solid waste. This provision establishes a case-by-case process that provides persons an administrative process for receiving a formal determination from EPA that, in this case, manure, as generated, that has not been discarded in the first instance and is indistinguishable in all relevant aspects from a fuel product, is not a solid waste. Any petition submitted to EPA requesting a non-waste determination would need to demonstrate that the manure has not been discarded in the first instance, satisfies the legitimacy criteria for fuels, and satisfies the following criteria: (1) Whether market participants treat the manure as a fuel rather than a solid waste; (2) whether the chemical and physical identity of the manure is comparable to commercial fuels; (3) whether the manure will be used in a reasonable time frame given the state of the market; (4) whether the constituents in the manure are released to the air, water or land from the point of generation to the point just prior to combustion of the manure are released at levels that are comparable to what would otherwise be released from traditional fuels; and (5) other relevant factors.

We partially agree with the commenter that was concerned about the legitimacy criterion that would require contaminants in biofuels to either be equivalent to, or lower than, levels found in natural gas. While we believe it is beneficial to promote the use of clean burning fuels, such as biofuels, non-waste fuels produced from secondary materials should have comparable or lower levels of contaminants relative to traditional fuels used today, since gaseous fuels that are produced from secondary materials have the potential to have elevated levels of contaminants (such as sulfur). As a result, we believe it is appropriate to require, as proposed, that contaminants be comparable, or lower than, those levels found in traditional fuels. However, as discussed in Section V.D.3, we are not defining comparable to mean "equivalent to or lower than" or "no higher than" the level of the contaminant in the traditional fuel. Rather, EPA is generally defining "comparable to or lower than" to mean contaminants can be present in non-hazardous secondary materials within a small acceptable range, or at lower levels, relative to the contaminants found in the traditional fuels. Thus, biofuels that are produced from non-hazardous secondary materials can have contaminants that are somewhat higher than the traditional fuel that otherwise would be burned and still qualify as being comparable, and would not be considered a solid waste.

*Comment:* Manure used as a fuel that would otherwise be applied to the land covered under a nutrient management plan[35] is in no way discarded.

[32] As we note elsewhere in today's preamble, this demonstration would be self-implementing and would not require a petition to EPA, but the person would be required to keep appropriate records as to the basis for this demonstration.

[33] Processing (as it relates to fuels) means any operations that transform the discarded non-hazardous secondary material into a legitimate fuel product, and includes, but is not limited to, operations that remove or destroy contaminants, operations that significantly improve the fuel characteristics of the material, e.g., sizing or drying the material in combination with other operations, and operations that chemically improve the as-fired energy content of the material. Minimal operations that result only in modifying the size of the material do not constitute processing for the purposes of this definition.

[34] As noted previously, one commenter described their operation and noted that "the mixed biomass fuel is lightly processed (*e.g.,* processed in a "de-lumper" followed by a disc screen) to break down clumps of material and remove incidental non-combustible tramp materials." This comment does not contain enough information to determine whether or not this would meet the regulatory definition of processing in today's rule. That is, processing is designed to produce or extract a product from a waste—not just to chop the waste up. However, to the extent that this level of processing is considered sufficient, the processed manure would not be a solid waste when burned in a combustion unit as a fuel for energy recovery.

[35] A nutrient management plan is defined in the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS) Standard (590) as, "Managing the amount, source, placement, form and timing of the application of nutrients and soil amendments." The NRCS nutrient management standard (590) is the guidance provided to NRCS field staff and other planners when providing technical assistance to producers participating in voluntary programs. The purpose of the 590 standard is to meet the nutrient needs of the crop

Continued

*EPA's Response:* We recognize that manure may also be beneficially used in other end uses, such as a fertilizer. As we have noted elsewhere in the preamble to today's rule, EPA is not making any determination whether non-hazardous secondary materials are or are not solid wastes for other possible beneficial end uses. Such beneficial use determinations are generally made by the states for these other beneficial uses, and EPA will continue to look to the states to make such determinations.

*Comment:* Combustion of manure is simply one of the ways of realizing the carbon value of manure (for energy production/recovery rather than as a soil amendment) and should not be considered in any way as a means of "discard," since the inherent value of manure as a fertilizer is essentially preserved in the resultant ash. Further, since the ash from manure combustion is still suitable as a fertilizer, the commenter also believes that manure does not contain contaminants that are significantly higher in concentration than traditional fuels.

*EPA's Response:* Both wastes and non-wastes can be utilized as fuels and in this rule EPA is determining what is and is not a solid waste when combusted. As we have stated, there are circumstances when manure would not be considered a solid waste when combusted. In the commenter's case, it does not appear that manure being burned solely to improve soil would meet the legitimacy criteria.

Further, whether the resultant ash is suitable as a fertilizer is not directly relevant to EPA's solid waste determination for non-hazardous secondary materials used as a fuel since contaminants that are present in the manure "as generated" can also be destroyed (discarded) in the combustion process or be directly emitted to the environment, either prior to combustion (during storage and transportation) or if they are not sufficiently combusted and/or controlled by the combustion unit's air pollution control system. Contaminants in manure that may be used as a fuel must be present at comparable or lower levels relative to traditional fuels for the manure to satisfy the contaminant legitimacy criterion. As previously discussed, EPA concludes that manure, as generated, may not satisfy this criterion for nitrogen and chlorine.

*Comment:* Given the biological basis of agricultural products and by-products and the unique nature of the transfer of agricultural commodities among entities, the commenter requests that EPA presumptively grant a non-waste determination for manure that is used as a combustion fuel outside the control of the generator that would otherwise meet the legitimacy criteria. The commenter states that crops grown from a cropping operation may be sold/provided to an animal production operation as a feed input, with the manure from the animal production operation being sold/provided to a community based or regional energy production system as one of many fuel sources from that area, with the resultant ash from the energy production system sent back to the cropping operation as a fertilizer source. The commenter then explains that the cropping and animal production operator may be the same entity, and asserts that the transfer among entities in this instance is to facilitate energy recovery, not disposal.

*EPA's Response:* Unlike scrap tires and resinated wood residuals, information and data were not provided that would allow the Agency to presumptively grant a non-waste determination for all manure that is used as a fuel outside the control of the generator. As a result, we conclude that the final rule cannot presumptively grant a non-waste determination for manure that is used as a fuel outside the control of the generator. We note, however, that sources may petition the Agency for a non-waste determination for materials managed outside the control of the generator (*see* Section VII.G), or, as previously discussed, process (as codified in § 241.2) the manure into a non-waste fuel that meets the legitimacy criteria.

*Comment:* Modern manure management systems that are designed and operated in accordance with applicable Federal, Tribal, State, and/or local regulations and requirements for air and water quality should be considered to meet the "adequate containment" requirements.

*EPA's Response:* EPA does not agree with the commenter that the statement "manure management systems that are designed and operated in accordance with applicable Federal, Tribal, State, and/or local regulations and requirements for air and water quality should be considered to meet the 'adequate containment' requirements" in itself, is sufficient for EPA to conclude that these systems satisfy the containment requirements because these systems may not have been designed for the use of manure as a fuel. These Federal, Tribal, State, and/or local regulations and requirements would have to be examined on a case-specific basis to determine whether manure that is used as a fuel is managed as a valuable commodity pursuant to EPA's legitimacy criteria. EPA does not believe that it can conclude that the "adequate management" criterion is met based on the descriptions of management practices that have been provided to EPA, such as stockpiling manure in open lots to facilitate drying.

*Comment:* Manure satisfies EPA's meaningful heating value legitimacy criterion since it typically has energy contents ranging from 6,000 to 8,000 Btu/lb on a dry basis.

*EPA's Response:* The data provided by the commenter summarize heating values on a "dry basis," rather than on an "as-fired" basis that accounts for the moisture content of the material, and thus, these data are not relevant to the "meaningful heating value" legitimacy criterion. Except as otherwise noted, to satisfy the meaningful heating value criterion, the non-hazardous secondary material must have at least 5,000 Btu/lb, as fired (accounting for moisture), since the as-fired energy content is the relevant parameter that must be assessed to determine if it is being discarded rather than used as a fuel for energy recovery. *See* Section VII.H.1. As previously discussed, the data available to EPA on an "as fired" basis would suggest that much of the manure, as generated, would have heating value levels of less than 5,000 Btu/lb. If the non-hazardous secondary material has a [meaningful] heating value of less than 5,000 Btu/lb, "as fired," the secondary material may still be considered to have a "meaningful heating value," but the source must demonstrate that a meaningful heating value is derived from the manure, and appropriate records kept.

3. Other Biomass

The proposed rule preamble discussed many different forms of biomass, including cellulosic and non-cellulosic biomass.[36] How the final rule views clean biomass was addressed earlier in Section V.B.1, which addresses traditional fuel. Manure was discussed in the previous section (Section V.B.2), while pulp and paper sludges and resinated wood residuals will be discussed in more detail in Sections V.B.4 and V.B.6, respectively, of this preamble. This section discusses other biomass materials that may be burned as a fuel, and whether or not they would be considered a solid waste when combusted as a fuel. Specifically, the proposed rule identified lead-based painted wood, and wood treated with pentachlorophenol, copper-based and

to be grown, while minimizing the loss of nutrients to surface and ground water.

[36] 75 FR 31861–31863.

borate-based compound treatments as solid wastes due to elevated contaminant levels relative to traditional fuels. Moreover, the proposed rule explained that, to the extent that any treated wood is identified as a hazardous waste, it would not be eligible to be burned in a non-hazardous waste combustion unit. We also specifically requested comment on the levels of contaminants in creosote-treated lumber due to the uncertainty associated with the level of contaminants (*e.g.,* levels of polycyclic aromatic hydrocarbons present in creosote).[37] We received comments on construction and demolition (C&D)-derived wood, treated wood, and OCC rejects.

*Comment:* Since creosote is a derivative of coal, itself a traditional fuel, the comments argued that creosote-treated wood should also be considered a traditional fuel. They suggested that this material is treated as a valuable commodity and has been used as a fuel for over a decade. One commenter provided data that showed that the mobility of contaminants indicates that p-cresol leaches at 75 percent of the hazardous waste toxicity characteristic leaching procedure (TCLP) levels in new ties, but that this is reduced to less than 10 percent in ties that are over 10 years old. Another commenter provided the average results from 605 TCLP tests and 605 totals analyses for metals on creosote-treated wood. These results were below TCLP limits for all of the contaminants it contains (*i.e.,* cresol, m,p-cresol, o-cresol leached an average of 1.23 mg/L, 0.90 mg/L, 0.35 mg/L, respectively), although two compounds, 2,4-dinitrotoluene and hexachlorobenzene, leached at levels close to the toxicity characteristic (TC) regulatory level (both leached at 0.09 mg/L with a standard deviation of 0.03).[38] Another commenter submitted a compositional analysis that compared the levels of constituents in creosote (not creosote-treated wood) to crude coke oven tar, a traditional fuel. For example, creosote contains between 8.00–17.30% of naphthalene and 0.50–0.80% quinoline, respectively, while crude coke oven tar contains between 3.00–11.00% naphthalene and 0.18% quinoline). Besides naphthalene and quinoline, data was also submitted for other compounds on the CAA section 112 HAP list, including biphenyl and dibenzofuran. The data submitted showed that all contaminants were present in the creosote at levels greater than in crude coke oven tar.[39] Other studies compared metal contaminants (As, Cr, Pb, and Cu) in creosote- and pentachlorophenol-treated wood (<1.97 ppm As, <4.21 ppm Cr, <64.13 ppm Pb, and 7.65 ppm Cu) to that of wood chips, bark, yard waste, and forest residuals and found that the levels were comparable (<3.61 ppm As, 0.12–4.77 ppm Cr, <17.5 ppm Pb, and <6.44 ppm Cu).[40]

Finally, a study was submitted that demonstrated that the co-firing of creosote- and pentachlorophenol-treated wood (10/90 treated wood/coal mix) results in a reduction of 79–107 ppm of oxides of sulfur ($SO_2$), 78–100 ppm of oxides of nitrogen ($NO_X$), and 0.4–0.5 ppm of total hydrocarbon (expressed as propane) emissions compared to those from samples of Upper Freeport coal. The same study, however, found that there was an increase of 17–84 ppm in HCl emissions when co-firing with treated wood, although the study noted these levels of HCl emissions could be within the range from coal found in other areas of the U.S.[41] HCl is listed on the CAA 112 HAP list. Other data were submitted that showed that PAH emissions from a combustion unit are less when burning treated wood (50/50 mixture of creosote- and pentachlorophenol-treated wood) than when combusting untreated wood. Data were also provided that indicated that pentachlorophenol and total chlorophenols were destroyed by combustion at greater than 99.9% removal efficiency.[42]

*EPA's Response:* We do not agree with commenters that creosote-treated wood should be considered a traditional fuel (either an historically managed traditional fuel or an alternative fuel as codified in § 241.2) solely based on the fact that it is manufactured using coal tar and wood, which are considered traditional fuels. Creosote was not derived for the purposes of creating a fuel, or the wood treated with creosote to produce a fuel, but the creosote was produced and used as a wood preservative. It is not made from virgin materials, but is a secondary material. Creosote is derived from coal tar through a distillation process and, therefore, creosote has different chemical concentrations than coal tar. While we recognize that creosote-treated wood has been utilized as a fuel for over ten years, few markets are available for creosote-treated wood due to concerns about the contaminants. This strongly suggests that burning this material is a waste treatment activity.

The TCLP data generally indicates that the material, on average, is not a hazardous waste. This does not mean, however, that the material is not a non-hazardous solid waste. Leaching data is not relevant to determine whether or not the treated wood is being discarded. We do note that the average values and standard deviations provided for 2,4-dinitrotoluene and hexachlorobenzene suggest that a few samples actually failed the TCLP test and would be classified as a hazardous waste. Creosote-treated wood that is classified as a hazardous waste must be managed as a hazardous waste, which is outside the scope of this rulemaking. Even though most creosote-treated wood is non-hazardous, the presence of hexachlorobenze, a CAA 112 HAP, as well as the other HAPs, in creosote-treated lumber suggests that creosote-treated wood include contaminants at levels that are not comparable to those found in wood or coal, the fuel that creosote-treated wood would replace.[43] In fact, the data provided demonstrates that combustion of these materials results in significant destruction, which is an indication of incineration, a waste activity. Moreover, we would note that this concept involving destruction is also consistent with the legitimacy criterion for contamination, which is based on the input into the combustion unit—that is, the contaminant concentration in the secondary material itself and not what may be emitted into the environment. Accordingly, creosote treated wood, when burned, seems more like a waste than a commodity and does not meet the legitimacy criterion for contaminants and, therefore, should be considered a waste when burned as a fuel.

In regards to wood treated with pentachlorophenol, no additional

[37] 75 FR 31863.

[38] *See* document EPA–HQ–RCRA–2008–0329–0875.1.

[39] *See* document EPA–HQ–RCRA–2008–0329–0767.1.

[40] Holtzman, M.I. and R.S. Atkins, 1995. "Emissions from Combustion of Treated Wood Fuel and Tires in Industrial Boilers," Presented to the Air and Waste Management Association's Annual Meeting, June 18–23, 1995.

[41] Freeman, M.C., W.J. O'Dowd, T.D. Brown, R.A. Hargis, Jr., R.A. James, S.I. Plasynski, G.F. Walbert, A.F. Lowe, and J.J. Battista, Jr. "Pilot-Scale Air Toxics R&D Assessment of Creosote-Treated and PCP–Treated Wood Co-firing for Pulverized Coal Utility Boiler Applications." U.S. Department of Energy's National Energy Technology Laboratory. *http://www.netl.doe.gov/technologies/coalpower/cctc/cctdp/bibliography/misc/pdfs/haps/2002–710.pdf*

[42] Smith, S.T., 1996. "Stack Testing Report, Koppers Industries, Inc., Grenada Plant, Tie Plant, MS," Submitted to the Mississippi Department of Environmental Quality, May 6.

[43] *See Preliminary Characterization Study Prepared In Support of the Proposed Rulemaking—Identification of Nonhazardous Secondary Materials That Are Solid Waste: Traditional Fuels and Key Derivatives,* EPA–HQ–RCRA–2008–0329–0461.21.

contaminant data was provided that would reverse our position from the proposal, which determined that pentachlorophenol was a solid waste due to concerns of elevated levels of contaminants.[44] While some commenters pointed to data that indicates that pentachlorophenol-treated wood (as well as creosote-treated wood) would have similar or lower air emissions to non-treated woods, the issue to determine whether a material is burned as a waste or a commodity is based on input and consequent destruction of contaminants. This is consistent with the legitimacy criteria, under which to be considered a non-waste fuel, the non-hazardous secondary material itself must have contaminant levels that are comparable to (or less than) those in traditional fuels. Thus, the final rule will retain the proposed approach, which considered wood treated with pentachlorophenol a solid waste. Of course, this assumes that the pentachlorophenol treated-wood is not classified as a hazardous waste. Hazardous wastes are not covered under the scope of this rulemaking.

*Comments:* Comments were submitted that argued that wood treated with borate-based compounds or copper napthenate did not contain any contaminants, but only contaminant data was supplied for wood treated with borate-based compounds. That study indicated that the most prevalent borate treatment, disodium octaborate tetrahydrate, contained 1.5 ppm of As, <1 ppm of Cd, <2.5 ppm of Cr, <5 ppm of Co, <0.02 ppm of Hg, <2.5 ppm of Ni, and 0.67 ppm of Se.[45] Since these levels represent the contaminant concentration of the borate treatment, the comments argued that the resulting wood that is treated with this compound would contain even lower concentrations of contaminants.

*EPA's Response:* With respect to borate-treated wood, after reviewing data from the one commenter, which shows that the levels of contaminants in this material are comparable to those found in unadulterated wood for the seven contaminants for which data was presented, we believe that such treated-wood meets the legitimacy criterion on the level of contaminants and comparability to traditional fuels. Therefore, borate-treated wood could be classified as a non-waste fuel, provided they met the other two legitimacy criteria and provided that the contaminant levels for any other HAP that may be present in this material are also comparable to or less than those in traditional fuels. We would also note that such borate-treated wood would need to be burned as a fuel for energy recovery within the control of the generator. Finally, we are aware that some borate-treated wood is subsequently treated with other chemicals, such as creosote, to provide an insoluble barrier to prevent the borate compounds from leaching out of the wood. We did not receive data on the contaminant levels of the resulting material, but data presented on creosote treated lumber indicates that this non-hazardous secondary material would likely no longer meet the legitimacy criteria and would be considered a solid waste when burned as a fuel.

We do not have information generally about the transfer of borate-treated wood to other companies to make a broad determination about its use as a fuel outside the control of the generator. (See Section V.A.1 for a general discussion of the issue concerning use of non-hazardous secondary materials within and outside the control of the generator and the EPA's response.) Thus, under today's rule, borate-treated wood would need to be burned as a fuel for energy recovery within the control of the generator. With that said, we encourage the use of the non-waste determination petition process to address those instances where transfer of the non-hazardous secondary material to a different company meets the relevant criteria—that the secondary material has not been discarded in the first instance and is indistinguishable in all relevant aspects from a fuel product.

With regard to wood treated with copper napthenate, no additional contaminant data was provided that would reverse our position in the proposed rule, which considered wood treated with copper napthenate a solid waste because of concerns of elevated levels of contaminants.[46] We acknowledge today, as we did in the proposed rule, that we do not have sufficient information on the contaminant levels in wood treated with copper napthenate.[47] Thus, if a person can demonstrate that copper napthenate treated-wood is burned in a combustion unit as a fuel for energy recovery within the control of the generator and meets the legitimacy criteria or, if discarded, can demonstrate that they have sufficiently processed the material, that person can handle its copper napthenate treated-wood as a non-waste fuel.

*Comments:* Commenters argued that, although C&D-derived wood is discarded by construction and demolition sites, it is sufficiently processed into a non-waste fuel. It is received at a mixed C&D processing facility as part of loads from construction and demolition sites. Potential contaminants are removed as much as possible before it enters the plant. Clean C&D wood is then separated out from the rest of the incoming stream one of two ways; either through mechanical means or through humans sorting along a specially built picking line. Painted and treated wood is identified either visually or utilizing x-ray fluorescence (XRF) analyzers. After separation, the wood is ground to a specific size and density per the specification of the plant using the biomass product. The creation of natural wood products follows a similar processing path, except that C&D wood is more carefully prepared because of the chemical analysis the C&D product undergoes.

Commenters also stated that C&D-derived wood meets the legitimacy criterion for having a meaningful heating value. They stated that C&D-derived wood has a heating value of between 7,000–8,200 Btu/lb, and thus, should be considered a non-waste fuel. Data from one plant that combusts C&D-derived wood found that it had a heating value that ranges from 6,700–9,000 Btu/lb, with an average value of 8,200 Btu/lb.

One company provided chemical constituent data on C&D-derived wood that is utilized at their plant in order to demonstrate that the material meets the legitimacy criterion for contaminants. The results of this analysis found that the chemical constituents were comparable to or lower to those found in coal (of unknown source or type). See Table 1 below for the results of this study.

[44] 75 FR 31863.

[45] *See* document EPA–HQ–RCRA–2008–0329–1569.

[46] 75 FR 31863.

[47] 75 FR 31863.

TABLE 1—COMPARISON OF CONTAMINANT CONCENTRATIONS IN SAMPLES OF COAL AND C&D-DERIVED WOOD[48]

| Material | Coal (unknown source or type) | C&D-derived wood |
|---|---|---|
| Sample Size | 16 | 14–16 |
| Median contaminant concentrations: | | |
| Cl: | | |
| (lb/billion Btu) | 46.0 | 56.0 |
| (ppm) | 391–644 | 459.2 |
| # of non-detects | 0 | 0 |
| Hg: | | |
| (lb/billion Btu) | 0.00622 | 0.0046 |
| (ppm) | 0.05287–0.08708 | 0.03772 |
| # of non-detects | 0 | 0 |
| Pb: | | |
| (lb/billion Btu) | 0.374 | 0.488 |
| (ppm) | 3.18–5.24 | 4.00 |
| # of non-detects | 0 | 0 |
| Cd: | | |
| (lb/billion Btu) | 0.00465 | 0.0218 |
| (ppm) | 0.03923–0.06510 | 0.17876 |
| # of non-detects | 7 | 2 |

Some commenters discussed studies that concluded that the use of appropriately processed C&D wood is similar in its emission profile to that of virgin wood, although some older studies indicated an increase in metals emissions (likely due to the inclusion of treated wood).[49] Another commenter submitted a life-cycle assessment that described how the recovery of C&D wood as a fuel decreased greenhouse gas emissions. This study found that combusting all C&D wood generated in New Hampshire per year (280,000 tons) will off-set energy from the northeast power grid and, therefore, result in 70,000–130,000 tons less of carbon emissions, 600 tons/year less of particulate matter, 430 tons/yr less of $NO_X$, 2,300 tons/yr less of $SO_X$, 890 tons/yr less of CO, and 10 pounds/yr less of lead. Even when compared simply to the combustion of virgin wood, it was found that the combustion of C&D-derived wood had lower impacts: 16,700 metric tons of carbon equivalents were offset, 50 tons/yr less of particulate matter, 200 tons/yr less of $NO_X$, 485 tons/yr less of $SO_X$, and 69 tons/yr less of CO.[50]

*EPA's Response:* The proposed rule included clean construction wood in the definition of *traditional fuels.* The final rule retains this conclusion, although clarifies the definition of *traditional fuels* to include alternative fuels. Clean cellulosic biomass is an alternative fuel as they are clean cellulosic materials that are indistinguishable in composition from wood that is commonly burned in combustion units (See the explanation in Section V.A). We note that the final definition of *traditional fuels* clarifies that this category includes clean demolition wood as well.

On the other hand, C&D-derived wood that is not clean would not be considered a traditional fuel, but a solid waste under today's rule. However, C&D-derived wood can be classified as a non-waste fuel if it has been sufficiently processed and meets the legitimacy criteria. C&D-derived wood is typically sorted to remove contaminants (*e.g.,* lead-painted wood, treated wood, non-wood materials), and size reduced prior to burning, producing material that likely meets the processing and legitimacy criteria for contaminants. (We would also note that the technology in use today to remove contaminants from C&D-derived wood has increased considerably.) The data provided by one company demonstrates that C&D-derived wood can be sufficiently processed to meet the legitimacy criterion for four contaminants, even when these contaminants are compared to untreated wood concentrations presented in the background document, *Preliminary Characterization Study Prepared In Support of the Proposed Rulemaking—Identification of Nonhazardous Secondary Materials That Are Solid Waste: Traditional Fuels and Key Derivatives.*[51] A complete determination, however, would also include the comparison of As and Cr concentrations. We would also note that based on the data presented, C&D derived wood also meets the meaningful heating value criterion.

With respect to those comments that argued that C&D derived wood have an emissions profile similar to that of virgin wood and that it would decrease greenhouse gas emissions, as we have noted previously, the criterion or test for determining whether a material is burned as a waste or a commodity fuel is the level of the contaminant in the secondary material itself—that is destruction of contaminants indicates a waste treatment activity rather than a commodity fuel. This is also consistent with the legitimacy criteria that would require that the non-hazardous secondary material, itself, must have contaminant levels that are comparable to (or lower than) those in traditional

[48] Source: EPA–HQ–RCRA–2008–0329–0774; Since the legitimacy criterion for contaminants compares concentrations per mass of the material (not per the heating value of the material), all concentrations reported in pounds per billion Btu (lb/billion Btu) were converted into parts per million (ppm) with the assumption that C&D-derived wood has a heating value of 8,200 Btu/lb (as fired) and that sub-bituminous and bituminous coal (the most common types of coal to be utilized in combustion units) have a heating value of 8,500–14,000 Btu/lb (per *Preliminary Characterization Study Prepared In Support of the Proposed Rulemaking—Identification of Nonhazardous Secondary Materials That Are Solid Waste: Traditional Fuels and Key Derivatives,* EPA–HQ–RCRA–2008–0329–0461.21).

[49] U.S. EPA, "Wood Products in the Waste Stream: Characterization and Combustion Emissions, Vol. 1," November 1996.

National Council for Air and Stream Improvement, Inc. Technical Bulletin (TB) 906, "Alternative Fuels Used in the Forest Products Industry: Their Composition and Impact on Emissions." September 2005.

Larsen, F.S., W.H. McClennen, X. Deng, G.D. Silcox-Person, and K. Allison, 1992. "Hydrocarbon and Formaldehyde Emissions from the Combustion of Pulverized Wood Waste." Combustion Science and Technology, 85 (1–6) p. 259–269.

[50] Jambeck, J., A. Carpenter, K. Gardner, and K. Wietz, 2007. "University of New Hampshire Life-Cycle Assessment of C&D Derived Biomass/Wood Waste Management," University of New Hampshire, Durham, NH, December 5.

[51] EPA–HQ–RCRA–2008–0329–0461.21.

fuels. In any event, because we had no information from the studies on the extent that these C&D materials were sufficiently processed to remove the contaminants of concern, we do not know what the emissions results from the submitted studies represent.

*Comment:* Some comments argued that there should be a *de minimis* exemption for C&D-derived wood that is processed to remove painted and treated materials, because while most of the contaminants are removed from the C&D derived wood, there still may be a small or *de minimis* amount remaining on it. Additionally, they also argued that while most non-wood contaminants are removed, there might still remain some small or *de minimis* amounts of other materials (*e.g.,* paper, insulation, etc.).

*EPA's Response:* C&D-derived wood can contain *de minimis* amounts of contaminants and other materials provided it meets the legitimacy criterion for contaminant levels.

*Comment:* Comments argued that OCC rejects, also known in the industry as "recycling process residuals," are never discarded, and therefore, should be considered a traditional fuel because they do not leave the plant, but are usually burned on-site as a fuel. In some cases, however, they do leave the plant to be burned in municipal or commercial energy facilities or employed as a fuel pellet ingredient.

In addition, while some commenters argued that they did not believe OCC rejects are ever discarded, they provided information on how OCC rejects are sufficiently processed to remove contaminants if they are determined to be discarded. For example, strings, wires, rags, and heavy objects are removed using manual and centrifugal force, while plastic and non-recyclable paper fibers are removed through screens.

Commenters also stated that OCC rejects meet the legitimacy criterion for contaminants as they have lower contaminants than traditional fuels. One comment provided data from 10 samples of OCC rejects from one company and 16 samples of coal (of unknown type or origin) to substantiate that claim (*see* Table 2).

TABLE 2—COMPARISON OF CONTAMINANT CONCENTRATIONS IN SAMPLES OF COAL AND OCC REJECTS [52]

| Material | Coal (unknown type or origin) | OCC rejects |
|---|---|---|
| Sample Size | 16 | 10 |
| Median contaminant concentrations: | | |
| Cl: | | |
| (lb/billion Btu) | 46.0 | 23.5 |
| (ppm, estimated) | 391–644 | 87.0 |
| # of non-detects | 0 | 0 |
| Hg: | | |
| (lb/billion Btu) | 0.00622 | 0.00324 |
| (ppm, estimated) | 0.05287–0.08708 | 0.01199 |
| # of non-detects | 0 | 0 |
| Pb:. | | |
| (lb/billion Btu) | 0.374 | 0.281 |
| (ppm, estimated) | 3.18–5.24 | 1.04 |
| # of non-detects | 0 | 1 |
| Cd: | | |
| (lb/billion Btu) | 0.00465 | 0.00558 |
| (ppm, estimated) | 0.03923–0.06510 | 0.02065 |
| # of non-detects | 7 | 2 |

Commenters also claimed that OCC rejects meet the legitimacy criterion for being managed as a valuable commodity, as they are managed in the same manner as analogous fuels—bark. Prior to burning, this material is co-mingled with bark on the bark pile.

Furthermore, commenters stated that OCC rejects pass the legitimacy criterion for having a meaningful heating value. For example, a commenter submitted data that indicated that, on a dry basis, OCC rejects have a heating value of 9,100 Btu/lb, while, as fired, they have a heating value of 3,700 Btu/lb.[53] Another commenter submitted ten tests at plants from one company that found that the heating value of OCC rejects ranged from 8,700–13,600 Btu/lb on a dry basis.[54]

Another commenter submitted a study by the National Council for Air and Stream Improvement to demonstrate that air emissions from burning OCC rejects are comparable to burning wood. In this study, emissions results were provided from three plants that burned 4.4–30% OCC rejects with 70%–95.6% wood and compared it to emissions from the same three plants when they only burned wood. Emissions were tested for total particulate matter (TPM), $SO_2$, $NO_X$, CO, and HCl. The results found that burning OCC rejects did not result in increased emissions of TPM, $SO_2$, $NO_X$, or CO, but occasionally resulted in a small increase in HCl emissions.[55]

*EPA's Response:* We do not agree with the commenters that OCC rejects should be considered a traditional fuel or alternative fuel since this non-hazardous secondary material, consisting of recycled paper and paper products, has not historically been managed as a fuel—that is, the recycling of OCC and the subsequent use of OCC

[52] Source: EPA–HQ–RCRA–2008–0329–0774; Since the legitimacy criterion for contaminants compares concentrations per mass of the material (not per the heating value of the material), all concentrations reported in pounds per billion Btu (lb/billion Btu) were converted into parts per million (ppm) with the assumption that OCC rejects have a heating value of 3,700 Btu/lb (as fired) and that sub-bituminous and bituminous coal (the most common types of coal to be utilized in combustion units) have a heating value of 8,500–14,000 Btu/lb (per *Preliminary Characterization Study Prepared In Support of the Proposed Rulemaking—Identification of Nonhazardous Secondary Materials That Are Solid Waste: Traditional Fuels and Key Derivatives,* EPA–HQ–RCRA–2008–0329–0461.21).

[53] Source: EPA–HQ–RCRA–2008–0329–0871.1.

[54] Source: EPA–HQ–RCRA–2008–0329–0774.1.

[55] National Council for Air and Stream Improvement, Inc. Technical Bulletin (TB) 906, "Alternative Fuels Used in the Forest Products Industry: Their Composition and Impact on Emissions." September 2005.

rejects is a relatively recent activity, nor is it made from virgin materials. However, we believe that these materials are not discarded when used within the control of the generator, such as at pulp and paper mills, since these non-hazardous secondary materials are part of the industrial process.

The data submitted during the comment period would seem to suggest that it would or could meet the legitimacy criteria. For example, the data received indicated that OCC rejects have contaminant concentrations that are comparable to, if not less than, coal, wood, and bark, which are all traditional fuels used at pulp and paper mills. While the meaningful heating value of the OCC rejects is lower than 5,000 Btu/lb, as fired, it can still meet this criterion if it can be demonstrated that the unit can cost-effectively recover energy from a non-hazardous secondary material. The information submitted also demonstrates that OCC rejects are managed as a valuable commodity as they are managed in the same manner as the analogous fuel—bark.

With respect to the OCC rejects that are shipped off-site for use by another company, the limited information provided indicates that this material is burned in municipal or commercial energy facilities (which appears to be municipal or commercial incinerators) and thus, would clearly indicate discard, or processed to produce a fuel pellet ingredient, which may be a non-waste, if and after it is sufficiently processed. That is, such limited information would appear to suggest that when OCC rejects are shipped off-site, which may not happen very often, it is treated more like a waste than a non-waste fuel. Therefore, the Agency finds that OCC rejects shipped off-site for burning would be considered a solid waste. However, as already noted, if the OCC rejects are sufficiently processed to produce a legitimate fuel product, or if a person submits and is granted a non-waste determination for such OCC rejects, than such non-hazardous secondary material when combusted as a fuel for energy recovery would be considered a non-waste fuel.

4. Pulp and Paper Sludge

In the proposal, EPA determined that pulp and paper sludge[56] is not a waste when used as a fuel within the control of the generator. This was based on limited contaminant data and information that these sludges are generally used on-site by generators to fuel their boilers and are treated like valuable commodities. Comments on the ANPRM had stated that these residuals are primarily composed of biomass and that emissions from burning these non-hazardous secondary materials are essentially the same as emissions from burning other biomass fuels, such as bark or wood. Emissions data contained in one report indicated that when sludges were burned at levels below about 10 to 15 percent of total heat input, that such burning would not result in elevated levels of criteria or criteria-related pollutants, forty-eight organic compounds, and metals.

However, given the limited data, EPA requested additional comment on contaminant levels and the appropriateness of considering these sludges to be non-wastes. EPA also noted, as an alternative, that it could consider these sludges to be wastes because of chlorine levels in the sludge.[57]

*Comment:* Pulp and paper sludges should be considered a traditional fuel because it has been utilized as a fuel since the early 1960's. In 2004, 22% of the pulp and paper sludge was used as a fuel.

*EPA's Response:* We do not agree that pulp and paper sludges should be considered a traditional fuel. While some portion of the pulp and paper industry uses these sludges as a fuel, it is not the industry norm or used as a fuel by a majority of the industry. For example, in 2002, 52% of pulp and paper sludges was landfilled or stored in lagoons.[58] Thus, these materials have not been historically managed as fuels. Pulp and paper sludges also would not be considered an alternative fuel, since they are not derived from virgin materials. Pulp and paper mills burn these secondary materials for energy recovery, but also for waste minimization purposes.[59] Therefore, the Agency does not consider pulp and paper sludges a traditional or alternative fuel.

*Comment:* The proposed approach that pulp and paper sludges burned within the control of the generator as a fuel would not be considered a solid waste needs clarification. Specifically, clarification is needed to determine if pulp and paper sludges that do not leave the site and have not been discarded (1) can be used as a fuel and (2) must pass the legitimacy criteria.

*EPA's Response:* The final rule retains the proposed approach, which considered pulp and paper sludges that remain within the control of the generator—whether burned at the generating facility, or burned in combustion units that the generator controls—are considered a non-waste fuel. However, such pulp and paper sludges must pass the legitimacy criteria to demonstrate that these non-hazardous secondary materials are "legitimate fuels" in order to be considered a non-waste fuel.

*Comment.* Commenters argued that pulp and paper sludges are not discarded if used off-site as they are used as a legitimate fuel at other locations. One commenter, who identified itself as a power plant, utilizes pulp and paper sludges generated less than a mile away and stated that the material is loaded into trucks for the short haul to the steam boilers, dumped into the wood handling system, conveyed to covered storage where it is contained and burned in the boiler all within the span of several hours. They suggest that this is a legitimate use of pulp and paper sludges off-site and is, therefore, not a waste.

*EPA's Response:* We agree that the use of secondary materials off-site (which we assume the commenter means not within the control of the generator) is not always indicative of waste activity and would generally agree that the case of the power plant provides an example of when secondary materials may be legitimately used as non-waste fuels by a different company. However, information was not provided in the comments which would allow EPA to generally determine that the transfer of pulp and paper sludges to other companies should always be considered a non-waste fuel, particularly since a large percentage of these sludges are actually disposed. (See Section V.A.1 for a general discussion of this issue and the EPA's response.) Thus, we will retain the proposed approach that pulp and paper sludges that are transferred to a different company for use as a fuel will be considered a solid waste. With that said, we encourage the use of the non-waste determination petition

[56] Pulp and paper sludge includes both primary and secondary wastewater treatment sludges. Primary sludges consist of wood fiber and inorganic materials, while secondary sludges are primarily microbial biomass.

[57] 75 FR 31862–63.

[58] Thacker, W., 2007. "Recycling Paper Mill By-products on Forest Lands: By-product Composition, Potential Applications, and Industry Case Studies." Presentation to EPA Office of Solid Waste Staff, Washington, DC, January 23, *http://www.epa.gov/osw/conserve/rrr/imr/irc-meet/03-paper.pdf*.

[59] Someshwar, A.V. and A.K. Jain, 2006. "Alternative Fuels Used in the Forest Products Industry: Their Composition and Impact on Emissions," Technical Bulletin No. 906, National Council for Air and Stream Improvement, Gainesville, Florida.

Vance, E. 2000. "Recycling Paper Mill By-products on Forest Lands: By-product Composition, Potential Applications, and Industry Case Studies" *The Forest Alternative: Principles and Practice of Residuals Use.* University of Washington College of Forest Resources Publication, Seattle, WA, p. 193–207.

process to address those instances where transfer of the non-hazardous secondary material to a different company meets the relevant criteria—that the secondary material has not been discarded in the first instance and is indistinguishable in all relevant aspects from a fuel product.

*Comment:* Commenters stated that pulp and paper sludges are adequately processed, such that when discarded (*i.e.,* sent off-site to another pulp and paper mill or to a power plant), it is a non-waste fuel. Processing is primarily performed by dewatering. In fact, 84% of all pulp and paper sludges are dewatered using belt filter presses or screw presses.[60] One state commenter stated that some mills further process pulp and paper sludges into dried pellet products for use as a fuel.

*EPA's Response:* We do not agree that dewatering alone meets our definition of processing.[61] While dewatering does improve the fuel characteristics of the material, this action is not sufficient to make the material sufficiently processed into a non-waste fuel as it is generally part of normal waste management activities (*e.g.,* prior to landfilling, or prior to burning the sludge for disposal in an incinerator). In the case of pelletizing the material for use as a fuel, we do not have sufficient information to make a general determination on whether this would be considered sufficient processing. However, if the pelletizing process is used to process the sludge into a form that improves its fuel value, we would agree that this is indicative of fuel activity (similar to pelletizing sewage sludge, which was used as an example of sufficient processing in Section VII.D.4 of the proposed rule)[62] and we would consider those activities to meet the definition of processing. Of course, to be considered a non-waste fuel, the processed pulp and paper sludges would need to meet the legitimacy criteria.

*Comment:* To show that pulp and paper sludges meet the legitimacy criteria for contaminants, three commenters submitted a total of 24 characterizations of pulp and paper sludge cake from 16 pulp and paper mills. These characterizations show that contaminants were found at non-detect levels. For example, As, Cr, Hg, and Pb were at levels of <0.4 ppm, <21.4 ppm, <0.44 ppm, and <21.6 ppm, respectively.[63] Elevated levels (6.36–45.8 ppm) of methyl ethyl ketone (MEK) were found in five out of eight samples from one pulp and paper mill, although we do not know to what extent this data is reflective of pulp and paper sludges generally since eight other samples (three from the same mill and five from five other mills) had non-detect levels of MEK at a detection level of <0.013 ppm.

Chlorine levels among an unknown number of pulp and paper sludge samples were noted by one commenter to have an arithmetic mean of 465 ppm, a median of 318 ppm, a maximum level among mill means of 2,399 ppm, and a maximum among individual analyses of 4,800 ppm (all on a dry weight basis). This is compared to a USGS database on U.S. coals to have chlorine levels with an arithmetic mean of 614 ppm and a maximum among individual analyses of 8,800 ppm (both on an as-is basis, which has <10% moisture). However, one sample provided in the comments had a chlorine concentration of 16,550 ppm (as received), while another had a chlorine concentration of 23 ppm (as fired). Other samples had chlorine concentrations of between 1,050–4,800 ppm (dry basis). Commenters also argued that combustion of high chlorine content in some pulp and paper sludge is not a waste treatment activity. Sources that produce secondary materials that have heat value can increase their energy efficiency by re-using these materials as a fuel. Materials are chosen for their constituents that are beneficial to the combustion or manufacturing process; more often, the materials are chosen for extracting their energy value.

In terms of meeting the legitimacy criteria for a meaningful heating value, comments were submitted that pulp and paper sludges have a heating value of between 3,300–9,500 Btu/lb, on a dry basis; no information was submitted on the "as fired" heating value of pulp and paper sludges. Commenters also argued that pulp and paper sludges meet the legitimacy criterion for being managed as a valuable commodity as they are dewatered to increase their energy value, collected on a continual or frequent basis (as produced), further processed and consolidated, including the removal of biosolids. One state commenter stated that some mills make a dried pellet product from the sludges for use as a fuel. One power plant that utilizes pulp and paper sludge generated less than a mile away stated that the material is loaded onto trucks for the short haul to the steam boilers, dumped into the wood handling system, conveyed to covered storage where it is contained and burned in the boiler all within the span of several hours.

*EPA's Response:* The final rule will retain the proposed approach—pulp and paper sludges managed within the control of the generator are a non-waste fuel as they would seem to meet all of the legitimacy criteria, as discussed below.

The proposed rule acknowledged a general lack of data regarding contaminant levels in pulp and paper sludges and specifically requested data on the issue in order to make a determination of whether pulp and paper sludges meets the third criterion of comparable contaminant levels to traditional fuels. The information we received indicates that these non-hazardous secondary materials meet the contaminant legitimacy criterion. While commenters compared contaminant levels in pulp and paper sludges to those in coal and found lower levels, we also found it appropriate to compare the contaminant concentrations to untreated wood since wood is also burned in pulp and paper mills. Since levels of chlorine in untreated wood are as high as 11,890 ppm, even the high end of the range of chlorine in pulp and paper sludges is comparable to that in untreated wood. When comparing to the information that we have compiled on coal, we find that chlorine levels in coal are reported to be as high as 7,400 ppm, and that average chlorine values for bituminous and sub-bituminous coal are 1,200 ppm and 140 ppm, respectively. Thus, the average chlorine levels reported in most pulp and paper sludge are likely to be comparable with average chlorine levels found in bituminous coal.[64] We note that there is one sample in the submitted data set that has a chlorine concentration of 16,550 ppm. We do not consider this to be comparable to the levels found in coal and, where it is replacing coal, would consider this material to be a solid waste. However, since this was the only sample with such a high concentration of chlorine, we do not think that it is representative of pulp and paper sludges generally.

The levels of metals were also lower in pulp and paper sludges than untreated wood and coal. For example, untreated wood has levels of As, Cr, Hg, and Pb as high as 6.8 ppm, 130 ppm, 2

[60] *See* document EPA–HQ–RCRA–2008–0329–0871.

[61] *See* the discussion on dewatering of sewage sludge in Section VII.F of the proposed rule, 75 FR 31878.

[62] 75 FR 31878.

[63] Document EPA–HQ–RCRA–2008–0329–1395; National Council for Air and Stream Improvement, Inc. Technical Bulletin (TB) 906, "Alternative Fuels Used in the Forest Products Industry: Their Composition and Impact on Emissions." September 2005.

[64] *See* the Material Characterization Papers for Pulp and Paper Sludges and for Traditional Fuels that are located in the docket for today's rule (EPA–HQ–RCRA–2008–0329).

ppm, and 340 ppm, respectively, while coal has levels of As, Cr, Hg, and Pb as high as 80 ppm, 121.3 ppm, 2 ppm, and 80 ppm, respectively.[65] These levels are all greater than those submitted in the comments for pulp and paper sludges. We did receive data on some elevated levels of MEK in five samples from one mill, but we do not believe that this data changes are view that these sludges generally meet the contaminant legitimacy criterion, especially since EPA removed MEK from the CAA 112 HAP list in 2005,[66] and thus, MEK is no longer considered a "contaminant" in evaluating the contaminant legitimacy criterion.

While pulp and paper sludges can have a heating value below 5,000 Btu/lb, even on a dry basis, pulp and paper mills do try to improve the heating value through dewatering. Thus, we believe that pulp and paper sludges generally meet the meaningful heating value legitimacy criterion. Also, since pulp and paper sludges are handled promptly (*i.e.,* not stored for long periods of time and are contained in storage units along with traditional fuels (such as wood and bark) with minimal loss (similar to a valuable commodity), we agree that pulp and paper sludges are managed as a valuable commodity.

*Comment:* Emission tests from two states were said to have shown no significant change in emissions associated with the combustion of pulp and paper mill sludge, although the specific emission test results were not provided in these comments. One other commenter stated that any emissions from those materials will be accounted for in the source's emission limits in its permit. One other commenter submitted a study by the National Council for Air and Stream Improvement (2006), which summarizes many different studies on the emissions from the combustion of pulp and paper sludges. Some studies show that keeping the amount of pulp and paper sludges to no more than 10–15% of the total heat input will result in no increased emission impacts. However, two studies stated that dioxin and furan emissions could result from the burning of pulp and paper sludges and that the levels of these compounds in the emissions are directly relevant to the amount of chlorine in the sludges. Thus, chlorine levels should not be greater than those in found in wood.[67]

*EPA's Response:* First, we would note that emissions testing results is not the criterion or test for determining legitimacy as combustion systems vary greatly and this rule aims to determine what is a solid waste. To be considered a legitimate non-waste fuel, the non-hazardous secondary material itself must have contaminants at levels that are comparable to (or lower than) those in traditional fuels. From the data available, it shows that chlorine levels in pulp and paper sludges, for example, are typically at levels that are lower than those found in coal and wood, as noted above. Nevertheless, we also recognize that high chlorine levels are an indicator that the combustion of such materials may result in increased emissions of dioxins and furans, such that if chlorine levels in pulp and paper sludges are excessively high, it may be an indication that the burning of those sludges is more reflective of waste management. Thus, chlorine levels in pulp and paper sludges should particularly be monitored and evaluated as part of a plants determination that their pulp and paper sludges meet the contaminant legitimacy criterion.

5. Scrap Tires

In the proposal, EPA stated that whole used tires, including those collected from tire dealerships and automotive shops and overseen by a state tire collection oversight program, are initially abandoned and thus meet the plain meaning of discard. As a result, whole used tires that are not processed into a legitimate fuel or ingredient (*e.g.,* shredded/chipped with steel belts removed) were considered a solid waste. EPA acknowledged that whole tires can be legitimately burned as a fuel, but because they have been discarded, were considered solid wastes and subject to the incinerator requirements in section 129 of the CAA, unless processed into a non-waste fuel product, in which case it would be subject to the section 112 requirements of the CAA.

However, EPA requested comment in the proposed rule on the discard interpretation stated in the ANPRM regarding scrap tires that are managed under the oversight of a state tire collection program, such that these non-hazardous secondary materials collected and sent for legitimate use as fuels are not discarded and are not solid wastes. EPA also solicited comment on the processing requirements for whole tires, as well as fuel contaminant data on whole tires or tire-derived fuel (TDF) chips as compared to coal, the replacement fuel.

In order to clarify the context of the proposed rule comments, the Agency describes the background below in "a. Background; Scrap Tire Approach in ANPRM and Proposal." The comments and EPA's responses are listed in "b. Scrap Tire Comments."

a. Background; Scrap Tire Approach in ANPRM and Proposal

*ANPRM Scrap Tire Approach.*[68] As part of its discussion regarding non-hazardous secondary materials used as legitimate "alternative" fuels that have not been previously discarded, the ANPRM noted that scrap tires used as tire-derived fuel, which include whole tires or tires that have been processed and have not been previously discarded, are legitimate non-waste fuels if they meet the legitimacy criteria *i.e.,* they are handled as valuable commodities, have a meaningful heating value, and do not contain contaminants that are significantly higher in concentration when compared to traditional fuel products (see Materials Characterization Paper on Scrap Tires in the docket for today's rule for a complete discussion on contaminants in TDF [EPA–HQ–RCRA–2008–0329]). We noted that in many cases, scrap tires that are collected pursuant to state tire oversight programs (*e.g.,* scrap tires from tire dealerships that are sent to used tire processing facilities) are handled as valuable commodities, and, therefore, have not been abandoned, disposed of, or thrown away (not discarded). We also noted that because State Agencies typically regulate these programs under their state solid waste authorities, it was not the Agency's intent to undercut the states' authority in this area. We, therefore, requested comment on whether scrap tires collected pursuant to state tire oversight programs have been discarded, and whether an EPA designation specifying that scrap tires, for example, managed pursuant to state tire collection programs are not solid wastes, would adversely impact a state's ability to manage such a program.

*Proposed Rule Scrap Tire Approach.*[69] The proposal took a different approach regarding the use of scrap tires when used as a fuel, based on comments received on the ANPRM.

[65] *Ibid.*

[66] The Agency removed MEK from the list of HAP because it concluded that the potential exposures to MEK emitted from industrial processes may not reasonably be anticipated to cause human health or environmental problems.

[67] National Council for Air and Stream Improvement, Inc. Technical Bulletin (TB) 906, "Alternative Fuels Used in the Forest Products Industry: Their Composition and Impact on Emissions." September 2005.

[68] The ANPRM was published in the **Federal Register** on January 2, 2009 (74 FR 41). This reference can be found on page 57 of the FR notice.

[69] The proposed rule, published on June 4, 2010 in the **Federal Register** (75 FR 31844) has numerous references to scrap tires. The statement described under "*Proposed Rule Scrap Tire Approach*" can be found on pages 31874 and 31875 of the proposed rule.

Specifically, some states argued that non-hazardous secondary material fuels that are transferred to a third party have entered what is traditionally considered to be the "waste stream" (and have been regulated by the states as wastes) and therefore should appropriately be considered wastes. Scrap tires, regardless of whether they were collected and managed pursuant to state programs or recovered from legacy waste piles, would be an example of such materials. As a result, the Agency re-examined its position of how the concept of discard applies to scrap tires. Whereas the ANPRM had indicated that there may be some number of secondary materials that would not be considered discarded even if the original generator sent them to another entity outside of its control, the proposed rule took the position that non-hazardous secondary materials that are used as fuels and are managed outside the control of the generator are solid wastes unless they were processed into non-waste fuel products or a case-by-case non-waste determination petition was granted by EPA.

*Proposal Kept ANPRM Scrap Tire Approach as an Option.* In the ANPRM, we considered scrap tires (except from tire dumps) that were collected under state tire collection programs as non-waste as described above. We reconsidered that position in the proposed rule as follows: "* * * tires collected under these recycling programs are discarded and are solid wastes. EPA proposes this formulation for tires, but is asking for further comment on the ANPRM formulation that secondary material collected and sent for legitimate use as fuels are not discarded and are not solid wastes.* * * EPA may issue a final rule containing either set of provisions depending on information received in the comment period and other information available to the Agency."

*The Scrap Tire Approach in the Final Rule.* Based on the proposed rule comments and all other relevant information in the rulemaking record, EPA has modified its approach for scrap tires in this final rule. Under today's rule, scrap tires are considered a non-waste when used as a fuel under the following scenarios:

(1) Scrap tires that are removed from vehicles and collected and managed under the oversight of established tire collection programs (as codified at § 241.2) are non-waste fuels [70] when burned as a fuel in a combustion unit. *See* details at § 241.3(b)(2)(i).

(2) Scrap tires that undergo a sufficient level of processing (as codified at § 241.2 and detailed in the scrap tire response to comments) are considered a non-waste fuel, when used as fuel in a combustion unit, independent of whether they have been previously discarded. *See* details at § 241.3(b)(4).

All other scrap tires are considered a waste when combusted, unless a non-waste determination petition is granted per the requirements in § 241.3(c).

The comments that led to this approach are further described in the response to comments below and in Section VII.C.

b. Scrap Tire Comments

*Comment:* Many of the commenters that compared the approach for whole scrap tires in the ANPRM (described previously in this section) with the proposed approach, preferred the ANPRM approach and believed it was an accurate assessment of how scrap tires are managed. Many of those commenters argued that whole scrap tires that are handled in this situation have not been discarded when removed from vehicles for use as a fuel if there is a process or network that ensures their safe handling prior to use as a fuel. In addition, many commenters listed the attributes that make it a good fuel, in particular they noted that the heat value for TDF is higher than typical solid fuels, including coal.

Commenters disagreed with the assumption that we made in the proposed rule that off-site/third party use of scrap tires equated to discard. Other comments on "transfer to third parties" apply to other non-hazardous secondary materials in addition to scrap tires and are addressed in section V.A.1. In addition, commenters said that the owner of the car does not abandon, dispose of, nor throw away the tire when a tire is changed at a tire shop. These tires are destined for a beneficial use and are managed as a valuable product. Commenters disagreed with EPA's statement in the proposal that scrap tires are "discarded" when removed from the automobile because the generator has relinquished control and the entity receiving the tires may not have the same incentives to manage them as a useful product. For example, one scrap tire commenter summarized the discard issue and suggests that if transfer to a third party does not equate to discard for hazardous secondary materials in specific instances, then EPA is able to make distinctions for non-hazardous secondary materials like scrap tires. Specifically, the commenter states, with respect to tire derived fuel:

"EPA's proposed approach stands in stark contrast to EPA's approach to hazardous secondary materials * * *. In the Subtitle C regulation, EPA was careful to identify circumstances where discard would occur based on a record of damages arising from cases of hazardous material recycling. EPA then shaped its transfer-based exclusion from the definition of solid waste to regulate only transfers where discard is taking place. *See* 73 FR at 64677–78. In contrast, with respect to non-hazardous secondary materials, EPA has no record identifying circumstances where discard may occur and yet is proposing to determine that all transferred material is discarded. Any definition of solid waste that sweeps so broadly exceeds EPA's authority under RCRA. EPA's proposed approach also stands in stark contrast to the approach and guiding principle outlined in the ANPRM. In the ANPRM, EPA did not assume that all non-hazardous secondary material that is transferred outside the control of the generator is discarded. Instead, as in its Subtitle C regulations, EPA was guided by the "overall principle * * * that materials treated as a commodity, rather than as a waste, are not discarded and are not solid wastes so long as they are legitimately recycled." 74 FR 53. If such an approach is appropriate for hazardous substances, a similar or perhaps less demanding determination would be still more appropriate for non-hazardous secondary materials. First, the dangers of sham recycling are far less. Second, the fact that industrial boilers are similar and are regulated in similar manner from industry to industry makes distinctions between industries uniquely hard to justify. EPA offers no persuasive evidence to overcome these considerations. As noted earlier, EPA says only that it "believes" that such materials have been discarded and that third parties "may not" have the same incentive to manage these materials properly as the generator. EPA offers a few off point examples but makes no effort to investigate this issue in any detail. Furthermore, EPA's approach ignores the fact that there is an established market infrastructure for the sale and purchase of secondary fuels such as TDF. As a result, TDF is subject to

[70] As described elsewhere, these tires do not need processing (as described in § 241.3(b)(4)), in order to be considered non-waste since they were not "discarded in the first place." Since these tires were "not discarded in the first place," boilers and cement kilns can use them as non-waste fuel as whole tires, shredded, or fully processed TDF at their discretion (provided they meet the legitimacy criteria). Regardless, most types of combustors require TDF chips, cement kilns are the notable exception.

normal business practices, including contractual arrangements that establish specifications for TDF. Just as a fuel supplier needs to provide a specific type of fuel oil to meet a customer's demands, so does the supplier of secondary fuels. The supplier will comply with the specification demanded by the customer or they will lose the business. As a matter of company policy, most generators of secondary material fuels take reasonable precautions to evaluate where their materials are going as part of risk management."

Commenters also disagreed with our assumptions that led to the Agency's discard position in the proposal with regard to third party use of scrap tires as follows.

• They disagreed that third party handlers would lack an incentive to manage them as a useful material [71] because, scrap tire derived materials have an exceptionally high rate of use in various markets and are sold as valuable products.

• Commenters also disagreed that scrap tires have the same market incentives for misuse as does hazardous waste, which EPA referenced in the proposal,[72] because, in part, hazardous waste are likely to have a relatively negative monetary value. They said that those EPA arguments based on hazardous waste are not relevant to scrap tire markets and usage and is inappropriate to use the rationale based on hazardous waste cases. Scrap tires do not have the environmental and economic risks associated with hazardous waste.

• Furthermore, commenters disagreed that there was currently a pattern of discard at third party scrap tire reclaimers [73] that can be processed and generating stockpiles as possible evidence of the lack of incentive to perform actual recycling).

• Commenters did acknowledge that there were problems in the past with tire dumps, but since tires are now effectively managed and brought to markets, the over-accumulation, disposal, and dumping that occurred in the past (as mentioned in the proposal) [74] is less of an issue now. In justifying this statement, many commenters discussed the success of eliminating tire dumps. Specifically, they argued that fewer than one million tires remain in stockpiles, compared to an estimate of one billion tires in 1990. It is clear the total number of tires discarded in tire dumps is being reduced annually, not increasing due to the improper management which the proposal postulated regarding the current management practices at third party sites. Also, they argued that of the 300 million scrap tires that are generated each year, scrap tires are reported to have the second lowest disposal rate at 10.7% in 2007, with lead acid batteries having the lowest disposal rate.

• Commenters, mainly from industry, also disagreed with our statement in the proposal that scrap tires that are transferred to a third party have entered what is traditionally considered to be the "waste stream" and therefore should appropriately be considered solid wastes. Refer to Section V.A.1 for the discussion on related comments (not specific to scrap tires). Some commenters (including some states), however, agreed that states tend to initially regard tires as waste until they are beneficially used.

*EPA's Response:* In the first place, to the extent these comments refer to EPA's general approach to secondary material transferred to another party, the Agency refers commenters to Section V.A.1. As discussed in that section, EPA has evaluated whether certain categories of materials are discarded or not. The Agency has not adopted the extremes of saying that all burning of secondary material, regardless of ultimate use, is waste treatment or that any secondary material that is recycled for legitimate fuel value is a commodity and not a waste. Wastes may have value, but are still wastes.

Between these broad parameters, EPA has examined a number of specific materials, recycled on-site and transferred to third parties for recycling, and determined whether they would be appropriately placed within the waste or non-waste categories. EPA would consider transferred materials not to be wastes if it could make the appropriate findings for those categories. In fact, the Agency does so with respect to scrap tires harvested from vehicles and resinated wood residuals. Any of EPA's decisions regarding specific materials, if challenged, must stand or fall based on its individual merit.

With respect specifically to how the Agency is dealing with scrap tires in this rule, the ANPRM noted that scrap tires that are collected pursuant to tire programs (*e.g.,* scrap tires from tire dealerships that are sent to used tire processing facilities) are collected and handled as valuable commodities, and, therefore, have not been abandoned, disposed of, or thrown away. The ANPRM had indicated that there are instances where non-hazardous secondary materials would not be considered discarded even if the original generator sent them to another entity outside of its control.

The proposed rule took an approach that assumed non-hazardous secondary materials that are used as fuels and are managed outside the control of the generator are solid wastes, unless they were processed into legitimate non-waste fuel products or a non-waste determination petition was granted by EPA. However, in the proposed rule, the Agency was open to an alternate interpretation and requested further comment on the ANPRM formulation that scrap tires collected and sent for legitimate use as fuels are not discarded and are not solid wastes, and specifically indicated that the Agency "may issue a final rule containing either set of provisions depending on information received in the comment period and other information available to the Agency."

After careful consideration of the comments and all the material in the rulemaking record, including documents cited in the ANPRM and the preamble to the proposed rule, the Agency agrees that a system where scrap

[71] The comments are in regard to this statement in the proposal: "When non-hazardous secondary material fuels are transferred to another party, we generally believe that the material is discarded since the generator has relinquished control of the secondary material and the entity receiving such materials may not have the same incentives to manage them as a useful product, which results in the materials being discarded." *See* EPA's statement in the proposal at 75 FR 31844, page 31875.

[72] The comments are in regard to this statement in the proposal, as well as other references to hazardous waste: "This lack of incentive to manage as a useful product has been well documented in the context of hazardous secondary material recycling as evidenced by the results of the environmental problems study performed in support of the DSW [hazardous waste] final rule. (This scenario does not apply to transfers taking place under the transfer based exclusion for hazardous secondary materials that are generated and then transferred to another company for the purpose of reclamation.) However, this finding also holds true for non-hazardous secondary materials that are used as fuel." *See* EPA's statement in the proposal at 75 FR 31844, page 31875.

[73] The comments are in regard to this statement in the proposal: "As discussed in the DSW final rule, this pattern of discard at off-site, third party reclaimers appears to be a result of inherent differences between commercial recycling and normal manufacturing. As opposed to manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, secondary materials recycling, including when used as a fuel, can involve generating revenue primarily from receipt of the secondary materials. Recyclers of secondary materials in this situation may thus respond differently than traditional manufacturers to economic forces and incentives, accumulating more inputs (secondary materials) than can be processed and generating stockpiles with sometimes little incentive to perform actual recycling."

[74] *See* EPA's statement in the proposal at 75 FR 31844, page 31875.

tires are removed from vehicles [75] and are collected and managed under the oversight of established tire collection programs are not "discarded in the first instance." Such tires (including both whole tires and tires that have been shredded—with or without metal removal)[76] are non-waste when used as a fuel in combustion units. These programs ensure that the tires are not discarded en route to the combustor for use as fuel and are handled as a valuable commodity as required in the legitimacy criterion in today's rule at § 241.3(d)(1)(i).

Consistent with other non-hazardous secondary materials that are considered to be non-wastes, scrap tires also meet the rest of the legitimacy criteria for fuel. They meet the requirement for meaningful heating value, required per § 241.3(d)(1)(ii) in that scrap tires have a higher heating value (12,000 Btu/lb to 16,000 Btu/lb) as compared to coal (the replacement fuel).

Scrap tires also meet the requirement specified at § 241.3(d)(1)(iii) for the non-hazardous secondary materials to have comparable (or lower) levels of contaminants as compared to the traditional fuel it is replacing. Refer to the specific response to comments on contaminants.

Established tire collection programs promote the collection of scrap tires and coordinate with tire dealerships, haulers, processors, and end users. The existing tire collection programs form an established collection infrastructure. These established tire collection programs together with state bans on landfilling in most states [77] effectively result in the beneficial reuse of tires (as fuel or used in other scrap tire markets) as the sole [78] end use option for scrap tires in those states.

While the Agency recognizes that there will be differences between the various established tire collection programs, at a minimum, the following components would need to be included as part of any established tire collection program: (1) A comprehensive system that prevents tires from being abandoned when the scrap tires are harvested from vehicles and collected at the various businesses where they are removed; these tires are not considered "discarded in the first instance" per this rule; and (2) standards for the scrap tires to be managed as a valuable commodity. These programs should ensure storage does not exceed reasonable time frames, the scrap tires are managed in a manner consistent with the analogous fuel (coal), and a system is in place to prevent scrap tires from being discarded (according to the plain language definition) en route to the combustor (and during any processing prior to combustion).

An example of this type of program is a tire dealership that has prearranged agreements where the combustor pays for the delivery of the tires harvested from vehicles and can track the delivery and has contractual obligations for a safe delivery. Another example is the Texas system where tires are not seen as waste, but have specifications for tracking and safe delivery to the end use markets.

These programs neither allow an opportunity for tires intended as a fuel to be discarded in the first place nor discarded while in transit. The definition of an established tire collection programs is codified in today's rule at § 241.2. These tires have not been "disposed of, abandoned, or thrown away" through the initial process of removing them from cars or collecting them under established tire collection programs.

It is the combustor's responsibility to confirm that the whole tires are not discarded and were handled appropriately under the established tire collection program. Notification and recordkeeping requirements with regard to the use of non-hazardous secondary materials under CAA 112 and 129 rules, including whole tires managed under established tire collection programs, are outlined in Section VII.I.

This approach for scrap tires is supported by comments from auto maintenance shops, tire retailers, and others in the automotive business. These commenters discussed the management of tires collected from tire and auto-related shops under established tire collection programs. Typically, the state and private programs work together to encourage the processing, reuse, and/or recycling, which results in a market demand for scrap tires to be collected, but the use as fuel is more independently sustainable in the free market.[79] In the event the combustor is disposing via combustion (*i.e.,* not utilizing the energy from combustion), it is a waste.

With the approach described in today's rule, EPA is recognizing that some specific types of secondary materials are more like valuable commodities than solid wastes, and the act of transferring them to a third party does not automatically involve discard. As commenters noted, the mere relinquishing of ownership does not make something a waste.

Furthermore, as EPA notes below, the fact that states may consider tires as wastes under state programs does not affect EPA's determination in this rule that certain scrap tires are not wastes for purposes of tire combustion under CAA sections 112 and 129. States may regulate tires as wastes while EPA, for purposes of the federal regulations, may consider them to be commodities.

We also recognize that the basis for the final position on scrap tires is different from the proposal and is more in line with our original position in the ANPRM. As we noted many commenters disagreed with the basis for the position on scrap tires in the proposal, in addition to stating a preference for the ANPRM position on scrap tires. The overall rationale for the position in the final rule regarding scrap tires is included in Section VII, entitled "Detailed Discussion and Rationale for Today's Final Rule."

*Comment:* A number of commenters stated that the concentration of contaminants that are found in tire-derived fuel TDF chips (or whole tires) are comparable (or less than) those found in the traditional fuels that it would be replacing. In the proposed rule, we requested data on the TDF contaminants that are HAP, as listed in section 112(b) of the CAA and the nine pollutants, as listed in section 129(a)(4) of the CAA. Some commenters provided independent test results that correlated to those contaminants and the results showed a trend that the contaminants were generally comparable to or lower than coal, the replacement fuel, (although individual tests and comparisons vary). In addition to independent data, some commenters referenced EPA's Materials Characterization Papers (used to support the proposed rule), and the TDF

[75] For purposes of today's rule, the term "vehicle" is meant to include any mechanical means of conveyance that employs the use of tires.

[76] If scrap tires are not discarded in the first place, they do not have to be processed per the standards in today's rule, but they can be converted to rough shreds or processed into TDF chips at the discretion of the combustor and still be a non-waste fuel. If the scrap tires were discarded, they have to be processed (with metal removal) per the standards in today's rule in order to be a non-waste fuel.

[77] A few states allow tires cut up in smaller pieces to be landfilled, while fewer states still allow whole tires in landfills.

[78] Note, a commenter has indicated that some states are considering revoking their tire landfill ban if combustors are no longer choosing to use tires for fuel based on the outcome of this rule.

[79] The recovery and management of tires that are removed from tire piles are largely supported or subsidized by State Agencies and these whole tires are considered discarded and waste when used as a fuel. This is not the case for the tires we are calling non-waste that are annually generated and are collected off the vehicles and sent for use as fuel.

American Society for Testing and Materials (ASTM)[80] data on chemical constituents and fuel characteristics. The TDF and coal data were typically reported as elemental analyses.

Specifically, commenters provided the following TDF concentrations for CAA section 112(b) HAP (some are also CAA 129 pollutants):[81] [82]

- Cadmium—less than 5 up to 6 ppm (also on the CAA 129 pollutant list);
- Calcium—3,780 ppm (although listed as "calcium cyanamide" in the HAP list);
- Chlorine—non-detect to 1,490 ppm (also listed in the CAA 129 pollutant list as "hydrogen chloride");
- Chromium—less than 5 up to 97 ppm;[83]
- Lead—51–65 ppm (also on the CAA 129 pollutant list);
- Manganese—less than 100 ppm;[84] and
- Mercury—non-detect up to levels in low-mercury coals (also on the CAA 129 pollutant list).

These contaminant levels, the commenters argue, are at or below documented levels in coals. Although barium and zinc are not CAA 129 pollutants or HAP, commenters also mentioned that barium was non-detectable and one commenter mentioned that data available from the USGS database showed coal can have much higher concentrations of zinc[85] than TDF. It was also reported that the steel wire in tires is 98.5% iron (which is not a HAP). As noted previously, many commenters argue that the small amount of steel wire in typical TDF is not considered a contaminant that could result in emissions. Rather, it presents a handling concern when used as boiler fuel; specifically, the TDF needs to have the exposed wire removed so that it is "flowable" like coal. One commenter went on to say that they can recycle metals from TDF post-combustion. A large number of commenters stated that the metal from tires is a necessary ingredient in the formation of clinker in cement kilns and becomes part of the clinker product, and is in no way considered a "contaminant" in cement kilns.[86]

Many of the commenters also reiterated that the constituents in TDF fuel product do not lead to emission problems as evidence by comparable or lower emissions for the following CAA 129 pollutants according to their tests: carbon monoxide (some higher some lower, but comparable), dioxins/dibenzofurans (some commenters stated no significant difference, while others claimed emission reductions), hydrogen chloride (specifically mentioned reduction in cement kilns), oxides of nitrogen (usually combustors witness the greatest reductions in this pollutant when using TDF[87]), and sulfur dioxide (usually reduced when using TDF). Many commenters thought that we should also take into consideration the reduction in greenhouse gases and the emissions improvements.[88] On the other hand, a number of commenters voiced concerns about emissions from scrap tires used as fuel, anticipating that they increased emissions (including those pollutants listed in section 129 of the CAA). A commenter cited that emissions increases were expected for a paper mill that was testing a substitution of TDF for wood.

Although we requested data on fuel contaminants, some contaminant data was reported as emission results. Results of a rather large study were reported by a commenter: "In 2008, PCA member companies completed a study on the impact of TDF firing on cement kiln air emissions. The study's data set included emission tests from thirty-one of the cement plants presently firing TDF. Dioxin-furan emission test results indicated that kilns firing TDF had emissions approximately one-third of those kilns firing conventional fuels—this difference was statistically significant. Emissions of particulate matter (PM) from TDF-firing kilns were 35% less than the levels reported for kilns firing conventional fuels (not statistically significant due to the low PM emissions reported for essentially all cement plants). Nitrogen oxides, most metals, and sulfur dioxide emissions from TDF-firing kilns also exhibited lower levels than those from conventional fuel kilns. The emission values for carbon monoxide and total hydrocarbons were slightly higher in TDF versus non-TDF firing kilns. However, none of the differences in the emission data sets between TDF versus non-TDF firing kilns for sulfur dioxide, nitrogen oxides, total hydrocarbons, carbon monoxide, and metals were statistically significant. Separate studies conducted by governmental agencies and engineering consulting firms have also indicated that TDF firing either reduces or does not significantly affect emissions of various contaminants from cement kilns."

*EPA's Response:* The Agency assessed the contaminants in TDF using the data submitted and the proposed rule data (referenced above) and compared it to the concentrations in coal, the traditional fuel that scrap tires would be replacing.[89] While the level of contaminants in TDF or tires vary slightly[90] between test results for the scrap tires and for the type of fuel that was used for comparison purposes (*i.e.,* coal, the replacement fuel), this data supports the commenters' position that the level of contaminants in TDF (or whole tires) are comparable to (if not less than) those found in the traditional fuel that it would be replacing.[91] Coal has a number of contaminants that are not present in TDF. See the Materials Characterization Papers on Traditional Fuels and on Scrap Tires in the docket for today's rule for a complete discussion on contaminants in TDF (EPA–HQ–RCRA–2008–0329).

The metal wire in tires is 98.5 percent iron, but it is a small component of the TDF when processed. The Agency has determined that the concentration of iron in the processed TDF chips is comparable to those in coal. However, iron is not a HAP, nor are the other components of the wire expected to be released to the emissions in a typical boiler. Rather, the wire ends up in the bottom ash such that, according to one commenter, the metal can be recovered.

[80] ASTM (American Society for Testing and Materials) or ASTM International, is a globally recognized leader in the development and delivery of international voluntary consensus standards.

[81] This is the available data for the elements or the compounds (that are among the nine CAA section 129(a)(4) pollutants or are on the 187 HAP listed in CAA section 112(b)) that were reported in comments, as well as data from the scrap tire Materials Characterization Paper referenced by commenters. Since TDF is usually co-fired with coal, the results can include contaminants that originated from the coal.

[82] Refer to the Materials Characterization Papers for traditional fuels in the docket for today's rule.

[83] If this is present from the steel wire, it is not expected to be released during typical boiler combustion.

[84] If this is present from the steel wire, it is not expected to be released during typical boiler combustion.

[85] The commenter said the coal sample was 51,000 ppm zinc, while coal is usually less than 100 ppm. TDF usually has higher concentrations of zinc than the average in coal.

[86] *See* the comment on cement kilns for more information relative to cement kiln usage.

[87] Commenters often said this is the biggest benefit in using TDF. State regulators are said to suggest the use of TDF if a combustor has a problem with $NO_X$ emissions.

[88] Refer to the Materials Characterization Papers for a detailed summary of the contaminant data for TDF, including data provided by commenters.

[89] The "contaminants" are the nine CAA section 129(a)(4) pollutants and the 187 HAP listed in CAA section 112(b).

[90] The elemental constituents in coal vary regionally so the test result comparisons to TDF also vary. For example, the relative percentage of some elements is sometimes slightly higher in some tests and lower in others. Overall, we find that TDF and coal have a comparable level of contaminants.

[91] While zinc has been reported to have higher levels in TDF than in coal, zinc is neither a HAP or one of the nine pollutants identified in section 129(a)(4) of the CAA and thus, would not be a contaminant for consideration.

If the scrap tires were discarded (*i.e.,* recovered from a tire dump), they would need to be processed into TDF chips with some removal of the metal wire (per the processing specifications described in a response to comments below) in order to be a non-waste fuel. Based on the comments, we recognize that this is more important for handling, than for emissions. We would also note that the steel wire in the whole tires used in cement kilns is regarded differently since it is needed to become part of the cement. That is, if the non-combustible ingredient in feedstocks that are necessary (*e.g.,* iron) for clinker production are no longer used, those materials must be replaced.

Finally, although we focus on the contaminants in fuel since that is the relevant criterion as it relates to the legitimacy criteria, and for deciding whether a material is a waste or a commodity, we do recognize the value of the greenhouse gas, as well as other criteria pollutant improvements using scrap tires as stated in the proposal and also raised by commenters. Specifically, the use of secondary materials as alternative fuels and/or ingredients in manufacturing processes using combustion not only recovers valuable resources, it is known to contribute to emissions reductions. For example, GHG has been reduced as a co-benefit of the use of secondary materials—the GHG rate associated with the combustion of scrap tires is approximately 0.09 $MTCO_2E$ [92] per million Btu of scrap tires combusted, while the GHG emissions rate for coal is approximately 0.094 $MTCO_2E$ per million Btu. Combined with the avoided extraction and processing emissions 0.006 $MTCO_2$ E/million Btu for coal, the total avoided greenhouse gas is 0.019 $MTCO_2$ E per million Btu. Also, substituting TDF for coal would avoid an estimated 0.246 Lbs/million Btu of particulate matter associated with the extraction and processing of the coal.

Relative to criteria pollutants, historical EPA and test program data demonstrate that, while emission rates vary over different TDF levels at different facilities, criteria pollutant emissions from combusting TDF have been found a majority of the time to be reduced or not significantly different than those from other conventional fossil fuels, provided combustion occurs in a well-designed, well-operated and well-maintained combustion device. In fact, results from a dedicated tires-to-energy (100% TDF) facility indicate that it is possible to have emissions much lower than those produced by existing solid-fuel-fired boilers (on a heat input basis) with a specially designed combustor and add-on controls.[93] Typically boilers use a mix of TDF and coal; they have comparable emissions with or without TDF with the same air pollution control device. We are not aware any small area sources that are able to use TDF for fuel. (See the Materials Characterization Papers in the docket for further details on these GHG estimates, and other estimates of avoided emissions associated with burning tires and other secondary materials as fuel.)

Finally, we would also note that the use of secondary materials, such as use as a fuel in industrial processes may also result in other benefits, including reduced fuel imports, reduced mining impacts, and reduced negative environmental impacts caused by previous dumping (*e.g.,* tires).

*Comment:* Some industry commenters claimed that the proposed rule would increase the costs for facilities that use scrap tires as a fuel due to the imposed costs for unnecessary processing, and would negatively affect them and existing tire recycling programs. According to the many comments by tire retailers, tires are a material handled as a commodity. Under the third party processing requirements in the proposed rule, they estimated substantially increased costs to remove the tires they handle from their shops. This would also have the effect of causing the tires to be seen as "waste-like" since their monetary value would be reduced.

*EPA's Response:* As a result of the changes made to the final rule concerning scrap tires that are collected as part of an established tire collection program, we anticipate that there will be no or minimal changes, to the current system that prevents scrap tires from being discarded. Thus, the costs for the tire retailers are not expected to increase, as anticipated by the commenters.

*Comment:* A number of state environmental agencies recommended that scrap tires not be considered a solid waste when combusted, because of potential impacts on their state programs. These state environmental agencies, however, typically preferred EPA to consider scrap tires a waste at least until it arrives at the combustion unit (or otherwise reasonably processed into a product according to some State Agency commenters). Many of these states noted the beneficial aspects of using whole scrap tires as a fuel and were concerned with the negative impacts and possible interference to the success of their beneficial use programs (typically for non-combustion determinations) and requested clarification on the scope and impact of this rule for all non-hazardous secondary materials, including scrap tires. For instance, they asked if the rule would affect or interfere with state solid waste regulations, laws, and beneficial use programs. They also requested that EPA clarify the implications to a state program if the scrap tires are considered non-waste when used as fuel for federal purposes, but are considered waste according to the state recycling and waste management programs (until beneficially used or made into a non-waste product).

*EPA's Response:* As discussed, the Agency has decided to identify scrap tires that are removed from vehicles and collected as part of an established tire collection program as a non-waste fuel when combusted. Thus, we believe that the concerns or impacts on the effective collection and use as a tire-derived fuel product should no longer be a concern. However, this approach would not address the request from state agencies that we identify scrap tires as a waste until combusted. As discussed previously, existing RCRA case law on hazardous wastes would not allow EPA to declare that a discarded material ceases to be a waste solely by the fact that it is beneficially used. Wastes may be used beneficially. Accordingly, once a non-hazardous secondary material (such as scrap tires retrieved from waste tire piles) is identified as a waste, its arrival at a facility for combustion would not change its status. EPA has also expressed the belief that case law would not prevent wastes from being processed into materials that are no longer wastes. However, that would require changing the material sufficiently so that a new fuel product is created.

In response to the states question concerning conflicting and concurrent interpretations of state and federal waste status (when used as fuel), EPA would like to clarify that non-hazardous secondary materials may be simultaneously regulated as a non-waste fuel or ingredient for use in combustion units under the federal program, but as a solid waste by the state's solid waste programs. That is, non-hazardous secondary materials that are designated as a non-waste by today's rule, while

[92] Metric tons of carbon dioxide equivalent ($MTCO_2E$)

[93] *See,* for example, Reisman JI (1997) Air Emissions from Scrap Tire Combustion, Appendix: Emissions Data from Controlled Tire Burning. Technical Report prepared for USEPA. Office of Research and Development, Washington, DC EPA 1997 at *http://www.epa.gov/ttn/catc/dir1/tire_eng.pdf*

not subject to the section 129 CAA standards, could be subject to the state standards that identify the same non-hazardous secondary material as a solid waste. The federal rule does not affect the state waste determination in this case. For more information about state agency concerns with regulating non-hazardous secondary materials, not just scrap tires, refer to Section IX.A, "Applicability of State Solid Waste Definitions and Beneficial Use Determinations."

Finally, we would note, and as stated elsewhere in this preamble, this rule only addresses those non-hazardous secondary materials that are burned in combustion units as a fuel or ingredient. Thus, we are not making any determination that non-hazardous secondary materials are or are not solid wastes for other possible beneficial uses. Such beneficial use determinations are generally made by the states for these other beneficial uses, and EPA will continue to look to the states in making such determinations.

*Comment:* One commenter stated that "[b]urning in incinerators, kilns, boilers, etc. is not the highest best use of scrap tires," and that with proper processing, they can be used in many value-added recycling processes. Many other commenters were opposed to the combustion of any non-hazardous secondary materials as a fuel, including scrap tires in CAA section 112 regulated units, and support the recycling or reuse of scrap tires for other uses instead of combustion.

*EPA's Response:* The issue that EPA is addressing in this rule is whether the burning of non-hazardous secondary materials, including scrap tires (whether whole or as TDF) is considered waste management. This is critical since the status of scrap tires—that is, whether they are a waste or not, determines which CAA emission standards the non-hazardous secondary material would be subject to. With that said, EPA supports the broad use of scrap tires in many different markets (*e.g.,* recycled rubber products, use in asphalt, and in civil engineering projects). The Agency also believes that the use of scrap tires as a fuel is a valuable use and should remain a component in the overall suite of recycling/management options provided the combustion units are subject to appropriate standards. In some cases, other recycling markets may not be available if TDF was not used a fuel. For example, in the standard process of shredding tires for tire-derived fuel (TDF), finer pieces are created as a by-product appropriate for recycled rubber products. In most cases, it would be too expensive to process the scrap tires solely for the recycling of this rubber (according to sources in the scrap tire program). Comments on the ANPRM and the proposal led us to believe that the non-combustion markets for scrap tires could not handle the surplus and will reverse the trend in cleaning up tire dumps and will lead to many tires being disposed of in scrap tire piles.

Specifically, in 2007, 89.3% percent of the scrap tires generated in the U.S. by weight were collected and consumed in end-use markets. The total volume of scrap tires consumed in these end use markets reached approximately 4,105.8 thousand tons of tires out of an estimated 4,595.7 thousand tons of tires generated in the U.S. By comparison, in 1990, only eleven percent of the scrap tires were consumed on a per tire basis.[94] Of the scrap tires that are collected annually and used in beneficial use end markets, about half are used for their fuel value, while the remainder are used in value-added recycling processes as the commenter preferred. We recognize that regionally, there are sometimes scrap tire shortages in an area that could support more non-combustion uses (as compared to the market demand for scrap tire usages). That is, some states are net importers and have very healthy markets using scrap tires as commodities, while other states do not have as much demand for scrap tires. The EPA supported scrap tire program is described on our Web site (*http://www.epa.gov/osw/conserve/materials/tires/index.htm*).

*Comment:* EPA describes coal and petroleum coke as traditional fuel. Based on the extensive use developed over the last 20–30 years in the industry, many of the alternative fuels, such as TDF can also be considered traditional. A number of commenters cited that scrap tires have been used as a fuel for a long time (since the late 70's) which should qualify as "historical use" and should be regarded as a traditional fuel. The cement industry's goals have emphasized use of alternate fuels and raw materials based on the industry increasing its reliance on this type of material since the 1980s. The use of TDF is a long-standing and customary practice now characteristic of cement manufacturing fuel options. In fact, commenters have argued that the number of major industrial boilers and cement plants utilizing TDF as a supplemental fuel has risen dramatically over the last 19 years and decreased the dependence on virgin fuel sources.

Other commenters mentioned that the components of tires are derived from hydrocarbons (like fossil fuels, such as coal, oil, and natural gas) and natural "biogenic" sources (the rubber), and therefore, they should be considered a traditional fuel. Still other commenters mentioned that TDF should be considered a traditional fuel since it should qualify for the same reasons as on-spec used oil. Finally other commenters argued that scrap tires should be considered a traditional fuel based on the comparable contaminant content and superior Btu value (at 12,000 Btu/lb to 16,000 Btu/lb), as compared to coal.

*EPA's Response:* We do not agree with the commenters that scrap tires should be considered an historically managed traditional fuel or alternative fuel. In fact, until this rulemaking, we are not aware that anyone has considered or identified scrap tires as a traditional fuel. While we recognize that scrap tires may have been used as a fuel since the 1970's, we would also note that tires are not produced for their fuel value, even though the components of tires are derived from hydrocarbons and natural biogenic source. Further, scrap tires are not derived from virgin material fuels (*e.g.,* as is the case of coal refuse derived from virgin coal).

*Comment:* Some commenters regarded the combustion of non-hazardous secondary materials, including scrap tires, as waste disposal and therefore the combustion unit that burns these secondary materials should be regulated as an incinerator. Another commenter was concerned with a combustor accepting fees to accept non-hazardous secondary materials and argued that waste-burning boilers can receive a pass-through portion of tipping fees and can also collect fees "to dispose of" the material through combustion at "clean energy" projects. The commenter went on to say that the fuel at these facilities is in no way sold in the marketplace the way that traditional fuels are sold for profit. In fact, the economic model is reversed, so that the combustion facility is paid to take the secondary material.

*EPA's Response:* The question of whether or not a non-hazardous secondary material, including scrap tires is or is not a solid waste, depends on whether it has been discarded, and whether it could legitimately be considered a fuel-like material, by meeting the legitimacy criteria. As we have discussed elsewhere in this preamble, we have determined that scrap tires, when collected as part of an

[94] These tire figures are compiled by RMA and are developed jointly with state scrap tire programs and listed in "U.S. Scrap Tire Markets 2007." The report can be found at *http://www.rma.org/scrap_tires/.*

established tire collection program and sent to a combustion unit for use as a fuel, or when sufficiently processed to produce a tire-derived fuel, have not been discarded and are not solid wastes. These secondary materials are more akin to non-waste fuels in these instances. Thus, we disagree with the commenters who argue that the combustion of non-hazardous secondary materials, including scrap tires, always constitutes waste management.

On the other hand, where scrap tires or any other non-hazardous secondary materials are disposed of (part of the plain meaning of discard) via combustion, they are a waste. For example, if a combustion unit's main purpose is to provide heat to dry a product, but they consistently have a surplus of tires received with a tipping fee and operate the unit without a product being dried, they are in effect destroying the scrap tires. In this case, they would be considered solid wastes, and the combustion unit would be subject to the CAA 129 standards. With respect to the situation where a facility accepts scrap tires for a tipping fee (as opposed to paying for the fuel), that can be an indicator that disposal may be occurring, but is not determinative to indicate that such transactions always constitute waste management. For example, the tipping fees could encourage over-accumulation leading to combustion for disposal versus being used as a valuable replacement fuel. Thus, this factor should be considered, in light of the other circumstances, in determining whether or not scrap tires when combusted as a fuel are or are not a solid waste.

*Comment:* A commenter described the associated environmental justice impacts that would occur at sites that would receive scrap tires if the proposed rule went into effect, as compared to the current environmental justice impacts associated with cement kiln sites. The commenter provided an analysis that they said showed a decreased chance of impacting environmental justice communities based on the demographic analysis at cement kilns versus the alternative sites. The commenter claimed that the processing described in the proposed rule would effectively prohibit them from using scrap tires as a fuel and will result in more scrap tires being disposed of or unnecessarily processed at sites that are more likely to be in environmental justice communities, as EPA's environmental justice analysis indicates.

The commenters' analyses indicated that cement kilns tend to be located in areas with fewer minorities than the national average, as well as fewer minorities as compared to the larger set of sites that use non-hazardous secondary materials that may become CISWI facilities, tire processors, and RCRA subtitle D facilities (as EPA assessed in the "Review of Environmental Justice Impacts" [95]). The commenter stated that "EPA's data shows vividly that there are no Environmental Justice issues at any of the cement plants in its CISWI database." The commenter also argued that land disposal (or processing) sites already have environmental justice issues and that the proposed rule would make it worse by having more scrap tires diverted to waste tire piles or processors. Another commenter indicated that states are considering removing landfill bans on whole tires if this rule goes into effect, and argued that the proposed rule would cause an increase in the number of tires going to landfills or stockpiles and would have a disparate impact on adjacent communities and mentioned the risks of fires and mosquito born vectors at tire piles.

*EPA's Response:* In the evaluation regarding the use of whole scrap tires (predominantly used as a fuel in cement kilns) and whether or not they should be considered solid wastes if collected as part of an established tire collection program, we considered the environmental justice demographics and impacts that would result at cement kilns. Based on our review of the demographics at cement kilns, on average, they are located in areas with fewer minorities and less poverty than RCRA subtitle D disposal sites, processing sites, and facilities assessed to become CISWI CAA section 129 incinerators.

Whole scrap tires can be used as a non-waste fuel in cement kilns under today's rule when they were harvested from vehicles and managed under the oversight of an established tire collection program prior to being delivered to the combustion unit. Based on our most recent demographic data, we agree with the commenter that sending whole tires to cement kilns as a non-waste fuel is not expected to have a negative impact on environmental justice communities. In fact, it appears that it would have benefits since RCRA subtitle D disposal sites, processing sites, and facilities assessed to become CISWI CAA 129 incinerators (the sites that would be accepting scrap tires if not burned as a fuel in cement kilns) are more likely to be located in environmental justice communities. Thus, while this was not the primary basis on which this decision was made, the Agency believes it important that its decision would lessen the impacts on environmental justice communities.

*Comment:* EPA never explains why it believes that, in the context of a secondary material that does not need processing or perhaps needs only minimal processing to serve as a wholly bona fide fuel, that scrap tires cannot be considered sufficiently "processed" unless they are physically shredded and undergo metals removal processing. We note that whole tires that have long been buried or stacked in aging piles may need minimal processing for use in cement kilns, such as removal of excess water and dirt, mud, and debris. Whole tires from newer stacks or piles often need no physical processing whatever. EPA never explains why it thinks this much processing is necessary for tires to escape the "discard" rubric and serve as bona fide fuels in portland cement kilns. The result of this faulty logic is that beneficial reuse of significant amounts of non-hazardous secondary materials will be greatly discouraged, and there will be no health or environmental benefits (only detriments). We believe it is obvious that EPA's proposal represents a "classic case of arbitrary and capricious rulemaking."

The portland cement industry simply cannot afford to jeopardize its product by using alternate fuels that affect cement quality. EPA justifiably had a concern (reflected in the earlier RCRA subtitle C rulemaking and policy documents it cites) that unscrupulous parties seeking to avoid the expensive subtitle C cradle-to-grave regime had incentives to claim that the hazardous waste they were burning was a bona fide fuel. At that stage in RCRA subtitle C development (mid 1980s), burning of hazardous materials for bona fide energy recovery purposes was exempt. This concern simply does not apply to the situation in which non-hazardous secondary materials are being burned in fully regulated industrial furnaces such as portland cement kilns.

Ironically, EPA has long recognized that products from portland cement kilns burning hazardous waste fuel are not adversely affected in any manner. In 1995, after reviewing exhaustive data presented in a petition filed under the Toxic Substances Control Act (TSCA), EPA rejected the petitioners' request that products produced from cement

[95] EPA's "Review of Environmental Justice Impacts" that the commenter referenced, can be found in the docket for today's rule (EPA–HQ–RCRA–2008–0329–0519). Cement kilns and other combustors that use non-hazardous secondary materials were included in the CISWI database used for EPA's demographics (many of the units in the CISWI database were not regulated as incinerators).

kilns that burn hazardous waste fuel carry warning labels because EPA found there was no difference in contaminant levels (or risks) in the product. 60 FR 39169 et seq., August 1, 1995. As recently as 2007, EPA's Assistant Administrator for Solid Waste and Emergency Response (OSWER) stated in a letter to the Center for Maximum Potential Building Systems that "there is no difference in the cement from kilns burning hazardous waste compared to cement produced by kilns not burning hazardous waste."

Moreover, NSF International has reviewed data from several portland cement kilns burning hazardous waste fuel to assess whether the product from such kilns could be safely used in concrete water pipes and water storage tanks. These studies have uniformly concluded that there is no statistical difference in contaminants between clinker or products made from kilns burning hazardous waste fuel as compared to kilns using only fossil fuels.

The commenters representing cement kilns also noted that a cement kiln is not a boiler or an incinerator. One of the commenters went on to say that "in enacting CAA section 129, Congress was focused exclusively on "incinerators." Incinerators burn waste materials solely for the purposes of destruction. They do not use "ingredients," and they make no product. Moreover, in all the rulemaking and litigation that prompted this proposed rule—culminating in the *NRDC* case * * * EPA, the parties, and the Court were focused exclusively on incinerators and boilers. Like incinerators, boilers do not use "ingredients." Unlike incinerators, boilers may burn waste materials for energy recovery purposes. But the only product they make is steam, and the steam that they make never comes in contact with the fuel they burn.

A portland cement kiln is significantly different from an incinerator or a boiler in key respects. First, it is one type of "industrial furnace" which, unlike boilers and incinerators, which makes a marketable product. All materials that are placed in the kiln—including fuels—come into mutual contact in the manufacturing process. The product the kilns produce must meet strict quality standards. EPA's RCRA regulations have long recognized these key distinctions among industrial furnaces, boilers, and incinerators. The commenter referred to 40 CFR 260.10.

Despite the fact that there was absolutely no issue with portland cement kilns producing ingredients in the development of CAA section 129 or the rulemaking and litigation leading to this rulemaking, the commenter stated that portland cement kilns have been included in this proposal in a manner that could have very adverse impacts on a kilns' ability to use non-hazardous materials beneficially; the commenter went on to argue that a significant flaw in the proposal is its failure to recognize the key differences between portland cement kilns as compared to incinerators and boilers.

*EPA's Response:* These comments may express legitimate policy concerns. However, they are essentially irrelevant to the decisions that EPA is making in this rulemaking. Tires from tire dumps are clearly wastes because they have been disposed for a long time. The tires were clearly abandoned if they were left in a tire dump. EPA understands the commenter's remarks that cement kilns are not "boilers" nor were designed to be "incinerators," but cement kilns are clearly "combustors" under the CAA and the Agency needs to decide whether CAA section 112 or 129 standards would apply.

With respect to the comments regarding "processing," EPA's intention is to provide a standard for turning clearly discarded material into a non-waste. EPA acknowledges that there is no direct case on point in which a court has opined on how a material may lose its status as a waste.[96] The comment assumes all fuel is not a waste. As EPA has repeatedly stated in this preamble, a waste may be used beneficially and may, indeed, be a bona fide fuel. This is consistent with the DC Circuit's opinion in *NRDC* v. *EPA.* A combustor that burns solid waste, even for energy recovery, must be regulated under CAA 129. If the kiln is regulated under CAA 129, no processing is needed for a waste scrap tire to be burned as a bona fide fuel.

Given the statutory provisions and case law, EPA is constrained to argue that discarded materials are solid wastes and would need to be burned under CAA section 129 standards. EPA notes that environmental groups would argue that all units combusting tires must be subject to emissions standards issued under section 129 of the CAA even if the tires have been processed into a separate TDF, and the comments include policy arguments to support this contention. The point of the comment is that requiring units to meet emissions standards issued under section 129 of the CAA would discourage burning of tires as an environmentally beneficial replacement for non-renewable fuels, yet environmental groups would argue that scrap tires should nevertheless be subject to such standards. EPA's focus, however, must be on the definition of solid waste under RCRA and the comment gives the Agency no basis to determine what kind of activity would make the waste a non-waste. Whether the material is a bona fide fuel does not provide the answer to that inquiry.

EPA sees no reason based on these comments to eliminate the processing requirement for this final rule.

*Comment:* The commenters that addressed the specific level of processing for whole scrap tires disagreed with EPA on the amount of processing required before TDF should be considered a non-waste fuel. In addition, many of the commenters had different interpretations of our proposed wire removal requirements and on the term "relatively wire free" (since some incorrectly believed that the proposed standard was up to 99% or absolutely no wire). Furthermore, many of these same commenters argued that the proposed processing requirements for units that use TDF chips were unrealistic and would dramatically increase processing costs, while a few commenters cited that many processors could not even achieve the specified level of wire removal. These changes would significantly deter facilities from using TDF that they regarded as a product. In fact, a number of commenters, including some state agencies, questioned the value of requiring unnecessarily costly processing of whole scrap tires that are to be used as a fuel in units, such as cement kilns, since the wire in the scrap tires can be beneficial due to the properties of the iron oxide resulting from the tire combustion in cement kilns. Other commenters noted that the presence of steel in the whole scrap tires or TDF should be irrelevant to their waste status since the wire removed is for improvement in handling—that is, the TDF needs to have the exposed wire removed so that it is "flowable" like coal within the combustion unit, as well as any loose wire removed since it can also cause handling issues in the units, not emissions.

A few commenters claimed that TDF processed to two-inch pieces was seen as the higher end TDF product and that this should be our standard. In particular, one commenter that markets TDF as a product, "request that the EPA use the widely accepted nominal two-inch minus, 90%+ wire free standard that has been standard in the industry

[96] Although we recognize that some states have systems in place where materials lose the waste status if beneficially used according to the state's standards.

for years" since this would accurately define a product. The commenter said that "TDF meeting this 90%+ wire free standard typically has a wire content of between 2% and 8% by weight." In addition, some state agencies have been known to specify two-inch TDF as a product rather than a waste, while rough shreds used for fuel in some combustors (bigger than two inches) are seen as a waste material (not a product) by those states. The size restriction is more prevalent in specification for TDF than specifying a percentage of metal.

Other commenters argued that a product is created when tires are processed at any level that makes it "TDF" and mentioned that the ASTM describes a process that creates a "product" called TDF. Another commenter mentioned that a necessary component in the processing of shredded tires is to remove the protruding wire from the shreds and to sort the rubber pieces from the wire remnants called "free wire." The commenter said that this part of processing is typically necessary in order for it to be sold as a TDF product to boilers. The commenter went on to say that the completion of this last step can be tested by spreading out the TDF chips in a single layer and passing a very strong magnet over them to see if any free wire remains. That commenter reasoned that TDF chips that pass the magnet test and had the free wire removed should qualify as a non-waste TDF product.

*EPA's Response:* In the situation where tires are discarded in the first place or otherwise do not meet the legitimacy criteria, processing is needed before it is considered a non-waste fuel (*i.e.,* tires that are not collected from vehicles as part of an established tire collection program per § 241.3(b)(2)(i)). We disagree with those commenters who addressed the level of processing needed before TDF is considered a non-waste as these commenters are answering a different question: How much processing is necessary before whole scrap tires can be burned properly in any particular combustion unit?

However, the question that EPA needs to answer is how much processing is sufficient before whole scrap tires are considered a non-waste fuel where the scrap tires are not collected as part of a scrap tire collection program? Examples of sufficient processing for other non-hazardous secondary materials include the processing of used oil to produce on-specification used oil and the processing of construction and demolition (C&D) wood into a fuel by sorting to remove contaminants (*e.g.,* lead-painted wood, treated wood, non-wood materials), and sizing it. In all these instances, the non-hazardous secondary material is being sufficiently changed, either chemically or physically to produce a non-waste product.

Thus, while insufficiently processed discarded tires can be burned in boilers as a fuel, such TDF would still be considered a waste-derived product because the Agency does not believe that simply shredding or quartering whole tires, or removing some dirt, is adequate to produce a non-waste product for use as fuel according to today's rule (refer to the processing definition in § 241.2 Definitions). While the extent of processing that may be required may vary for different types of non-hazardous secondary materials, the Agency contends that a sufficient amount of processing must occur to produce a non-waste product from secondary materials.

One commenter mentioned, boiler operators are able to recycle the metal from the wire post-combustion (although minimal). This is after it has been cleaned of the rubber particles via the combustion process, so this iron can be recovered and recycled (not disposed in emissions). However, whether or not the metal from the wire (post-combustion) can be recycled does not go to the question of whether or not the non-hazardous secondary material has been "sufficiently processed" to produce a non-waste product.

With respect to the technical question of how much wire must be removed before the amount of processing is considered sufficient, the specific unit types that use TDF chips require different levels of metal removal for handling concerns as noted by commenters. The ASTM Standard D 6700 "Standard Practice for Use of Scrap Tire-Derived Fuel"[97] describes the process for "dewired" and has a helpful guideline on the appropriate amount of wire removal for different unit types under the topic titled "Handling Considerations Conveying, Grate and Ash." However, the ASTM standard is concerned with proper dewiring and not whether the resultant material is a waste or non-waste fuel.

In the proposed rule, EPA referred to the level of processing in varied terms ("relatively wire free," "processed to the Standard Practice for Use of Scrap Tire-Derived Fuel ASTM Standard D 6700–01," "wire removed," "steel belts removed," and "sufficiently processed"). While ASTM was not deciding whether this material would be a waste, or not, EPA in the proposal was suggesting that such material would be sufficiently processed to render the new material a commodity fuel. Thus, to be considered sufficiently processed, there has to be metal removed and, it should be at the level of wire removal that is specific to the combustion unit as mentioned above. EPA agrees with the commenter who stated that TDF that has been chipped/shredded, sorted and dewired (or at least 90%+ wire free) would be considered sufficiently processed. However, this may not be the only standard, to the extent that other unit types require different levels of metal removal.

With respect to the commenter that suggested the removal of free wire as an indicator of sufficient processing, we would agree that the removal of free wire (as described by the commenter) is a necessary component of processing scrap tires into a non-waste product for the purposes of this rule, but that alone, may not be sufficient to meet our definition of processing. It could qualify if, according to product specifications appropriate for the particular combustion unit, it is processed into TDF chips and enough wire is removed from the TDF and the loose free wire is removed (to the degree practical) appropriate to the unit.

However, we would also note, as is the case for all types of solid fuel, proper characterization of the size and composition of TDF are important factors that combustion unit operators assess to determine if the TDF is a suitable fuel for their specific combustion unit design.[98] For example, ASTM Standard D 6700, describes standard practices for using TDF as fuels, and also specifies sampling and analysis methods and procedures that apply to TDF that cover composition and fuel characterization analyses. The standards also address the size of the tire pieces and metal content in order to optimize combustion. The ASTM Standard D 6700 "Standard Practice for Use of Scrap Tire-Derived Fuel" also describes the process for "dewired" TDF and has a helpful guideline on the appropriate amount of wire removal for different unit types under the topic

[97] ASTM Standard D6700–01, 2006, "Standard Practice for Use of Scrap Tire-Derived Fuel," ASTM International, West Conshohocken, PA, 2003, DOI: 10.1520/C0033–03, *http://www.astm.org.* This standard can be obtained through the following Web site: *http://www.astm.org/Standards/D6700.htm.*

[98] With regard to the legitimacy criteria discussed in Section V.D., the heating value of scrap tires (12,000 Btu/lb to 16,000 Btu/lb) is the highest of all non-hazardous secondary materials, except used oil (17,800 Btu/lb), and higher than typical coal values. Contaminants of potential concern have been measured for both materials: The constituents are comparable.

titled "Handling Considerations Conveying, Grate and Ash." In summary, EPA considers that previously discarded tires that have been made into TDF (shredded/chipped, sized, sorted, and with a significant portion of the metal belts or wire removed, at a level appropriate for the unit), meets the definition of "sufficient processing."

Finally, as discussed above, the final rule also allows for scrap tires that have been harvested from vehicles (as part of an established tire collection program) to be used as a non-waste fuel. The question of processing into TDF or the "extent of processing" is only relevant if they are using scrap tires that have first been discarded.[99] Scrap tire processors typically enter into contracts with the end users of these products that specify that the processed tires meet certain specifications (*i.e.,* size of chips and possibly other considerations) to ensure that the product that is produced consistently meets the needs of that particular end use. Boilers, unlike cement kilns,[100] benefit from TDF that has been processed into small chips that feed in the combustion unit like coal and the reduction of metal to improve its handling and operational qualities in the combustion unit. For instance, the removal of the exposed wire around the perimeter of the tire chips makes it "flowable" like coal in the combustion unit.

EPA notes that merely harvesting tires from vehicles does not render the material a non-waste. If the tires are used in a combustor for which they are not suitable, which can be determined through the analysis of the legitimacy criteria, they would be wastes.

6. Resinated Wood Residuals

The proposed rule described resinated wood products as those generated during the manufacture of particleboard, medium density fiberboard, and hardboard and includes materials, such as board trim, sander dust, and panel trim. The proposal indicated that such resinated wood products were considered a non-waste fuel when burned in a combustion unit because this secondary material generally meets the legitimacy criteria. We acknowledged, however, that we had limited data on the level of contaminants in resinated wood products, but the data we had did generally indicate that this non-hazardous secondary material would meet the legitimacy criterion for contaminants. In order to gather additional information on which to base our decision, we requested comment and data on the contaminant levels contained in these secondary materials, as well as the appropriateness of calling them a non-waste.

*Comment:* The *American Mining Congress* v. *EPA* case states that secondary materials beneficially used within the generating industry, not within the generating plant, is part of a continuous industrial process and thus, not a solid waste. Therefore, transfer of materials within the generating industry would have to be considered a non-waste fuel.

Some commenters contend, however, that any secondary material burned for energy recovery is a solid waste, regardless of whether it remains within the control of the generator. These commenters object to allowing control by the generator to be relevant to rendering secondary material a non-waste, even if burned under the legitimacy criteria, claiming that these secondary materials are wastes. The commenter goes on to note that EPA itself admits that a secondary material could still be a waste even if it is recycled on-site or within the control of the generator and cites the court's holding in *API II.*

*EPA's Response:* EPA needs to correct some of the industry and environmental group misrepresentations of the cases on the definition of solid waste. In *AMC I,* the court was only noting that secondary materials reclaimed within a continuous process are not wastes and are not subject to EPA's jurisdiction as solid wastes. The case is actually a narrow discussion of one basic principle regarding what is not discarded. The court does not even state whether any particular material is discarded. For example, while there is a reference to used oil that could be discarded, the court in no sense was saying that all used oil is discarded. In fact, in *API II* the court specifically noted that in *AMC I* they "did not address the discard status of any of the particular materials discussed in the briefs." 216 F.3d at 56. The court freely admitted in *API II* that its "prior cases have not had to draw a line for deciding when discard has occurred," but only dealt with the extreme cases of materials that were either wastes or non-wastes. 216 F.3d at 57.

As the various definition of solid waste cases hold, the ultimate issue for deciding when most materials are discarded is whether EPA's determination complies with the arbitrary and capricious standard of the Administrative Procedure Act (APA). Sweeping formulations involving whether a process is within an "industry" is not helpful, nor is it consistent with the case law. EPA, and the courts, reject any formulation that under *AMC I* the statement that discard cannot be found in the case of immediate recycling within a continuous industrial process means ipso facto that any material transferred within an "industry," even between companies located in New York and California, is not a waste. EPA's decision on whether resinated wood is a waste (within the control of the generator or if transferred) is based on the circumstances under which the material is handled and combusted. Merely keeping material on-site will not render it a non-waste, nor will mere transfer make the material a waste.

*Comment:* Trim, sawdust, shavings, sander dust and other residual materials from producing panels and other engineered wood products containing resins have been widely used as fuels by wood product plants since the industry began in the 1950s and should, therefore, be classified as a traditional fuel. In fact, the wood product plants have been designed so as to specifically utilize these residuals that the process creates and would not be able to operate as designed without this material. The commenters argue that there are no significant contaminants in resinated wood residuals that are used as fuels. None of the constituents are among the contaminants controlled under CISWI. This fact provides sufficient justification to accept resinated fuels as traditional fuels from the standpoint of contaminants.

*EPA's Response:* We do not agree with those commenters who argue that resinated wood residuals should be considered a traditional fuel, since it can have contaminants at levels greater than traditional fuels (as discussed below). We recognize, however, that much of the resinated wood residuals are used as a product fuel, and that the plants have been designed to catch and then burn these residuals to supply energy and heat to other parts of the plant. EPA recognizes that some specific types of non-hazardous secondary materials, such as resinated wood residuals, are more like valuable

[99] Since scrap tires that are harvested from vehicles (as part of an established tire collection program) can be burned as whole tires and still be considered a non-waste fuel, the Agency does not believe it appropriate to require such tires to meet the level of processing (as codified in § 241.2). However, other scrap tires, e.g., those that are removed from tire piles would need to be processed (as codified in § 241.2) in order to be burned as a non-waste fuel.

[100] We note that most cement kilns use whole tires as fuels, as opposed to TDF chips, because their process does not require the TDF to be in the form of small chips to use it as a fuel, and does not require removal of the metal (since they use the metal as an ingredient).

commodities than solid wastes. Resinated wood is a secondary material that, upon examination, is not discarded when used on-site or transferred off-site to a different company. Thus, EPA would consider resinated wood residuals used as a fuel in a combustion unit as not being a solid waste, provided these materials satisfy the specified legitimacy criteria for fuels.

*Comment:* Commenters argued that resinated wood residuals are often used off-site in a manner that does not constitute discard and the secondary materials should not be classified as solid waste when transferred between facilities or companies. As much as 6% of resinated wood residuals are sold into the fuel market and are routinely transferred between either intra- or inter-company facilities and used as either "furnish" (*i.e.,* raw materials) or fuel at the receiving facilities. Inter-company transfers are typically managed through buy-sell contracts that likely do not specify how the materials will be used because the receiving facility likely mixes the purchased material with self-generated materials. Those combined materials are either used as furnish or fuel in accordance with the needs of the facility at the time. Because these resinated materials are bought and sold and used in a manner—either as furnish or fuel—similar to how self-generated resinated materials are used, this transaction does not constitute discard and the materials should not be classified as solid waste simply due to the transfer between facilities or between companies.

*EPA's Response:* We agree that transferring secondary materials between companies or facilities does not necessarily mean that the material has been discarded. As resinated wood residuals transferred off-site are utilized in the same manner as self-generated resinated wood residuals (*i.e.,* contained in the same bins as furnish materials used in the product, transferred via conveyors or ducts), which the plants are specifically designed to burn as a fuel, we agree that this does not constitute discard. Thus, we have determined that resinated wood residuals are not solid waste when transferred off-site for use as fuel, provided the material meets the legitimacy criteria and has not been otherwise deemed to be discarded. We have codified this concept under 40 CFR 241.3(b)(2)(ii).

*Comment:* Processing should not be necessary when utilizing the material on-site or off-site to be considered a non-waste fuel. However, resinated wood residuals are generally chipped or hogged to reduce its size before burning. This should be sufficient to meet the processing requirement.

*EPA's Response:* We generally agree with the commenters that resinated wood residuals do not need to be processed, but if processed, such as by chipping or hogging, this level of processing would not affect the status of this material.

*Comment:* Resinated wood residuals have contaminants that are comparable to traditional fuels. The list of resins and adhesives include constituent chemicals that are on the hazardous air pollutant list. Notably, phenol, formaldehyde, methylene di-isocyanate and epichlorohydrine are HAP. However, these individual components react completely within the resin curing process, leaving, in the worst case, only trace amounts of the HAP. With the exception of formaldehyde, undetectable or extremely low levels of these HAP remain behind after the resin/adhesive cure. As noted in the comments referenced in the proposal, miniscule amounts of formaldehyde remain in some resinated wood residuals, less than 0.02%, a number that is expected to fall as the California Air Resource Board (CARB) Composite Wood Airborne Toxic Control Measure (ATCM) is implemented nationwide, per the new Public Law 111–199 (which establishes consistent standards for wood products across the country). Further, since formaldehyde is found in natural wood, it should not be considered a contaminant in resinated wood.

*EPA's Response:* The proposed rule acknowledged a general lack of data regarding the levels of formaldehyde in these non-hazardous secondary materials and specifically requested data on this issue. While we received only limited contaminant information during the comment period, the data we do have suggests that the levels of formaldehyde in these resinated wood residuals is at non-detect levels. The existing data we have is that resinated wood residuals contain "free" formaldehyde at levels less than 0.02 percent (or 200 ppm). In addition, new rules, as mandated by the CARB Composite Wood ATCM, per new Public Law 111–199, will reduce the formaldehyde levels even further to levels that are comparable to unadulterated wood. We also have limited data on the formaldehyde levels in traditional fuels. Specifically, we have limited data that natural wood has between 0.6 and 8.5 ppm of formaldehyde,[101] but we have no data on formaldehyde levels in other traditional fuels, such as coal, oil, and natural gas. We do know, however, that organic materials produce formaldehyde. For example, studies have shown that formaldehyde is generated from coal piles.[102]

Thus, considering the fact that new rules will reduce the amount of formaldehyde to levels comparable to unadulterated wood, we have concluded that resinated wood residuals when burned as a fuel by the generator or outside the control of the generator and not discarded should be considered a non-waste fuel. However, as we have noted elsewhere, the generator of these secondary materials would still need to demonstrate that such residuals meet the legitimacy criteria. Thus, they would need to show that the levels of formaldehyde, as well as other possible contaminants, in the resinated wood residuals are at levels comparable to those found in traditional fuels, which in this case would be natural wood. We would note that we would not consider levels of formaldehyde of 200 ppm or slightly less to be comparable since the levels in unadulterated wood are at least two orders of magnitude lower. The levels would need to be lower to be considered comparable to those found in natural wood.

*Comment:* The comments indicated that resinated wood residuals have about 5 percent moisture content, with heating values typically between 8,500–9,000 Btu/lb (as fired). This fuel value is equal to or better than unadulterated wood, which has higher moisture content.

The comments also argue that resinated wood residuals are managed as a commodity as they are typically pneumatically transferred through ducts, stored temporarily in a fuel silo, and then utilized in boilers to provide heat to hot presses and dryers. In fact, wood product plants have been designed so as to specifically utilize

[101] Weigl, M., R. Wimmer, E. Sykacek, and M. Steinwender, 2009. "Wood-borne formaldehyde varying with species, wood grade, and cambial age," Forest Products Journal 59(1/2) 88–92.

Meyer, B. and C. Boehme, 1997. "Formaldehyde Emission from Solid Wood," Forest Products Journal 47(5) 45–48.

Killiam, B. "Background Formaldehyde Emissions for Solid Wood," Temple-Inland Forest Products Corporation, Diboll, TX.

[102] Cohen, H. and U. Green, 2009. "Oxidative decomposition of formaldehyde catalyzed by bituminous coal," Energy Fuels 23(6) 3078–3082. Nehemia, V., S. Davidi, and H. Cohen, 1999. "Emission of hydrogen gas from weathered steam coal piles via formaldehyde as a precursor: I. Oxidative decomposition of formaldehyde catalyzed by coal—batch reactor studies," Fuel, 78(7) 775–780.

Nehemia, V., 1997. "Oxidative decomposition of formaldehyde catalyzed by coal," Fuel and Energy Abstracts 38(6) p. 386.

these residuals that the process creates and would not be able to operate as designed without this material.

*EPA's Response:* The heating value range presented (8,500–9,000 Btu/lb) indicates that resinated wood residuals meet the meaningful heating value criterion as it is greater than the heating value of unadulterated wood. We also agree with the commenters that resinated wood residuals meet the legitimacy criterion for being managed as a valuable commodity since these residuals are managed as a primary fuel for wood products manufacturers. We acknowledge that wood products manufacturing plants were specifically designed to burn these resinated wood residuals to power the facility. In addition, wood product manufacturers have designed their plants to use their residuals (including placing the material in silos and transferring the material via conveyor belts and ducts) that supply the process both as a raw material and as a fuel, indicating that the resinated wood residuals are managed as a valuable commodity.

*Comment:* Commenters referred to studies that show that the combustion of resinated wood residuals does not produce adverse air emissions. Specifically, EPA's "Wood Products in the Waste Stream—Characterization and Combustion Emissions" (1996) describes studies that were conducted to determine if various types of wood produce more non-criteria air pollutants than typical wood sources. Air emissions and fuel materials were sampled at six different processors and boilers. Fuel materials that were used at the boilers were a mixture of wood produced at construction and demolition sites at the time: Unadulterated lumber, treated wood (including CCA-treated wood), resinated wood residuals, and painted wood (including lead-based paint). The study concludes that organic compounds that are emitted include aldehydes, benzene, phenol, and polynuclear aromatic hydrocarbons (PAH). These compounds are formed as products of incomplete combustion and did not appear to be a function of the woods composition or source. Instead, they appear to be an indicator of combustion inefficiency. "Good" combustion conditions appear to minimize organic emissions. Metals usually found in wood combustor particulate include As, Cr, Cu, Pb, Zn, Al, Ti, Fe, and Mg. Metals were found to be higher in samples taken, although this could be a result of the inclusion of treated wood in the samples combusted. Metals control efficiency appears to be roughly equivalent to total particulate control efficiency. Chlorinated organic compounds, such as dioxins, furans, polychlorinated biphenyls, chlorinated phenols, and chlor-benzenes were measured at extremely low concentrations or were reported to be less than minimum detection limits.

One commenter argued that, since resins contain only carbon, hydrogen, oxygen, and nitrogen, the wood and its adhesives will convert to carbon dioxide, water, and nitrogen oxides (which would be produced even if nitrogen is not present in the fuel, since nitrogen represents approximately 80% of air) under normal conditions that normally occur in industrial wood combustion units. Thus, the products of combustion from wood are the same from the adhesives. Adhesives are expected to be more combustible than wood, due to their simpler structure and lower molecular weights. Conditions which assure the complete combustion of wood are adequate to assure the complete combustion of these adhesives. Although it is possible that different types of compounds could be produced from the adhesives than from wood and that more of certain types of compounds might be produced from one fuel or another, there does not appear to be any scientific basis for a presumption that emissions from incompletely combusted adhesives are more harmful than emissions from incompletely combusted wood. In fact, the results of toxicity studies commissioned by National Forest Products Association in response to New York State law which requires manufacturers to provide data on the toxicity of smoke from their products indicate that smoke from glued wood products is no more toxic than wood smoke. There are a few halogen-containing synthetic polymers, such as polytetrafluorethylene, which can produce more hazardous fumes, but they are not normally used in wood products.

The commenter also submitted data on HCl and $NO_X$ emissions from burning sander dust that was not yet published. Emissions from five combustion systems that burned a combination of sander dust and hog fuel were sampled. One test was run only using hog fuel (which consisted primarily of bark). Results are presented in Table 3. The commenter argued that these results prove that HCl and $NO_X$ emissions from the combustion of resinated wood residuals are comparable to the combustion of hog fuel alone. In fact, the three samples that contained the lowest percentages of sander dust (0%, 15%, and 25%) produced the greatest percentages of chloride in the fuel emitted as HCl and nitrogen in the fuel that was subsequently emitted as $NO_X$.

TABLE 3—EMISSIONS DATA FROM SIX COMBUSTORS THAT BURNED HOG FUEL OR A COMBINATION OF HOG FUEL AND SANDER DUST

| Sample number | 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|---|
| Fuel mixture, %Hog fuel/Sander dust | 100/0 | 75/25 | 85/15 | 60/40 | 60/40 | 60/40 |
| Hog Fuel content (%, dry basis): | | | | | | |
| Chloride | 0.02 | 0.01 | 0.01 | 0.02 | 0.02 | 0.02 |
| Nitrogen | 0.58 | 0.56 | 0.56 | 0.51 | 0.58 | 0.56 |
| Sulfur | 0.02 | 0.04 | 0.04 | 0.04 | 0.05 | 0.03 |
| Sander dust content (%, dry basis): | | | | | | |
| Chloride | ..... | 0.18 | 0.18 | 0.16 | 0.15 | 0.15 |
| Nitrogen | ..... | 3.7 | 3.7 | 3.2 | 3.4 | 3.8 |
| Sulfur | ..... | 0.05 | 0.05 | 0.06 | 0.04 | 0.03 |
| Total Fuel Content (lb/hr): | | | | | | |
| Chloride | 1.7 | 3.3 | 2.1 | 6.0 | 6.4 | 5.6 |
| Nitrogen | 49 | 84 | 60 | 136 | 151 | 143 |
| HCl | 0.17 | 0.19 | 0.08 | 0.09 | 0.11 | 0.16 |
| $NO_X$ | 26 | 53 | 31 | 45 | 48 | 53 |
| Emissions (lb/MMBtu): | | | | | | |
| HCl | 0.0024 | 0.0038 | 0.0017 | 0.0012 | 0.0015 | 0.0023 |
| $NO_X$ | 0.38 | 1.08 | 0.69 | 0.62 | 0.64 | 0.75 |
| % of Cl in Fuel Emitted as HCl | 9.6 | 5.5 | 3.5 | 1.4 | 1.7 | 2.8 |
| % of N in Fuel Emitted as $NO_X$ | 16.1 | 19.3 | 15.7 | 10.1 | 9.7 | 11.2 |

*EPA's Response:* We recognize that the studies have shown that there are decreased HAP emissions from burning resinated wood residuals. As we have stated previously, however, the criterion or test in determining the legitimacy criterion is based on the level of contaminants in the secondary material itself, and not by comparing the differences in emissions. We believe that in order for a non-hazardous secondary material to be considered a non-waste fuel, it must be similar in composition, whereas comparing the emissions profiles between combustion units that burn traditional fuels and non-hazardous secondary materials only tells one how well the combustion unit is operating, not what the material is that is being burned. Thus, while the Agency recognizes that such emissions data can be useful in determining whether or not burning such material presents a risk to human health or the environment, we believe it says nothing in terms of whether or not the non-hazardous secondary material is a legitimate non-waste fuel (see also Section V.D.3 discussion on legitimacy criteria).

In response to some of the specific comments made, we would note that none of the studies or data provided information on formaldehyde emissions, the HAP that we identified that we were most concerned with in the proposal.[103] While the EPA study did state that organics were not detected above typical wood fuel, it is not possible to ascertain what percentage of the material that was burned was represented by resinated wood residuals. Thus, we do not know how much resinated wood materials were in the samples that were tested and how it correlates to the emissions data.

We also acknowledge that resins are made from H, N, C, and O. However, our concern rests with the amount of formaldehyde (which is a HAP and also is made of H, C, and O) that is generated in the stack. While formaldehyde may be generated as a product of incomplete combustion, it may also be emitted from the stack if it is present in the fuel material and is not combusted at all. In other words, if some of the formaldehyde escapes combustion while in the fuel chamber and is emitted in the stack, more formaldehyde is likely to escape. A unit combusting 10 tons of formaldehyde is likely to result in more formaldehyde emissions than a unit combusting one ton of formaldehyde simply due to the fact that there is more formaldehyde in the fuel. Therefore, none of the information provided addresses our concern regarding formaldehyde emissions. However, given that Public Law 111–199 will decrease formaldehyde levels in the resinated wood residuals, the combustion of resinated wood residuals should not increase the amount of formaldehyde that is emitted.

7. Used Oil

In the ANPRM, EPA had stated that off-specification (or "off-spec") used oil that is collected from repair shops is generally thought to be originally discarded, but that on-specification (or "on-spec") used oil was considered to be a product fuel, not a waste, because it meets the fuel specification requirements of 40 CFR 279.11.[104] However, between the ANPRM and the proposal, EPA modified its view of on-spec used oil and identified it as a traditional fuel because the Agency had decided that the on-spec used oil is similar in composition to virgin fuel oil and has been historically managed as a valuable fuel product rather than as a waste.[105]

While EPA considers on-spec used oil to be an alternative fuel and thus, within our definition of traditional fuel (*see* Section VII.A), the Agency finds that the rationale in the ANPRM also provides a valid reason for considering on-spec used oil to be a legitimate product fuel and not a solid waste. The proposal also referred to the provisions of 40 CFR Part 279 that allows off-specification used oil to be processed into on-specification used oil.[106] Used oil may be rendered on-specification, therefore, either by being generated that way or by being processed under existing EPA regulations. These circumstances are not changed by EPA's issuing today's rule.

On the other hand, based on the information received and the record established for this rulemaking, we still consider off-spec used oil to be a solid waste, as off-spec used oil contains contaminants at levels that are not comparable to those in traditional fuels. Under the existing used oil regulations promulgated under RCRA, off-spec used oil can only be used in limited devices, as identified in 40 CFR 279.61, including small oil-fired space heaters provided the burner meets the provisions of 40 CFR 279.23.

EPA reiterates that the determination as to the waste status of used oil does not reopen the regulations in Part 279. Those regulations remain in place. This rule considers the waste status for purposes of CAA sections 112 and 129 based on the existing regulations. Further, EPA is specifically clarifying in this final rule that used oil combusted in an oil-fired space heater that meets the provisions of 40 CFR 279.23 need not be tested to establish whether or not such oil is on or off-spec. This includes used oil generated by small facilities such as auto repair shops and machine shops that have such units, and used oil-generated by homeowners who change their own oil (referred to as "do-it-yourself" or "DIY" oil) that are burned in such units. This is because the CISWI regulations promulgated elsewhere in the **Federal Register** today do not establish emissions limits for such units, and therefore the concerns of the commenters that such units would have to comply with CAA Section 129 standards have been addressed for this population of combustion units.

*Comment:* Many argued that all used oil is a traditional fuel and should not be considered a solid waste regardless of its chemical composition, as it is treated as a valuable product no different than virgin fuel oil. Thus, some commenters agreed with EPA that on-spec used oil is a traditional fuel, but disagreed with the Agency's determination that off-spec used oil is a solid waste.

Other commenters believe that that used oil, both on- and off-spec, falls within the "ordinary everyday sense" of discarded materials whether they are burned or not and that all used oil should be classified as a solid waste. Indeed, EPA does not identify any situation in which these secondary materials are not wastes, except when they are burned for energy recovery. Thus, EPA is essentially claiming that non-hazardous secondary materials, including used oil, which would otherwise indisputably be wastes become non-wastes solely because they can be burned with energy recovery. Neither RCRA nor any of the case law interpreting RCRA lends the slightest support to that notion.

*EPA's Response:* We disagree that off-spec used oil should be considered a traditional fuel, or even a non-waste fuel, since as we have discussed elsewhere in the preamble, such used oil contains contaminants at levels that are not comparable to (or lower than) in traditional virgin refined fuel oil. In fact, off-spec used oil may contain contaminants at levels that are significantly higher than those in traditional virgin refined fuel oil. On the other hand, used oil that has been determined to be on-spec contains contaminants at levels below the maximum concentration limits established in the standards, levels that

[103] 75 FR 31862.

[104] *See* 74 FR at 58.

[105] *See* 75 FR 31855, 31861, 31864.

[106] 75 FR 31865, 31877.

EPA considers to be comparable to (or less than) those in traditional virgin refined fuel oil.[107] In accordance with 40 CFR part 279, once used oil is determined to be on-spec, it is no longer regulated under the used oil management standards.[108]

We also disagree that we are defining the use of used oil as fuel oil as the only situation where used oil is not a solid waste. RCRA is silent on the issue of whether or not used oil is or is not a solid waste. This rulemaking effort is the first to determine in which situations used oil would be considered a solid waste. Additionally, 40 CFR part 279 puts no restrictions on the use of on-spec used oil once it has been determined to be on-spec, which indicates that the Agency has historically viewed this material as a commodity and not a waste. We are also simply not opining on other situations where used oil is used beyond its use as fuel as it does not matter for federal law. States may make their own decisions on whether other uses are solid wastes.

*Comment:* Industry commenters argue that off-specification used oil should not be considered a solid waste for a number of reasons relating to the statute and EPA regulations, as well as policy preferences. (We elaborate and respond to each of the comments separately, below. The comments also refer to on-specification used oil in much of the argument, but we have dealt with on-specification used oil above. Thus, the comments and responses below only deal with off-specification used oil issues.)

*Comment:* Section 3014 of RCRA did not classify used oil as a waste and instead established a separate regulatory program for used oil. This section provides EPA with authority to regulate used oil that is recycled, independent of any determination whether or not used oil is a waste. Moreover, RCRA section 1004(37) defines used oil to include "recycled oil" that is "burned." Consistent with this provision, the used oil regulations in 40 CFR part 279 state "EPA presumes that used oil is to be recycled unless a used oil handler disposes of used oil, or sends used oil for disposal." 40 CFR 279.10(a). The commenters claim that these provisions mean that "disposal" is separate from "burning" because "disposal" must be separate from "recycling." Thus, "recycling" is separate from "solid waste" because the two terms are mutually exclusive.

In addition, the 40 CFR part 279 regulations already define what is legitimate used oil recycling under section 3014 of RCRA, which includes recycling of off-specification used oil with appropriate environmental safeguards. EPA cannot now reverse this determination without a reasoned analysis.

Another provision of EPA's hazardous waste regulations, 40 CFR section 261.33, supports this position with respect to whether off-specification used oil is a solid waste. Under this provision, commercial chemical products and intermediates and off-specification variants listed as hazardous wastes in 40 CFR 261.33, as well as some other materials not relevant here, are solid wastes when burned for energy recovery unless the commercial chemicals are themselves fuels. Commercial chemicals that are themselves fuels are not wastes when burned for energy recovery. According to the comments, even off-specification variants of the commercial chemical products may be burned as fuels and not be considered solid waste. See 40 CFR 261.33(a) and (b); 40 CFR 261.2(c)(2)(B)(ii). The argument is that off-specification used oil should also be treated as a non-waste when burned for energy recovery. That is, used oil, even if off-specification, should be considered a product and not a waste under the rationale that used oil is a commercial chemical product. Further, EPA should not treat off-specification potentially hazardous wastes different from off-specification non-hazardous wastes.

*EPA's Response:* EPA disagrees that this analysis of the statute and regulations shows that off-specification used oil is not a solid waste. The Agency agrees that section 3014 of RCRA does not classify used oil as either a waste or a commodity. However, section 1004(37), also, does not define "recycled oil" as either a waste or a commodity. As EPA has explained elsewhere in this preamble, the recycling of secondary materials, per se, does not mean that such materials are either wastes or not. Wastes may have value and may be recycled, but they are still wastes. Used oil may be recycled by being "burned," as provided under 1004(37), or may be recycled in any number of other ways. The mere fact that the secondary material is recycled is not dispositive for determining whether it is a waste. Thus, under the statute, contrary to the commenter's view, "recycling" and "solid waste" are not mutually exclusive. This means that EPA must decide whether the secondary material is a waste based on the definition of solid waste in RCRA 1004(27) by deciding whether material is "discarded" in the plain meaning of the word.

Similarly, part 279 does not provide that the terms, "recycling" and "solid waste," are mutually exclusive. Section 279.10(a) does distinguish between materials that are clearly "disposed of" by, for example, being thrown into a landfill, but makes no determination as to whether recycled secondary material is "discarded" in any other sense. Both *ILCO* and O*wen Steel,* for example, provide examples of recycling of wastes. As EPA continues to emphasize, wastes may be recycled even by being burned for energy recovery, but they are still wastes.

As mentioned above, based on the information received and the record established for this rulemaking, we have concluded that off-spec used oil does not meet the legitimacy criteria. EPA has determined that off-specification used oil is a solid waste when burned for energy recovery because it has greater contaminant levels than fuel oils and its markets are limited due to this contamination. In particular, 40 CFR part 279 restricts the burning of off-specification used oil to industrial furnaces, industrial boilers, utility boilers, certain used oil-fired space heaters, and hazardous waste incinerators and specifically excludes non-industrial boilers, such as those located in apartment and office buildings, schools, and hospitals. For a more detailed discussion of off-spec used oil, see 75 FR 31865. On-specification used oil, on the other hand, is not a waste because it has contaminant concentrations similar to fuel oils. Due to this, 40 CFR part 279 does not restrict where on-specification used oil can be burned. The definitions cited by the commenters in the statute and regulations do not affect these determinations.

Section 261.33, also, does not affect EPA's interpretation of the waste status of used oil. That provision deals with hazardous wastes and EPA has repeatedly stated that it is not reopening its RCRA subtitle C regulations for comment. In any event, however, section 261.33 provides that chemicals manufactured as a fuel may be burned for energy recovery. It does not apply to secondary materials that may later be used as fuels when their original use was different.

[107] *See* Used Oil Final Rule, 50 FR 49181 (November 29, 1985).

[108] Once used oil is claimed to be on-spec and the marketer complies with the requirements for analysis and record retention, notification, and record tracking shipment to on-specification burners, it is no longer subject to other management standards. We note that today's rule does not change any of the regulations in place that regulate on-spec used oil.

Furthermore, EPA is not making any changes to 40 CFR part 279 by virtue of this rule. The Agency is not reversing itself on any part of 40 CFR part 279. Also, 40 CFR part 279 makes no determination regarding the nature of the CAA regulations for any facilities that burn used oil and EPA is not amending 40 CFR part 279 to state whether any used oil is a waste or not. Based on the current provisions of 40 CFR part 279, it is entirely reasonable for the Agency to find that on-specification used oil is not a waste, while off-specification used oil is a waste. Also, we would note that off-spec used oil may still be burned in the same types of facilities provided in 40 CFR part 279, but the CAA must determine how they are to be controlled based on the fact that the off-spec used oil is a waste.

*Comment:* If EPA classifies burning off-specification used oil as a waste, it will no longer be covered by the Part 279 Used Oil Management Standards. As EPA noted when it promulgated the Part 279 Used Oil Management Standards, section 3014 only authorizes the regulation of oil that is destined for recycling, not oil that is "discarded."

*EPA's Response:* EPA disagrees with this comment. As noted above, EPA is not changing the used oil regulations and off-spec used oil burned as a waste would still be subject to 40 CFR part 279. The commenter is conflating the clear disposal of used oil—throwing it in a landfill, for example—with the concept of "discard." "Discard" is not used in 40 CFR part 279 and "disposal" is not a congruent term to "discard." That is, the regulations at 40 CFR part 279 do not discuss or address whether used oil has been discarded; rather the requirements ensure that used oil that is recycled is done so in a manner that protects human health and the environment.

Also, as noted repeatedly in the rulemaking record, wastes may be recycled as a fuel, but they would still be wastes and would be discarded. The determination in this rule that off-spec used oil is a waste only means that the facilities that burn it are burning it as a waste and they will be subject to the appropriate CAA authorities. EPA has not previously opined as to the consequences under the CAA of the various facilities that burn used oil.

*Comment:* If EPA fails to classify off-specification used oil as a product, it will be in violation of the Congressional mandate to promulgate regulations that "do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment." 42 U.S.C. 6935(a).

*EPA's Response:* EPA disagrees with this comment. The Agency is constrained by the provisions of RCRA that define solid waste as material that is discarded. Furthermore, we feel the definitions established in this rulemaking in fact do not discourage the recovery or recycling of used oil. For example, EPA is specifically clarifying in this final rule that used oil combusted in an oil-fired space heater that meets the provisions of 40 CFR 279.23 need not be tested to establish whether or not such oil is on or off-spec. This includes used oil generated by small facilities such as auto repair shops and machine shops that have such units, and used oil-generated by homeowners who change their own oil (referred to as "do-it-yourself" or "DIY" oil) that are burned in such units. This is because the CISWI regulations promulgated elsewhere in the **Federal Register** today do not establish emissions limits for such units, and therefore the concerns of the commenters that such units would have to comply with CAA Section 129 standards have been addressed for this population of combustion units.

*Comment:* Commenters argued that contaminant concentrations found in "off-spec used oil" is comparable to traditional fuels. While commenters submitted studies that looked at both on-spec and off-spec used oil to support this assertion, Table 4 only summarizes data presented in the comments on the contaminant levels in off-spec used oil as compared to fuel oil and coal. In U.S. Study 1, 55 samples were collected "throughout the USA" from facilities that combust used oil in space heaters and/or small boilers. Two of the 55 samples were off-spec; one was off-spec for total halogens and the other was off-spec for cadmium. The researchers identified the off-spec used oil for total halogens was an industrial oil that contains non-hazardous chlorinated paraffin and the other was from a military operation. Table 4 presents the data on the two samples that were off-spec. In the U.S. Study 2, researchers looked at a database of used oil samples maintained by a national commercial laboratory. The database contained over 3,500 used oil samples from the U.S. and other countries on which over 17,000 analyses were performed from 2008 to present. Between 24 and 53 samples in this dataset exceed the specification for one of the contaminants—specifically for total halogens and chromium. The researchers speculated that the high levels of halogens were due to non-hazardous chlorinated paraffin which is used (added to the oil by lubricant manufacturers) in industrial oils designed to encounter high pressure. The researchers did not speculate on the reasons for the high levels of chromium. Table 4 presents the data on the off-spec samples, only. In the Canadian study, 230 samples of used oil were collected from various businesses in Ontario, Canada between 2003 and 2010. Of those samples, four were off-spec for arsenic, but not by significant amounts. The commenters did not speculate on the reasons for the high levels of arsenic. Table 4 presents the results of the analysis of the four off-spec samples.

TABLE 4—CONTAMINANT CONCENTRATIONS IN OFF-SPEC USED OIL AND TRADITIONAL FUELS

| Material | U.S. study 1 [109] | U.S. study 2 [110] | Canadian study [111] | Fuel oil No. 1,2,4,6 [112] | Coal [113] |
|---|---|---|---|---|---|
| # Samples | 2 | 24–53 | 4 | Unknown | Unknown. |
| Year | 2010 | 2010 | 2003–2010 | Unknown | Unknown. |
| Containment Concentrations: | | | | | |
| Total Halogens (ppm): | | | | | |
| Minimum | 2,700 | NR | 42.2 | <500 | 13,140 |
| Maximum | 6,170 | NR | 151.0 | | |
| Median | 4,435 | 6,642 | 80.5 | | |
| Average | 4,435 | 9,409 | 88.6 | | |
| As (ppm): | | | | | |
| Minimum | <1.0 | NR | 5.1 | <2.3 | 1.0—120 |

TABLE 4—CONTAMINANT CONCENTRATIONS IN OFF-SPEC USED OIL AND TRADITIONAL FUELS—Continued

| Material | U.S. study 1 [109] | U.S. study 2 [110] | Canadian study [111] | Fuel oil No. 1,2,4,6 [112] | Coal [113] |
|---|---|---|---|---|---|
| Maximum | <1.0 | NR | 6.7 | | |
| Median | <1.0 | <1.0 | 6.1 | | |
| Average | <1.0 | 1.95 | 6.0 | | |
| Cd (ppm): | | | | | |
| Minimum | 0.30 | NR | <0.92 | <1.2 | 0.2—5.0 |
| Maximum | 2.60 | NR | <1 | | |
| Median | 1.45 | 0.13 | 0.97 | | |
| Average | 1.45 | 0.69 | 0.97 | | |
| CR (ppm): | | | | | |
| Minimum | <4.0 | NR | <1.2 | <2.3 | 1.0—90 |
| Maximum | <4.0 | NR | 2.2 | | |
| Median | <4.0 | 16.0 | 2.0 | | |
| Average | <4.0 | 20.9 | 2.0 | | |
| Pb (ppm): | | | | | |
| Minimum | 14 | NR | <4.6 | 7–57 | 0.5–0.9 |
| Maximum | 15 | NR | 17.0 | | |
| Median | 15 | 11.0 | 5.6 | | |
| Average | 15 | 35.2 | 8.2 | | |

NR = Not Reported.

*EPA's Response:* While data was submitted regarding higher levels of contaminants in coal than in off-spec used oil, coal is not an appropriate comparison for used oil since some combustion units that burn used oil can alternatively only burn fuel oil and not coal (such as space heaters). Thus, used oil should be compared to fuel oil. The specifications promulgated under 40 CFR 279.11 were developed by looking at contaminants in fuel oil and the risks posed by those contaminants. The data submitted states that the average total halogen content of off-spec used oil from one study is 9,409 ppm (with the on-spec concentration of 4,000 ppm maximum). Also, off-spec used oil contains as much as 21 ppm of Cr, on average, (with the on-spec concentration of 10 ppm maximum). Thus, off-spec used oil does not meet the legitimacy criterion for contaminants.

When EPA created the specification levels set in 40 CFR 279.11, it identified those levels as being comparable to fuel oils. EPA maintains that these levels are appropriate standards to measure what should and should not be burned in CAA section 112 and 129 units. Thus, off-spec used oil (those oils that do not meet the specification levels set in 40 CFR 279.11) is deemed to have more contaminants than fuel oils produced for burning and, therefore, are a solid waste.

*Comment:* EPA is ignoring the fact that the level of contaminants in a secondary material is not dispositive of whether or not a secondary material is a waste. It is merely an indicator of whether or not EPA should look more closely at the recycling activity when making the waste determination. Levels of contaminants only insignificantly higher than those found in traditional fuels hardly imply a purpose of disposal, assuming the secondary material being combusted is otherwise a valuable fuel. Only when a material contains contaminants at significantly elevated levels does it begin to become reasonable to presume that there may be an intention to discard.

*EPA's Response:* We agree that contaminant levels are an indicator of waste activity and we have investigated the case of off-spec used oil to fully assess if its use in a combustion unit is truly a waste activity. As a result of our investigation, it is clear from the data in Table 4 that off-spec used oil does not contain comparable levels of contaminants to fuel oils.

*Comment:* In the context of determining whether a hazardous secondary material is a solid waste, EPA recognizes that legitimate recycling can occur even if the material has higher levels of toxics than virgin materials. To show this, the comment cites a discussion by the Agency in an earlier rule in which foundry sands are reused for mold making in a facility's sand loop. The comment argues that it is relevant that the sands used to make the molds may have significantly higher concentrations of hazardous constituents than virgin sand. However, because the sand is part of an industrial process where there is little chance of the hazardous constituents being released into the environment or causing damage to human health and the environment, these levels would not affect the legitimacy of the recycling process.

*EPA's Response:* EPA disagrees with this comment. In the first place, the Agency is not reopening its hazardous waste regulation. EPA's identification of the legitimacy criteria is based on the record for today's action, and does not address hazardous waste. In any event, the discussion of foundry sand contamination, even though it would be a hazardous waste without application of the legitimacy criteria for that rule, presents what appears to be a vastly different recycling situation. In this rule, combustion will result in releases to the air. This is why the rule calls for restrictions on burning. The foundry sand example is a closed loop system and is not implicated by contamination problems that releases lead to the atmosphere. We would also note that in a March 28, 2001 letter from Elizabeth Cotsworth, then Director of the Office of Solid Waste and Eric Schaeffer, then Director of the Office of Regulatory Enforcement to Amy Blankenbiller of the American Foundry Society, we also discussed the use of foundry sand as part of the sand loop for mold-making being part of a continuous industrial

[109] *Source:* EPA–HQ–RCRA–2008–0329–0799.2

[110] *Source:* EPA–HQ–RCRA–2008–0329–1273.1 Attachment B

[111] *Source:* EPA–HQ–RCRA–2008–0329–0799.4

[112] *Source:* EPA–HQ–RCRA–2008–0329–0799.2, EPA–HQ–RCRA–2008–0329–1273.1, Attachment B

[113] *Ibid.*

process.[114] However, the letter also made clear that the letter did not address the thermal processing of sand, which would be a combustion unit, and would be more equivalent to a scenario that is addressed in today's final rule.

*Comment:* Commenters argued that processing of off-spec used oil is contrary to the goals of energy efficiency and wise resource utilization. They argued that the rule should continue to allow/follow the rules set forth in 40 CFR 279.11 as it pertains to used oil as a viable and not discarded fuel. That is, if off-spec used oil is blended with virgin oil or on-spec used oil to meet the 40 CFR part 279 used oil specs, the resulting oil should be considered a legitimate fuel product.

Other commenters argued, however, that when these materials are distilled into fuel, they are still wastes, regardless if they have been blended or processed to obtain an on-spec material. Wastes are always wastes and their status cannot be changed through simple processing.

*EPA's Response:* Whether or not processing of used oil is contrary to the goals of energy efficiency, off-spec used oil contains more contaminants than traditional fuels, and thus, is not a traditional fuel. In addition, as we have stated previously, the regulations at 40 CFR part 279 do not discuss or address whether used oil has been discarded, as commenters have claimed, but rather ensure that used oil that is recycled is conducted in a manner that protects human health and the environment. To that end, we encourage, and the RCRA used oil regulations currently allow, the processing of off-spec oil to create on-spec used oil as per 40 CFR 279.50, which states that processing "includes, but is not limited to: blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining." There is nothing in today's rule that would change this requirement.

We also disagree with commenters that processing of off-spec used oil into on-spec used oil still renders it a waste. EPA's regulations at 40 CFR 279.11 state that, once oil is determined to be on-specification in accordance with the regulations in Part 279, the used oil regulations do not apply to the material. On-specification used oil is for all intents and purposes the same as oil refined as a product fuel in the first instance and the Agency is not reopening its 40 CFR part 279 regulations.

*Comment:* Commenters argued that used oil, particularly from automobiles, is on-specification and facilities that burn automobile oil should be allowed to burn them under CAA section 112, along with other on-spec used oil. Comments base this determination on the elimination of leaded gasoline. Commenters also supplied studies to support this assertion.[115]

*EPA's Response:* The data provided in the comments indicates that a very small portion of used oil is off-spec. Assuming the data is representative of used oil, most used oil will be an alternative fuel (within the definition of a traditional fuel). This does not allow us to make a broad classification that, because only a small portion of used oil is off-spec, used oil can be generally classified as on-spec. On the other hand, the data in the studies submitted by commenters indicate that used oil obtained from small, private automobiles serviced by DIYers and auto repair shops will be on-spec, which would not be a solid waste. In addition, as we describe elsewhere in today's preamble, persons can submit a non-waste determination petition if they believe that their used oil is not a waste.

*Comment:* Many commenters stated that there are numerous auto repair shops that use used oil to fuel their space heaters, which do not (or would not likely) meet the air pollution controls required by the CAA section 129 standards. The commenters argue that such auto repair shops will no longer be able to use off-spec used oil in their space heaters if off-spec used oil is determined to be a solid waste.

Moreover, commenters assert that auto repair shops will likely not want to take on the additional burden of testing the used oil to determine if it is on-spec in order to use some portion of the material in their space heaters without having to comply with the CAA section 129 standards. They further assert that these shops may illegally dispose of used oil if they cannot burn it in their space heaters and they are not located near a processor. Commenters expressed concerns that they may also stop collecting used oil from individuals who remove their own used oil (do-it-yourselfers, or DIYers) as they have no incentive to take the DIYers oil, which may lead to DIYers illegally disposing of their used oil.

*EPA's Response:* In this rule, EPA determined whether off-specification used oil is a solid waste. However, EPA's regulations promulgated today under CAA 129 do not apply to space heaters. Thus, today's rule would not in any way change the current regulatory scheme or operations for burning of used oil in space heaters since the Agency is not promulgating emission standards for such units.

In particular, EPA is specifically clarifying in this final rule that used oil combusted in an oil-fired space heater that meets the provisions of 40 CFR 279.23 need not be tested to establish whether or not such oil is on or off-spec. This includes used oil generated by small facilities such as auto repair shops and machine shops that have such units, and used oil-generated by homeowners who change their own oil (referred to as "do-it-yourself" or "DIY" oil) that are burned in such units. This is because the CISWI regulations promulgated elsewhere in the **Federal Register** today do not establish emissions limits for such units, and therefore the concerns of the commenters that such units would have to comply with CAA Section 129 standards have been addressed for this population of combustion units.

EPA also points out that anyone wishing to show that the material is on-spec does not have to test the used oil, but can use other information besides analyses. Specifically, the existing regulation under 40 CFR 279.72 states that used oil fuel can be determined to be on-spec by "performing analyses or obtaining copies of analyses or other information documenting that the used oil fuel meets specifications."

8. Coal Refuse [116]

Coal refuse refers to any by-product of coal mining or coal cleaning operations. Coal refuse is generally defined by a minimum ash content combined with a maximum heating value, measured on a dry basis. Coal refuse consists primarily of non-combustible rock with attached coal that could not be effectively separated in the era in which it was mined. Due to advances in coal preparation technology over the past century, the processing of coal has evolved such that materials that are now generated in the coal mining process, which would have been considered coal mining rejects in the past and discarded in waste piles, are now handled and

[114] A copy of this letter can be found in the docket to today's rule.

[115] *See* documents EPA–HQ–RCRA–2008–0329–0799; EPA–HQ–RCRA–2008–0329–1273.1; EPA–HQ–RCRA–2008–0329–1686.

[116] The proposed rule differentiated between coal refuse and mined landfill ash. For a discussion regarding the use of mined landfilled ash as a fuel, see the coal combustion residuals section for fuels (Section V.B.9); for a discussion regarding the use of these non-hazardous secondary materials as ingredients, *see* the coal combustion residuals section for ingredients (Section V.C.2).

processed as coal. In the early twentieth century, coal preparation involved simple size segregation into lump coal for domestic use and intermediate-sized coal for industrial use. Coal fines were considered unfit for use and were disposed of as mine rejects in discarded coal refuse piles. Today, however, coal preparation plants are much more capable of separating coal from mineral matter through processes, such as density separation and froth flotation.[117]

Thus, the proposed rule differentiated between coal refuse that is currently generated and coal refuse that was generated in the past and placed into "legacy" piles. The proposed rule considered coal refuse that is currently generated and used as a fuel as not being abandoned or disposed of and, therefore, is not considered a solid waste. On the other hand, the proposed rule stated that coal refuse placed in legacy piles has clearly been discarded, thus meeting the definition of a solid waste material. With regard to coal refuse from legacy piles, the proposed rule described the processing of this non-hazardous secondary material as involving separation through the use of screens or grizzlies, blending, crushing, or drying. Although we understand that virgin coal is similarly processed, the proposal stated that the Agency believes that such operations would constitute "minimal processing" and would not meet the processing definition, as proposed. Thus, under the proposed rule, coal refuse abandoned in legacy piles would be considered solid waste, as would the coal refuse that has been processed and used as a fuel in what was considered to be a minimal set of sizing activities.

The proposal also noted one commenter who contended that coal refuse contained elevated levels of mercury, chromium, and lead when compared to other coals. Because the proposal already determined coal refuse in legacy piles to be a solid waste (discarded and insufficiently processed), we did not believe it was necessary to determine whether coal refuse from legacy piles would satisfy the contaminant legitimacy criterion. However, the proposed rule noted that although coal refuse can contain metals concentrations that are higher than found in virgin coal, data also show that emissions levels from some facilities burning coal refuse (namely those equipped with circulating fluidized beds (CFBs)) are lower than most existing pulverized coal utility boilers. For the proposed rule's characterization of coal refuse, see 75 FR 31865–6.

Accordingly, the Agency seems to have faced a dilemma in deciding how to treat the "legacy" piles. This dilemma was reflected in the comments, described below, which shows an inherent illogic in treating coal refuse generated from mining operations today and used as fuel differently from coal refuse mined from the "legacy" piles, which seem to be no different.

*Comment:* Responding to EPA's request for comment regarding whether other fuels in use today should also be classified as traditional fuels, several commenters argued that coal refuse should be considered a traditional fuel, regardless of when generated, as it has been used as a fuel for approximately 30 years. Citing the preamble to the proposed rule, commenters stated that EPA recognized that "changes in technology and in the energy market over time may result in additional secondary materials being economically viable to be used as 'traditional' fuels," and that the advancement of technology, specifically the advent of circulating fluidized beds (CFBs), has allowed coal refuse to be used as fuels for decades.[118] Thus, these commenters reason, it is most appropriate to consider coal refuse to be a traditional fuel.

*EPA's Response:* We begin by recognizing that we have several difficulties in dealing with coal refuse. We are faced with a statute that places limits on the Agency's ability to cover "discarded" material. Case law indicates that a material may not lose its waste status merely because it has value. As technology advances, material that has been a waste may be no different from material that may today be used as a product. EPA, in fact, has no jurisdiction to consider as wastes currently mined coal that was formerly "refuse."

Coal refuse is unique, however, from other non-hazardous secondary materials addressed in this rulemaking, as it is generated in the process of producing fuels (*i.e.,* the mining of coal for use as fuel) and its subsequent use and value as a secondary material is also as a fuel. Since the primary product of a coal mining operation is itself fuel, we consider coal refuse to be more akin to a raw material that is subsequently processed and utilized to produce a fuel. In other words, coal refuse is different from other non-hazardous secondary materials, such as used tires or resinated wood residuals, in that it is generated in the production of fuel and can be used itself as a fuel (and in fact has never been used for anything else).

The two materials that are used in major quantities today as valuable fuels, but have formerly been discarded are coal refuse and tires. A major difference between these two materials that EPA finds relevant is that the coal refuse in the legacy piles has never been used for anything else and is mined as fuel in the first place. Tires, on the other hand, are originally produced for a use that is fundamentally different from its current use as a fuel. Cement kiln users do not ask tire manufacturers to produce tires for burning in the kilns. Coal, however, was never used for any other activity. It was mined years ago to produce a fuel, but may now be used itself as fuel. Therefore, coal refuse is fundamentally different from tires, as well as the other non-hazardous secondary materials that are discussed in the preamble to this final rule.

Responding to commenters that also noted that coal refuse has been used as a fuel for thirty years due to advances in technology, we find this information useful, but not determinative in our analysis of whether or not coal refuse meets our definition of a traditional fuel. However, the fact that coal refuse has been used and managed as a fuel for thirty years when coupled with the fact that coal refuse is unique from other non-hazardous secondary materials in that it is a byproduct of fuel production processes and is itself a raw material that can be used as a fuel leads us to determine that coal refuse that is currently generated and used as a fuel should be considered a traditional "alternative fuel." However, coal refuse that has been abandoned long ago in legacy coal refuse piles would not be considered a traditional fuel that is not subject to coverage and assessment in this rule, since it is clearly a material that has been discarded in the first instance.

We note that other non-hazardous secondary materials have also been used as fuels for similar lengths of time or even longer, but would not be considered traditional fuels. We again emphasize that our decision to classify coal refuse as an alternative fuel is based both on the fact that it has been used and managed as a fuel for thirty years combined with the fact that we find coal refuse to be distinctive among the other non-hazardous secondary materials at issue in today's rule; *i.e.,* coal refuse is in fact raw material coal that is generated as a result of coal

[117] *See* National Research Council of the National Academies (NRC), "Coal Research and Development," 2007, accessed on May 14, 2008 at: *http://www.nap.edu/catalog.php?record_id=11977. See* generally "Materials Characterization Paper on Coal Refuse," a copy of which is included in the docket for today's rulemaking.

[118] Referenced citation can be found at 75 FR 31856.

mining operations whose primary product is fuel.

We also note that our characterization of coal refuse that is currently generated as an alternative fuel is not inconsistent with the proposed rule's characterization of this material. The proposed rule stated that currently generated coal refuse would not be abandoned or disposed of and, therefore, not a solid waste. The proposed rule did not, however, specifically state that coal refuse that is currently generated is a traditional fuel. For clarity, it is appropriate to do so today, and will amend our definition of traditional fuels to also include alternative fuels that reflect this determination.

As previously discussed, coal refuse that has been placed in legacy piles would not meet the definition of traditional fuels, as they clearly have not been historically used and managed as a fuel. It is clear that coal refuse abandoned in legacy piles has been discarded and managed as a waste. Our rationale for this distinction between coal refuse that is currently generated and coal refuse that was placed in legacy piles is further discussed in the comment response below. Thus, coal refuse that has been placed in legacy piles would be considered solid waste unless it is processed into a legitimate fuel product. We respond to comments received regarding the processing of coal refuse later in this section.

*Comment:* Many commenters stated that all coal refuse should be considered a "fuel," regardless of when the coal refuse is generated and urged EPA to eliminate the "false distinction" based on when the coal was mined (*i.e.,* coal refuse that is mined from legacy piles shares the same characteristics as coal refuse that is generated today).

At least one commenter cited 40 CFR 60.41 as defining "fossil fuel" as "natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat." The commenter went on to cite 40 CFR 60.41b, which states that "Coal means * * * coal refuse * * *"[119] and argues that this definition in the regulation has nothing to do with when the coal refuse was generated and should always be considered a fuel.

*EPA's Response:* We disagree with the comments contending that coal refuse placed in legacy piles should be characterized and regulated the same as coal refuse that is generated currently, as this fails to acknowledge that such coal refuse has been discarded. As has been discussed, the statutory definition of solid waste turns on whether or not a material has been discarded in the first instance. Courts have consistently held that the term "discard," is to have the ordinary, plain-English meaning (*i.e.,* "disposed of," "thrown away," or "abandoned"). As coal refuse placed in legacy piles have clearly been abandoned, we cannot ignore the fact that these materials have been discarded in the first instance and, therefore, do not agree with the contention that this construct represents a "false distinction." The resulting distinction may lead to results that some may find illogical, but we are faced with the definition of "discard" and the fact that the mere fact that discarded material may have value does not allow the material to lose its waste status.

Although we recognize that all coal refuse is (and was) generated during the fuel production process and are more akin to raw materials, coal refuse that has been abandoned in legacy piles have not been historically used and managed as a fuel and therefore cannot be considered a traditional fuel. Because the technology did not exist that could effectively make use of the fuel value of these materials at the time of their generation, they were managed as wastes and abandoned in legacy piles. While we find that currently generated coal refuse should now be considered alternative fuels for the reasons stated above, we cannot ignore that coal refuse that has been placed in legacy piles have clearly been discarded and, thus, unless these materials are "sufficiently processed" and satisfy all legitimacy criteria for fuels, these secondary materials would be considered solid wastes when burned as fuels in combustion units.

Regarding the comments that argue that EPA has previously defined coal to include coal refuse, we note that this information was helpful, but disagree the cited regulatory definitions control in this rulemaking. The cited definitions, which are included in the standards of performance for new stationary source regulations, were developed pursuant to the CAA and do not address the issue of discard. Today's rulemaking is being promulgated under RCRA, which, as mentioned above, hinges on the whether or not the non-hazardous secondary material at issue has been discarded. EPA also reemphasizes that the distinction is not between "fuel" and "waste," but between fuel that is a commodity (not a waste because it has not been discarded) and waste fuel that has value, but is still a waste.

In the same CFR sections cited by commenters which define coal as including coal refuse, we note that coal refuse is defined as meaning "waste-products of coal mining, cleaning, and coal preparation operations (*e.g.,* culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material"[120] and "any byproduct of coal mining or coal mining operations with an ash content greater than 50 percent, by weight, and a heating value less than 13,900 kJ/kg (6,000 Btu/lb) on a dry basis."[121] These definitions highlight the uniqueness of coal refuse and in fact support the distinction we are making between coal refuse that is currently generated and coal refuse that has been placed in legacy piles. That is, it may be appropriate to consider coal refuse to be within the definition of coal because it may now be used as coal, while at the same time, it may also be appropriate to consider coal refuse to be a "waste-product" or "byproduct" of coal mining operations. EPA's evaluation that coal refuse that is currently generated and used as a fuel has never been discarded and should be considered an alternative fuel, while discarded coal refuse should be considered a solid waste, is consistent with these regulatory definitions.

*Comment:* Most commenters addressing the issue of processing coal refuse stated that coal refuse from legacy piles is processed the same way as is virgin coal; that is, the processing of these materials includes the use of grizzlies, screens, and blending to improve the quality, remove metal objects, reduce the ash content, reduce the sulfur content, and reduce concentrations of various constituents. These comments maintained that this level of processing should satisfy EPA's definition of "processing" because the processing that occurs is designed specifically to improve the fuel quality and remove contaminants in the process (for example, metals that are removed with ash that is screened out).

One commenter stated that it is illogical and problematic for EPA to propose a minimal level of processing that requires additional activities than are used to prepare virgin materials for use. This commenter provides the example of a company that recovers coal refuse from previously discarded piles, screen the refuse to remove large pieces of slate and rock, conducts a chemical

[119] "Coal means all solid fuels classified as anthracite, bituminous, sub-bituminous, or lignite by the American Society of Testing and Materials in ASTM D388 (incorporated by reference, *see* Sec. 60.17), coal refuse, and petroleum coke * * *" *See* 40 CFR 60.41b.

[120] *See* 40 CFR 60.41.

[121] *See* 40 CFR 60.41b.

analysis to identify Btu, ash, and sulfur characteristics, hauls the coal refuse to its preparation plant where it is cleaned just like mined coal, and then sold as is or blended with mined coal to meet contractual orders. This commenter argues that EPA did not provide adequate justification in the proposed rule for why this process would be insufficient to turn a once discarded non-hazardous secondary material into a non-waste fuel product.

Additionally, commenters noted that in the case of facilities burning coal refuse, regardless of whether it is generated currently or was placed in legacy piles, the engineering design of a CFB is based on the quality of the coal refuse available to be burned in the boiler. In other words, considerations for use of the coal refuse as a fuel precede facility construction and directly impact boiler design and application. Therefore, coal refuse from legacy piles that is processed in this manner (*i.e.,* in the same manner as currently generated coal refuse) should not be considered a solid waste.

*EPA's Response:* As finalized in § 241.2, the term "processing" is defined as meaning "any operations that transform discarded non-hazardous secondary material into a non-waste fuel or non-waste ingredient product. Processing includes, but is not limited to, operations necessary to: remove or destroy contaminants; significantly improve the fuel characteristics of the material, *e.g.,* sizing or drying the material in combination with other operations; chemically improve the as-fired energy content; or improve the ingredient characteristics. Minimal operations that result only in modifying the size of the material by shredding, do not constitute processing for purposes of this definition." We have determined that this definition encompasses an appropriate level of processing necessary to render a discarded material into a non-waste product.

As several commenters noted, the processes that are employed to recover coal refuse that has been placed in legacy piles in order to be used as fuels are the same as the processes that virgin coal is subject to. As discussed above, coal refuse is unique from other non-hazardous secondary materials in that it is a byproduct of fuel production processes and is itself a raw material that can be used as a fuel. Because coal refuse is essentially raw material coal, which is generated in the production of fuel and can be used itself as fuel, we agree with the commenter who stated that it would be illogical to require a different level of processing for discarded coal refuse than is used for virgin coal. Therefore, coal refuse that is recovered from legacy piles and used as fuel that is subjected to the types of operations that are used to process virgin coal, which serve to both increase energy values as well as reduce contaminants, would meet our definition of processing and would not be considered solid waste, provided these materials satisfy our legitimacy criteria, which they do since currently mined coal is certainly a legitimate fuel and is the same as those from the legacy piles.

*Comment:* EPA received comments providing new contaminant data for coal refuse. However, some commenters acknowledged that coal refuse can have higher levels of some metals, but agreed with EPA that coal refuse is typically used as a fuel in newer boilers equipped with CFBs, which have emissions levels lower than most existing coal utility boilers.[122] One commenter stated that notwithstanding the higher metals content of coal refuse, CFBs typically capture between 90–99 percent of mercury and other metals. While most commenters noted that emissions levels associated with burning coal refuse are similar to those found when burning virgin coal, one commenter did provide a comparison in concentration levels of various contaminants between coal refuse and regional coal samples. A selection of the specific data provided by the commenter is replicated in Table 5 below:

TABLE 5—COMPARISON OF TRACE METAL CONTENTS (PPM) OF REGIONAL COAL SAMPLES AND COAL REFUSE FROM LEGACY PILES, AS PROVIDED IN COMMENTS ON THE NHSM PROPOSED RULE

| Sample description | Sample ID | Sb | As | Be | Cd | Cr | Co | Pb | Mn | Hg | Ni | P | Se |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Coal samples from USGS database—Cambria, Indiana, and Somerset Counties, PA [123]. | No. Samples | 244 | 244 | 244 | 244 | 244 | 244 | 244 | 244 | 244 | 244 | 244 | 244 |
| | Minimum | 0.11 | 0 | 0.6 | 0.01 | 2 | 1.5 | 0.8 | 2 | 0.00 | 3.4 | 22 | 0.68 |
| | Maximum | 7.80 | 200 | 9.5 | 1.00 | 65 | 34.0 | 44.0 | 390 | 2.90 | 86.0 | 3400 | 20.00 |
| Samples of coal refuse from legacy piles located in Cambria, Indiana, and Somerset Counties, PA. | | | | | | | | | | | | | |
| | Sample 1 | 1.5 | 50.7 | 2.1 | 0.3 | 80.2 | 22.7 | 33.1 | 134 | 0.644 | 44.7 | 718 | 7.8 |
| | Sample 2 | 1.7 | 53.4 | 2.1 | 0.3 | 84.5 | 23.8 | 35.2 | 139 | 0.748 | 50.5 | 719 | 8.6 |
| | Sample 3 | 1.5 | 47.3 | 2.1 | 0.3 | 84.7 | 22.8 | 33.1 | 144 | 0.613 | 47.1 | 745 | 8.6 |
| | Average | 1.6 | 50.5 | 2.1 | 0.3 | 83.1 | 23.1 | 33.8 | 139 | 0.668 | 47.4 | 727 | 8.3 |

This data indicates that the concentration of the various contaminants in the coal refuse samples were lower for almost all constituents (including mercury and lead) when compared to regional coal samples. According to this data set, only chromium was consistently higher in the coal refuse samples than the regional virgin coal, which also indicates that the difference in concentration may be much closer than previously indicated in the preamble to the proposal.[124] Therefore, provided

[122] CFBs ability to achieve lower emissions levels is due to several factors: (1) CFB boilers are often newer than many existing pulverized coal utility boilers and may be equipped with better particulate matter (PM) controls; (2) CFBs utilize lower operating temperatures, which result in lower metal and $NO_X$ emissions; and (3) CFB boilers often add limestone to their feed to control $SO_2$ emissions, which results in greater fixation to the ash.

[123] Coal sample data found in the U.S. Geological Survey—National Coal Resources Data System. For more information, *see http://energy.er.usgs.gov/coalqual.htm*).

[124] Data provided by the commenter indicated that the average chromium levels of coal refuse was 83.1 ppm, whereas the range of chromium levels for the regional virgin coal samples was between 2–65

Continued

that coal refuse from legacy piles are sufficiently processed, this commenter asserts that coal refuse would pass the contaminant legitimacy criterion and should therefore not be classified as a solid waste.

*EPA's Response:* Regarding the contaminant levels in coal refuse in legacy piles, we agree with those commenters who acknowledged that coal refuse can have higher concentrations of some metals than is found in virgin coal. As noted in the proposed rule, at least one commenter on the ANPRM contended that coal refuse could have up to four times more mercury and chromium, and three times more lead than virgin coal.[125] We note that this commenter did not provide primary sources for this data, a point which was raised by at least one commenter. We generally recognize, however, that available data show that coal refuse placed in legacy piles often has higher metals concentrations than non-refuse coal concentrations, but we would presume that the levels of contaminants are the same as in currently mined coal that would have been placed into these piles in the past. We also recognize that contaminant levels will vary significantly depending upon the region and type of coal at issue.[126]

As discussed above, we now determine that coal refuse that is currently generated should be considered an alternative fuel. On the other hand, coal refuse that is recovered and processed from the discard environment would need to pass the legitimacy criteria in order to be considered a non-waste fuel. As coal refuse is recovered from legacy piles are subject to the same processes as currently-generated coal refuse in order to meet the same fuel specifications, they would contain any potential contaminants at levels that are comparable to or lower than coal refuse that is currently generated.

We would further note that the contaminant data provided by the one commenter demonstrates that there are also examples of coal refuse taken from legacy piles satisfying the contaminant legitimacy criterion when directly compared to contaminant levels in coal. Given the regional variations in coal compositions, the analysis is on point given the fact that the commenter compared similar regional coal refuse and virgin coal samples. Therefore, we agree with the commenter that there are instances when coal refuse would also satisfy the contaminant legitimacy criterion when compared to virgin coal as well.

Finally, we would note that although emissions comparisons are not a direct indicator of whether these materials satisfy the contaminant legitimacy criterion, the emissions from CFBs that use coal refuse as fuel typically have lower levels of emissions than typical pulverized coal burners.

*Comment:* Several commenters contended that the management of coal refuse at mining sites is already regulated under the Surface Mining Control and Reclamation Act of 1997 (SMCRA) and that defining coal refuse as a solid waste would be inconsistent with SMCRA. Specifically, some commenters point out that although the term "solid waste" under RCRA includes mining waste in the definition, EPA determined, in accordance with section 1006(c) of RCRA that provides for the integration of RCRA with SMCRA, that materials and products associated with coal mining activities should not be regulated as hazardous wastes.

*EPA's Response:* RCRA section 1006(c) pertains to hazardous wastes under RCRA subtitle C. As such, it is inapplicable for today's rulemaking, which is solely concerned with non-hazardous secondary materials. Thus, we disagree with those commenters who cited section 1006(c) of RCRA and argued that regulation of coal refuse found in legacy piles should be deferred to SMCRA. In addition, SMCRA is concerned with the management and removal of coal refuse piles at mining sites. It does not address the issue of "discard," which is critical to the definition of solid waste under RCRA, and as such, which emission standards coal refuse that is in legacy piles and burned in a combustion unit is subject to under the CAA.

9. Coal Combustion Residuals [127] [128]

Coal combustion residuals (CCRs) are formed during coal-burning processes in power plants and industrial boilers, and are produced in various forms that are categorized by the process in which they are generated. The proposed rule differentiated between CCRs (which include such secondary materials as fly ash, bottom ash, and boiler slag), that are currently generated from those CCRs that have been previously disposed of (such as, mined landfill ash) and are used as fuels in combustion units. Under the proposed rule, currently generated CCRs that have not been discarded in the first instance and satisfy the legitimacy criteria would not be considered a solid waste when used as a fuel in combustion units provided the CCRs were burned in units within the control of the generator. For example, the proposal described a situation where currently generated, high-carbon fly and bottom ash that is taken directly from existing boilers is burned within the control of the generator at power generating stations. On the other hand, CCRs recovered from landfills or other disposal units would clearly have been discarded in the first instance and would therefore have to be sufficiently processed into a non-waste fuel product and meet the legitimacy criteria in order not to be considered a solid waste when used as a fuel.

The proposed rule also noted comments received on the ANPRM describing patented processes that separate the carbon from the fly ash in order to produce a new fuel product. Although this level of processing appeared likely to meet the proposed definition of processing, the proposed rule solicited comment on how CCRs are processed. The proposed rule also requested comment regarding the extent to which CCRs are recovered from the discard environment (*e.g.,* landfills) and used as fuels. For the proposed rule's discussion of CCRs used as fuels, *see* 75 FR 31865–6.

*Comment:* Most commenters argued that CCRs, when used in combustion units, should be classified as ingredients rather than as fuels. The commenters often contended that classifying all CCRs as ingredients would simplify waste determinations for these secondary materials by clearly establishing the appropriate legitimacy criteria that apply (*i.e.,* facilities would not need to determine whether the fuel or ingredient legitimacy criteria apply based on the primary purpose of the secondary materials). Some commenters acknowledged, however, that CCRs can be combusted (*e.g.,* by electric utilities) for energy recovery of its carbon content

ppm. The proposed rule noted that chromium levels of coal refuse can be up to four times higher than virgin coal.

[125] *See* 75 FR 31865.

[126] *See* our Materials Characterization Paper on Coal Refuse, located in the docket for today's final rule.

[127] In a separate rulemaking effort, EPA has proposed regulations that will provide for the safe disposal and management of coal combustion residuals from utility coal-fired power plants (the "Coal Combustion Residuals Proposed Rule"). The proposed rule was published in the **Federal Register** on June 21, 2010. See 75 FR 35127. Today's final rule does not affect that rulemaking effort, as our rule considers the use of coal combustion residuals in combustion units as fuels or ingredients, while the coal combustion residual proposed rule is concerned with the safe disposal and management of these residuals in landfills and surface impoundments. For more information on the coal combustion residual proposed rule, *see* Docket ID No. EPA–HQ–RCRA–2009–0640.

[128] For a discussion of CCRs used as ingredients, *see* Section V.C.2 of this final rule.

or combustion in carbon burn-out (CBO) units for processing marketable fly ash products.

One commenter described CBO units, which they explained burn "unwanted carbon" from fly ash to produce a low-carbon fly ash that is more suitable for use as an ingredient in Portland cement, as being typically integrated with power plants. The CBO unit combusts fly ash from the power plant in a fluidized bed, extracts the residual energy content of the fly ash to fuel the CBO, and returns useful heat to the power plant. The commenter stated that the major equipment that comprises the CBO unit includes a fluidized bed combustor and heat exchanger to recover heat from the fly ash combustion. This same commenter described the heat generated from the combustion of the carbon in the fly ash as "valuable" and is typically recovered from the CBO and used to heat the host plant's condensate stream, which reduces the amount of extraction steam required. In reasoning that this high-carbon fly ash should be considered an ingredient, however, the commenter notes that energy generated from burning the secondary material is of secondary importance to the production of the valuable low-carbon fly ash to be sold to cement kilns.

*EPA's Response:* We do not agree with commenters that all CCRs, when used in combustion units, should categorically be defined as ingredients. As some commenters acknowledged, some CCRs are indeed used for their fuel value as opposed to their ingredient value, especially when re-burned, as in the case of their use in combustion units by electric utilities. Therefore, we cannot categorically classify CCRs as ingredients when it is clear that, in some cases, these secondary materials are being burned for their fuel value and/or to produce a new secondary material (*i.e.,* low-carbon fly ash). In cases where the primary purpose of using CCRs is for their fuel value and not for the ingredient value (*e.g.,* by electric utilities in utility boilers), the secondary materials must meet the requirements for fuels, including the legitimacy criteria, in order to not be considered a solid waste. In other words, to the extent that CCRs are used as fuels, these secondary materials must remain within the control of the generator and meet the legitimacy criteria for fuels or be sufficiently processed into a new fuel product in order not to be considered a solid waste. We note, however, that sources may petition the Agency for a non-waste determination for secondary materials managed outside the control of the generator, including CCRs. *See* Section VII.G.

Regarding CBO units that burn high-carbon fly ash, creating both energy, as well as a new marketable ingredient (*i.e.,* low carbon fly ash), this activity would not constitute use of these secondary materials as ingredients. When the fly ash goes into a CBO unit, it is clearly not being used as an ingredient, but is used to produce an ingredient. It is less clear, however, whether this activity represents a legitimate use of these secondary materials as fuels or should be considered a type of waste management. The commenter states that burning of this fly ash in CBO units provides "valuable heat" and indicates that the energy is used in turn to power the CBO or returned to the power plant, which indicates that the burning of the fly ash could constitute a legitimate use as a fuel. On the other hand, the same commenter also noted that the fuel value is "secondary" to its value as an ingredient and the CBO process as removing "unwanted carbon" from the fly ash, which may suggest that the fly ash is being burned as a waste activity (*i.e.,* the destruction of the unwanted carbon in order to generate a marketable product).

Unfortunately, from the comments received, we are not able to make a categorical determination whether or not the burning of fly ash in these units would constitute "discard," as it is unclear whether the carbon is being destroyed or whether it is actually used for its fuel value. In other words, the CBO unit is either "destroying" the carbon, which would make these materials a solid waste, or the carbon is being recovered and used as a fuel, in which case these materials would not be considered a solid waste provided they meet the legitimacy criteria.

While the CBO units are burning the ash to create a marketable product, in so doing they may also be utilizing the separated carbon for its fuel value. The commenter indicates that use of high carbon-fly ash in these CBOs may have more than marginal energy value and can even be a source of additional power to an adjoining power plant. While we do not have sufficient information to make a categorical determination regarding the use of fly ash as a fuel in these CBO units, it is appropriate for these units to consider the legitimacy criteria in order to determine whether or not the fly ash is being burned for discard or burned legitimately for its fuel value.

As discussed in Section VII.H, legitimacy criteria are critical to ensuring that non-hazardous secondary materials are being legitimately used. To the extent that a CBO unit can determine that it meets the legitimacy criteria for fuels (including whether the fly ash has meaningful heating value and is used as a fuel in a combustion unit that recovers energy), we would consider such a use to be legitimate. We emphasize, however, that mere destruction of the unwanted carbon would clearly represent discard and would by definition fail the meaningful heating value legitimacy criterion. We also note that it is not clear from the comments how the CBO unit recovers energy and whether it would meet our definition of a legitimate energy recovery device. For a discussion of legitimate energy recovery devices, see the Response to Comments on Sewage Sludge (Section V.B.10). If these units do not legitimately recover energy, they would not meet the meaningful heating value criterion. *See* also Section VII.I, which discusses the types of notification and recordkeeping requirements, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, that a facility using these secondary materials as fuels that remain within the control of the generator are subject to.

Finally, we note that the resulting low-carbon fly ash would be considered a new secondary material, which would be considered an ingredient if it is later used in the production of cement.

*Comment:* One commenter, a utility, stated that the proposed rule's setting of minimum energy content values for a secondary material to be used as a fuel and not be considered a solid waste (*i.e.,* the meaningful heating value legitimacy criterion) is inappropriate for the re-burning of fly ash when producing concrete quality fly ash, as the coal ash used for re-burn is selected based on its mineral content, combined with the mineralogy of the coal currently being used as a fuel. The fuel value of the fly ash is only one technical consideration when introducing coal ash in combustion systems for creating concrete quality fly ash and requiring a minimum heating value may restrict the use of high quality fly ash for use in concrete and other applications.

*EPA's Response:* We appreciate that the fuel value is only one of several considerations made when selecting fly ash for re-burn; however, in order for fly ash that is re-burned to not be a solid waste under today's final rule, it would need to either remain within the control of the generator and meet the legitimacy criteria for fuels, including the meaningful heating value criterion, or, if discarded, be processed into a new, legitimate fuel product. Some

commenters stated that the energy content of fly ash when burned is returned as useful heat. Based on the comments received, however, it is unclear whether the fly ash in that instance would meet the meaningful heating value criterion, as these comments do not include enough information about how much energy is being recovered from the use of these secondary materials as fuels. In order to not be considered a solid waste, the facility must determine whether the fly ash meets the legitimacy criteria, including whether the fly ash has meaningful heating value and is used as a fuel in a combustion unit that recovers energy.

We also note that we are not establishing a bright line test for satisfying the meaningful heating value test. Rather, for purposes of meeting the legitimacy criteria for fuels, we would consider non-hazardous secondary materials with an energy value greater than 5,000 Btu/lb, as-fired, to have a meaningful heating value, and satisfy this legitimacy criterion. However, for facilities with energy recovery units that use non-hazardous secondary materials as fuels with an energy content lower than 5,000 Btu/lb, as fired, we believe it is also appropriate to allow a person to demonstrate that a meaningful heating value is derived from the non-hazardous secondary material if the energy recovery unit can cost-effectively recover meaningful energy from the non-hazardous secondary materials used as fuels. *See* Section VII.H.1 for a discussion of how non-hazardous secondary materials can satisfy the meaningful heating value criterion for fuels.

*Comment:* Some commenters argued generally that EPA should not restrict the source of coal ash that is re-burned and should allow coal ash that is used as a fuel to be transferred between facilities and retrieved from landfills because it is being beneficially used. One of these commenters described how one of its power plants re-burns coal ash that it receives from two other power plants that it also owns. This same commenter also noted that it re-burns coal ash in one of its power plants that it has retrieved from an off-site landfill.

*EPA's Response:* As discussed in Section V.A.1, EPA is not making a sweeping arbitrary assumption in categorizing transferred secondary materials as discarded. Instead, EPA has evaluated whether certain categories of materials are discarded or not. The Agency has not adopted the extremes of saying that all burning of secondary material, regardless of ultimate use, is waste treatment or that any secondary material that is recycled for legitimate fuel value is a commodity and not a waste. Wastes may have value, but are still wastes.

Between these broad parameters, EPA has examined a number of specific materials, recycled on-site and transferred for recycling, and determined whether they would be appropriately placed within the waste or non-waste categories. EPA would consider transferred non-hazardous secondary materials not to be wastes if it could make the appropriate findings for those categories. In fact, the Agency does so with respect to scrap tires harvested from vehicles and resinated wood residuals.

Commenters discussing scrap tires and resinated wood residuals, however, provided specific information regarding how these secondary materials were managed when they no longer remained within the control of the generator and the frequency with which these materials were collected and transferred off-site. For example, resinated wood residuals are routinely transferred between either intra- or inter- company facilities and used as either "furnish" (*i.e.,* raw materials) or fuel at the receiving facilities. The material being transferred off-site is used and handled in the same manner that resinated wood residuals are used when generated on-site (such that it is impossible to distinguish between materials that are being used as a raw material and those that are being used as a fuel).

On the other hand, commenters discussing the use of CCRs as fuels outside the control of the generator did so only in general terms. Commenters provided legal arguments that case law holds that transfer of such materials between companies were irrelevant for determining whether a recycled material was properly viewed as a solid waste. *See* Section V.A.1 for our response to these legal arguments on the issue of "transfer" as it relates to the concept of discard. However, these commenters did not specify how the proposed rule's presumption that non-hazardous secondary materials that are used as fuels and are managed outside the control of the generator are solid wastes was inappropriate for CCRs. In general, the DC Circuit has not accepted such presentations in "broad abstraction." *See ABR* at 1056.

Because commenters did not provide sufficient information detailing how CCRs are managed when transferred outside the control of the generator, we are unable to determine whether such movement of CCRs outside the control of the generator is or is not indicative of discard. Thus, such a determination is best left to the non-waste petition process, as finalized in today's rule. As we've discussed, we believe this petition process is essential because many non-hazardous secondary materials are recycled and managed in many different ways, and the Agency may lack the specific details in certain cases to know whether such non-hazardous secondary materials are or are not solid wastes. For a discussion of non-waste determination petitions, see Section VII.G of today's rule.

Regarding the commenter who described how one of its power plants re-burns coal ash that it receives from two other power plants it also owns, we would expect that such a situation would fall within the definition of "within the control of the generator," as codified in § 241.2. For the purposes of today's final rule, "within the control of the generator" means that the non-hazardous secondary material is generated and burned in combustion units at the generating facility; or that such material is generated and burned in combustion units at different facilities, provided the facility combusting the non-hazardous secondary material is controlled by the generator; or both the generating facility and the facility combusting the non-hazardous secondary material are under the control of the same person. We have also codified the definition of "control" as meaning the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in this section shall not be deemed to "control" such facilities. *See* § 241.2. As the commenter states that it owns the other two plants, such intra-company movement would ensure that the materials would remain within the control of the generator and, therefore, such CCRs would not be considered a solid waste when used as a fuel provided they meet the legitimacy criteria. In the instance where a facility is re-burning coal ash that is recovered from landfills, such coal ash is a solid waste, as this material has clearly been discarded. Coal ash that is recovered from landfills must be sufficiently processed in order to no longer be considered a solid waste.

*Comment:* We received a few comments regarding the extent to which CCRs are mined from landfills (*i.e.,* recovered from the discard environment). One commenter asserted that it was unaware of any recovery of CCR from disposal sites, while one another commenter acknowledged that while it could utilize recovered landfill fly ash, it was not currently doing so.

Still another commenter stated it removes CCRs from landfills and that such removal for either energy recovery or beneficial reuse was facilitated by a regulatory innovation program sponsored by the state and endorsed by EPA. Consequently, this commenter commonly re-burns coal ash that is recovered from landfills. This commenter notes that it has developed and uses patented processes to use this fly ash, but does not provide specific details regarding how these secondary materials are processed.

*EPA's Response:* It does not appear that it is a widespread practice for CCRs to be recovered from the discard environment (*e.g.,* landfills) and beneficially used. However, from comments received both on the ANPRM and the proposed rule, it appears that at least some CCRs are being recovered from the discard environment or could be recovered from the discard environment—for example by the one commenter citing its participation in a state regulatory innovation program. Although we recognize the benefits associated with recovering CCRs from landfills, these non-hazardous secondary materials have clearly been discarded in the first instance and would have to be sufficiently processed into a new fuel product (or ingredient product) to not be considered a solid waste when used in combustion units. As we've stated elsewhere in the preamble, today's final rule is limited to CCRs used as fuels or ingredients in combustion units. In other words, today's rulemaking should not impact other potential beneficial uses of CCRs, such as using these secondary materials as a base material to replace stone or gravel under roads, parking lots and buildings.

*Comment:* EPA received comments on the ANPRM stating that there are at least four patented processes for removing unwanted carbon from fly and bottom ash that allow the processed ash to produce both technically compliant ash for use in concrete and a separate carbon stream that can be re-introduced into the boiler for its fuel value. One electric utility, commenting on the proposed rule, also mentioned patented processes for using CCRs recovered from landfills. However, neither of these commenters provided specific details regarding how the CCRs are actually processed.

*EPA's Response:* Unfortunately, EPA did not receive sufficient information during the comment period describing the types of processes that CCRs undergo to be able to make a categorical determination whether the patented processes referenced in the proposed rule would meet the definition of processing being promulgated in today's final rule. Although we did receive some information regarding how CCRs are processed, we have determined, as we stated in the proposed rule, that certain operations are currently being utilized to recover CCRs from the discard environment that would likely meet our definition of "processing." For example, we are aware of at least one electric utility that recovers ash from ponds or landfills and then separates this secondary material into its fundamental components: carbon, silicates, and high-density, iron-rich materials. A coarse carbon-fuel product is then recovered by density separation using concentrating spirals. A fine carbon-fuel product is also recovered with flotation cells.[129] We believe that this type of processing operation is likely to meet our definition of processing, as it appears that these operations in fact remove contaminants and improve the fuel characteristics of recovered CCRs. Thus, a determination would need to be made as to whether such processes meet the definition of processing, as codified in § 241.2.[130]

10. Sewage Sludge

The proposed rule classified sewage sludge (or wastewater treatment sludge) generated from publicly owned treatment works (POTWs) as solid waste when burned as fuels in combustion units. However, the proposed rule also specifically solicited comment on whether it is within the Agency's discretion to provide a regulatory solid waste exclusion for sewage sludge when burned in incinerators in order to preserve the current framework for regulating sewage sludge managed under section 405 of the Clean Water Act (CWA) and to avoid redundancy. When making the determination that sewage sludge is a solid waste when burned as a fuel in a combustion unit, the proposed rule stated that the Domestic Sewage Exclusion (DSE) under RCRA (see 261.4(a)) does not apply to the sludge generated from the treatment process and thus, sewage sludge is a solid waste if discarded. The proposed rule also noted that burning sewage sludge without energy recovery (*i.e.,* burned for destruction) would constitute discard. Responding to commenters describing POTWs that recover heat in the form of usable heat via waste heat boilers, the proposed rule stated that the Agency does not consider waste heat boilers to be legitimate energy recovery devices, but rather these combustion units are burning the sewage sludge primarily for disposal purposes. Finally, the proposed rule stated that sewage sludge would likely not satisfy the contaminant legitimacy criterion, as data indicates that sewage sludge often contains metals at levels that are significantly higher in concentration when compared to traditional fuels. For the proposed rule's discussion of sewage sludge, see 75 FR 31866–7.

*Comment:* Several commenters argued that EPA has the discretion to exclude or exempt sewage sludge from this rulemaking and should exercise that discretion in order to preserve the current framework for regulating the burning of sewage sludge pursuant to 40 CFR 503 (Part 503), which codifies regulations developed under the authority of section 405 of the CWA. These commenters also note that EPA has a non-discretionary duty to consider all environmental laws to prevent duplication when promulgating regulations under section 1006(b) of RCRA and that deeming sewage sludge a solid waste to be regulated under section 129 of the CAA violates EPA's non-discretionary duty to harmonize environmental laws because emissions from sewage sludge incinerators (SSIs) are already comprehensively regulated under other statutes.

*EPA's Response:* We agree with the commenters that section 1006(b) requires EPA to integrate the RCRA requirements with the requirements of the CWA and the CAA, as well as other laws. Section 1006(b) also states that such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in RCRA and in the other acts referred to in section 1006(b). Thus, while we recognize that emissions from SSIs have been regulated under other statutes, the purpose of today's final rule is not to regulate emissions from SSIs, but rather to determine whether sewage sludge is or is not a solid waste to allow the Agency to decide whether the material must be combusted under emissions standards developed under section 112 or 129 of the CAA. Sewage sludge is one of many non-hazardous secondary materials that are discussed and analyzed in this final rule.

We also note that section 405(d)(5) of the CWA states that nothing in section

[129] *See* "Materials Characterization Paper on Coal Combustion Residuals-Coal Fly Ash, Bottom Ash, and Boiler Slag." A copy of this document has been placed in the docket for today's rule.

[130] We note, however, that burning any secondary material, including CCRs, in a combustion unit would not constitute "processing," as determining whether or not a material is a solid waste must occur prior to its placement in the combustion unit. To consider the burning of such materials as "processing" would be circular.

405 is intended to waive more stringent requirements established by the CWA or by any other law. This provision clearly states that section 405 of the CWA does not preempt other regulation. Therefore, we believe today's final rule is consistent with the goals and policies of RCRA, the CWA, and the CAA and thus, satisfies the requirements of section 1006(b).

*Comment:* Commenters asserted that Congress wrote section 112 of the CAA to regulate sewage sludge emissions, stating that section 112(e)(5) [131] of the CAA directs EPA to issue emissions standards under section 112(d) for POTWs, including SSIs. These commenters also argued that sewage sludge quality and incineration is strictly regulated under the CWA and that the current regulatory structure under both the CWA and section 112 of the CAA is effective and should not be altered.

*EPA's Response:* Today's final action is defining solid waste under RCRA and as such we are not addressing the definition of POTW under the CWA or the requirements of the CAA.

*Comment:* Several commenters reiterated the position that the DSE applies to sewage sludge generated by POTWs and, therefore, stated that sewage sludge is exempted from the definition of solid waste under RCRA. Citing the preamble to the 1980 RCRA subtitle C regulations, at least one commenter stated that the Agency indicated that once the to-be-developed regulation under section 405 of the CWA is promulgated, sewage sludge would be exempt from coverage under other sets of regulations.[132] The same commenter also cites the 1990 Petroleum Refinery Primary and Secondary Oil/Water/Solids Separation Sludge Listings Rule (1990 Listings Rule), which states "It should be noted that if wastewaters generated at petroleum refineries are discharged to a POTW and such wastewaters are mixed with domestic sewage from nonindustrial sources, the sludges generated in the POTW are covered under the domestic sewage exclusion and are not included in today's listings." [133]

*EPA's Response:* For the same reasons stated in the proposed rule, we do not agree with the comments suggesting that the DSE applies to the sludge generated from the treatment process. EPA has long viewed sewage sludge generated from POTWs as a solid waste, beginning with the 1980 Identification and Listing of Hazardous Waste rulemaking. In that final rule, EPA stated that the DSE is "only applicable to non-domestic wastes that mix with sanitary waste in a sewer system leading to a POTW." [134] In that same rule, EPA further said it decided not to exclude sewage sludge from regulation under RCRA, since the statutory expressions regarding the definitions of "solid waste" and "sludge" was clear.[135]

We agree that the 1980 Identification and Listing of Hazardous Waste rulemaking referenced by the commenter states that once the regulations are promulgated under section 405(d) of the CWA, sewage sludge will be exempted from coverage from "other sets of regulations." The preamble continues, however, to state: "In particular sewage sludge that qualifies as a hazardous waste will be exempted from this Part [261] and Parts 262 through 265" once this program is promulgated under CWA section 405. However, this exclusion is specifically limited to RCRA subtitle C (*i.e.,* hazardous waste),[136] and does not apply to the subtitle D program under RCRA.

Regarding the citation from the 1990 Listings Rule, this footnote is in error and is inconsistent with our historic interpretation of the scope of the DSE, as discussed both in the proposed rule and today's final rule. Thus, the DSE does not apply to the sludge generated from the treatment process.

*Comment:* Several commenters stated that sewage sludge has meaningful heating value and that EPA should re-evaluate its description of this criterion. Commenters argued that EPA's determination that waste heat boilers do not qualify as combustion units that recover energy is arbitrary and does not recognize the significant value of waste heat boilers and their role in energy generation. One commenter, a regional sewer district that estimated roughly 93 percent of its sewage sludge was "incinerated," stated that four of its boilers had produced a total of 2.5 billion pounds of high pressure steam over a twenty-five year span by converting the heat generated from burning sewage sludge in multiple hearth incinerators to high pressure steam.

*EPA Response:* We find that most sewage sludge is burned not for energy recovery, but for destruction. Sewage sludge burned in an incinerator for the purposes of destruction would clearly meet the meaning of discard, and thus be a solid waste. While we recognize that waste heat boilers are useful devices for providing energy in the form of steam for secondary processes, the presence of a waste heat boiler does not, by itself, change the fact that the unit combusting the non-hazardous secondary material is primarily an incineration unit burning waste for disposal purposes.

Further, the Agency does not regard waste heat boilers as legitimate energy recovery devices because they receive their energy input from the combustion of off-gases via a separate combustion chamber. Under the RCRA program, a legitimate energy recovery device is one that meets the definition of a boiler or an industrial furnace.[137] Among other criteria, a boiler's combustion chamber and primary energy recovery section(s) must be of integral design, unless it falls under the process heater or fluidized bed combustion exemption. Thus, a combustion chamber that is connected by a duct to a waste heat boiler (or recuperator/heat exchanger) does not qualify as a legitimate energy recovery device.

Unlike boilers, which are specifically designed to recover the maximum amount of heat from a material's combustion, waste heat recovery units are designed to cool the exhaust gas stream, and/or to recover, indirectly, the useful heat remaining in the exhaust gas

[131] CAA section 112(e)(5) states, "The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatments works (as defined in Title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 *et seq.*] not later than 5 years after November 15, 1990."

[132] *See* 45 FR 33102 (May 19, 1980).

[133] *See* 55 FR 46364 (November 2, 1990) (Footnote 14).

[134] *Id* at 45 FR 33097.

[135] *Id* at 45 FR 33101. "Under Section 1004(27) of RCRA, the definition of "solid waste" specifically includes "sludge from a waste treatment plant." In defining "sludge," Section 1004(26A) includes wastes from a "*municipal* wastewater treatment plan." Because of these very clear statutory expressions, EPA must regulate sewage sludge under RCRA. * * *"

[136] We would note that even though the CWA section 405(d) regulations have been promulgated, EPA never exempted sewage sludge from the subtitle C hazardous waste regulations, and thus, sewage sludge that exhibits any of the characteristics of hazardous waste must be managed as a hazardous waste. *See* 45 FR 33102, May 19, 1980 where it states, "The Agency's strategy for the development of a comprehensive sewage sludge management regulation will eventually result in the establishment of a separate regulation. Once such a regulation is in place, sewage sludge will be exempted from coverage under other sets of regulations. * * * Pending promulgation of this comprehensive sewage sludge regulation, sewage sludge will not be specifically excluded from Subtitle C."

[137] *See* February 28, 1984 Memorandum from John H. Skinner, Director, Office of Solid Waste, to Thomas W. Devine, Director, Air and Waste Management Division, EPA Region IV, entitled, "Guidance on Determining When a Hazardous Waste Is a Legitimate Fuel That May Be Burned for Energy Recovery in Boiler or Industrial Furnace." A copy of this memorandum is included in the docket for today's rule. For definitions of "boiler" and "industrial furnace" under RCRA, *see* 40 CFR 260.10.

from a combustion unit that has some other primary purpose (such as an institutional waste incinerator). Thus, we continue to consider that sewage sludge is primarily burned for destruction and the presence of a waste heat recovery unit would not, by itself, satisfy the meaningful heating value legitimacy criterion.

*Comment:* Regarding the contaminant levels in sewage sludge, a number of commenters noted that the pretreatment standards have reduced contaminants (particularly metals) in sewage sludge, with a few commenters providing more recent contaminant data for sewage sludge than was available in the proposed rule and stated that this new data demonstrates that currently generated sewage sludge would meet the contaminant legitimacy criterion.[138] The National Association of Clean Water Agencies (NACWA) amended the data set included in the proposed rule by providing data from a 2006–2007 Targeted National Sewage Sludge Survey (TNSSS). *See* column four of Table 6 below:

TABLE 6—COMPARISON OF TOXICS OF MUNICIPAL WASTEWATER TREATMENT SLUDGES TO TRADITIONAL FUELS

| Element | 40 City study (1982) | National sewage sludge survey (1988) | Targeted national sewage sludge survey (TNSSS) | Coal |
|---|---|---|---|---|
| Mg/dry kg | | | | |
| Arsenic | 9.9 | 6.7 | 6.9 | 10 |
| Cadmium | 69 | 6.9 | 2.6 | 0.5 |
| Chromium | 429 | 119 | 80 | 20 |
| Lead | 369 | 134.4 | 76 | 40 |
| Mercury | 2.8 | 5.2 | 1.2 | 0.1 |
| Nickel | 135.1 | 42.7 | 48 | 20 |
| Selenium | 7.3 | 5.2 | 7 | 1 |

Other commenters, however, agreeing that sewage sludge should be considered a solid waste, noted that sewage sludge tended to have higher contaminant levels than traditional fuels and should be regulated as solid waste when used as a fuel. Although not a part of the proposed definition of "contaminants," some commenters noted the presence of pathogens in sewage sludge.

*EPA's Response:* The Agency appreciates the more recent and site-specific data provided by several commenters. We agree that in most cases, the specific data provided by commenters indicates that contaminant levels for most contaminants is not as high as previously reported in the earlier studies. However, we note that the TNSSS data provided by commenters still indicates higher levels, and those that EPA would not consider to be "comparable" for most of the contaminants found in sewage sludge when compared to coal. Thus, under today's final rule, sewage sludge would not satisfy the contaminant legitimacy criterion because of the presence of non-comparable levels of metals when compared to traditional fuels. Regarding the commenter's reference to pathogens, pathogens are not included as a contaminant in today's rule since that definition focuses on those constituents identified in the CAA that EPA will be evaluating to determine whether to establish emission standards (*see* also discussion in V.D.3).

*Comment:* Finally, several commenters urged EPA to explicitly limit the scope of the final rule, making it clear that this rulemaking would have no regulatory effects or impacts for sewage sludge that is not incinerated (*e.g.,* land application). On the other hand, one commenter requested that the Agency designate sewage sludge as a solid waste regardless of the manner that it is managed for disposal (land application, surface disposal, co-disposal in a municipal solid waste landfill, or incineration).

*EPA's Response:* We disagree with the one commenter who requested that this rulemaking define sewage sludge as a solid waste regardless of its end use (*i.e.,* land application, surface disposal, etc.). In this final rule, EPA is articulating a framework for determining whether a non-hazardous secondary material is or is not a solid waste when burned as a fuel or ingredient in a combustion unit; we are not making solid waste determinations that cover other possible end uses (*e.g.,* land application of sewage sludge). It is the Agency's view that these regulations should not dictate to state programs how to characterize and/or regulate this material (as well as any other non-hazardous secondary material), particularly since EPA does not have authority to regulate the beneficial use of non-hazardous secondary materials under subtitle D of RCRA. Therefore, EPA agrees with those commenters who suggested the limited scope of this final rule and explicitly recognize the narrow focus of this rulemaking.

11. Processed Fats

Processed fats, including both animal fats and vegetable oils, can be turned into biofuels for use in industrial boilers. The proposal did not discuss the use of this non-hazardous secondary material or discuss its status as a fuel or waste under this rule. We did receive comments pertaining to its status, however.

*Comment:* Commenters have argued that processed fats are a traditional fuel as they are not discarded and are legitimate fuel products. Specifically, they argue that the use of processed fats as fuel has been used in industrial boilers for more than a decade, as evidenced by approval of the use of such fats as fuels in air permits for industrial boilers. The commenters also note that processed fats are a primary product of the rendering process and not secondary materials or by-products, are derived from inedible animal products, which are the primary products of value and sale of the meat industry and not a secondary material or by-products, and are therefore not a solid waste since it or its primary feedstock have never been a waste or discarded.

[138] The proposed rule included a table comparing sewage sludge data taken from a 1982 40-city study and a 1988 National Sewage Sludge Survey, cited in the National Biosolids Partnership's 2005 "National Manual of Good Practices for Biosolids," and coal data taken from a 1998 U.S. EPA report entitled, "Development of Comparable Fuels Specifications." May 1998.

Processed fats also are managed as valuable commodities and have meaningful heating value. They are managed similar to traditional oils, utilizing the same tanks, hoses, nozzles, and tanker trucks, and have a heating value of around 17,000 Btu/lb.[139] Processed fats, the commenters argue, also have a comparable composition to traditional fuel products. In fact, processed fats contain considerably less contaminants (*e.g.,* <0.010% sulfur by weight, 0.022% ash by weight) and burn cleaner than many traditional fuels and derivatives (*e.g.,* coal, oil, coal tar oil, asphalts, etc). The limited contaminant data that was submitted showed that processed fats had less than 1 ppm of vanadium. Commenters also stated that processed fats have fewer contaminants than No. 6 residual oil (2% sulfur content), which will result in lower emissions of sulfur dioxide, nitrogen oxides, particulate matter, and carbon monoxide. Furthermore, they stated that processed fats also have lower emissions of sulfur dioxide, particulate matter and carbon monoxide, as compared to No. 2 distillate oil (0.5% sulfur content). However, no data was submitted to validate these statements.

The commenters also note that the federal government has encouraged the development and use of materials, such as processed fats as a clean, renewable fuel that reduces dependency on petroleum oils. Since 2006, the use of processed fats as fuel has been encouraged through the Alternative Fuel Mixture Credit (26 U.S.C. 6426(e)). Although the proposed rule is intended to facilitate the use of certain materials that would otherwise be treated as waste by allowing them to be designated as non-hazardous secondary materials and burned as fuels, the net effect, with respect to processed fats, is the opposite. Rather than facilitate the use of processed fats as fuel, the rule will effectively end the development of this market. This is because the end result under the rule as it currently is proposed is a requirement that each potential customer must petition and obtain EPA approval for each facility in which they wish to burn processed fats. The burden and delay of submitting to such a process will have a chilling effect on the development of new customers and markets for processed fats as fuel. As a practical matter, this outcome is contrary to longstanding federal policy encouraging the development and use of clean, renewable fuels in place of petroleum and other fossil fuels.

*EPA's Response:* We disagree that process fats are a traditional fuel. Process fats are secondary materials as they are produced from inedible parts of animals that were primarily butchered for meat, not for use as a fuel. We recognize, however, that these non-hazardous secondary materials contain lower concentrations of contaminants than traditional fuels[140] and, as such, are being encouraged for use instead of fossil fuels.[141] In addition, since the fats are managed the same way that traditional oil is, it is evident that the material is handled as a valuable commodity, meeting that legitimacy criterion. Additionally, the material meets the legitimacy criterion for a meaningful heating value. Since these materials are sometimes not managed within the control of the generator (*i.e.,* the butcher, the restaurant, etc.), questions could be raised as to whether they are discarded if not burned in a combustion unit within the control of the generator. However, we would note that the rendering process "sufficiently processes" the material into a non-waste fuel that meets the legitimacy criteria, as we note above. Thus, the commenters concern that non-waste determination petitions would need to be submitted on a case-by-case basis, and would have a chilling effect on the development of new customers and markets for processed fats, is not the case. Thus, the final rule establishes these non-hazardous secondary materials, after being processed, as a non-waste fuel.

### *C. Comments on Specific Materials Used as Ingredients*

The ANPRM identified a number of non-hazardous secondary materials that the Agency believes are currently being used as legitimate non-waste ingredients in combustion processes. The proposed rule then identified the four material groups for which we received the majority of the comments on the ANPRM. The four material groups are CKD, CCRs, foundry sand, and blast furnace slag/steel slag. The proposed rule did not assume that ingredients used in combustion units that are not managed within the control of the generator are discarded materials (as is the case for most non-hazardous secondary material fuels), since we believe that non-hazardous secondary materials used as ingredients are more akin to commodities managed within continuous commerce and are used as an integral part of the manufacturing process. That is, non-hazardous secondary materials that are directly used (or in the case of previously used materials, reused), function as effective substitutes (*i.e.,* as raw materials) in normal manufacturing operations or as products in normal commercial applications, and thus, EPA has interpreted the definition of solid waste as excluding non-hazardous secondary materials recycled in ways that most closely resemble normal production processes, provided they meet the legitimacy criteria.

Besides the comments on specific non-hazardous secondary materials used as ingredients described below, we again note the overarching comment that was raised by some commenters that the Agency has no authority under section 129 of the CAA to regulate the use of secondary materials as ingredients, as EPA's section 129 authority is limited to "solid waste incineration units," which the statute defines as units that "combust" solid waste. As discussed in Section V.A of today's final rule, we believe that this comment is not relevant to this regulation, which determines whether non-hazardous secondary material is a solid waste, or not under RCRA. EPA has clear authority to interpret RCRA to decide whether non-hazardous secondary materials are solid wastes or not.

#### 1. Cement Kiln Dust

CKD is a fine-grained, solid, highly alkaline material removed from the cement kiln exhaust gas by scrubbers. Much of the material comprising CKD is incompletely reacted raw material, including a raw mix at various stages of burning, and particles of clinker. Generation of CKD is directly connected to the production of cement clinker. The proposed rule indicated that CKD used in a cement kiln would not be considered a solid waste when used as an ingredient in a combustion unit, so long as it was not discarded in the first instance and satisfies the legitimacy criteria for ingredients. Whether CKD remains within the control of the generator or is transferred to another person is not in and of itself indicative of discard, as discussed above. If CKD has been discarded, however, its use as an ingredient in cement kilns would be considered combustion of a solid waste, unless it has been processed to produce a non-waste ingredient.

[139] *See* document EPA–HQ–RCRA–2008–0329–0706.1. Adams, T.T., J. Walsh, M. Brown, J. Goodrum, J. Sellers, and K. Das, 2002. "A Demonstration of Fat and Grease as an Industrial Boiler Fuel," University of Georgia, Athens, GA.

[140] *See* the Preliminary Characterization Study Prepared In Support of the Proposed Rulemaking—Identification of Nonhazardous Secondary Materials That Are Solid Waste: Traditional Fuels and Key Derivatives, EPA–HQ–RCRA–2008–0329–0461.21.

[141] See Adams, T.T., J. Walsh, M, Brown, J. Goodrum, J. Sellers, and K. Das, 2002. "A demonstration of Fat and Grease as an Industrial Boiler Fuel," University of Georgia, Athens, GA.

*Comment:* We received limited comments on CKD. One commenter urged EPA to state that CKD that is removed from on-site storage piles or monofills should be considered a legitimate non-hazardous secondary material and should not be considered a solid waste. The commenter explains that while CKD may have been previously placed in storage piles or even permitted solid waste management units (SWMUs), the technology did not exist previously to reuse the material. However, newer kiln systems can now use the CKD that has previously been disposed of, and thus, these non-hazardous secondary materials (which are ingredients in the manufacture of cement) should not be subject to the CAA section 129 standards.

*EPA's Response:* The commenter acknowledges that even though the CKD has remained on-site, the intent or purpose of placing CKD in storage piles or SWMUs was to dispose of them (*i.e.,* discard). Additionally, CKD that has been placed in storage piles in this manner would likely not meet the legitimacy criterion of "managed as a valuable commodity." Thus, it would appear in this instance that CKD that has been placed in storage piles for the purpose of disposal, even if on-site, has been discarded and would be considered a solid waste if burned in a combustion unit, unless the discarded CKD is processed into a non-waste ingredient product. (See discussion elsewhere in today's preamble regarding the reason why non-hazardous secondary materials that have been discarded in the first instance are solid waste if burned in a combustion unit, unless the non-hazardous secondary material is processed into a non-waste ingredient product.) CKD that has not been discarded in the first instance, however, and satisfies the legitimacy criteria would not be considered a solid waste when used as an ingredient.

2. Coal Combustion Residuals [142]

CCRs are formed during the coal-burning processes in power plants and industrial boilers, and are produced in various forms (*i.e.,* fly ash, bottom ash, and boiler slag) that are categorized by the process in which they are generated. The proposed rule indicated that CCRs used as ingredients in combustion units would not be considered solid wastes, provided they were not discarded in the first instance and satisfy the legitimacy criteria.[143] We also noted that CCRs can be used both as an ingredient and as a fuel supplement and proposed that the decision to treat them as a fuel or ingredient should be based on the primary purpose of their use in a combustion unit. We took comment on this approach, especially our characterization that the primary use of CCRs in cement kilns is generally for their ingredient value, as opposed to their fuel value.

The proposal also indicated that when CCRs are used for their ingredient value, the transferring of these materials to another person would not in and of itself be indicative of discard. However, to the extent that CCRs have been discarded in the first instance, they would have to be processed into a non-waste ingredient product and satisfy the legitimacy criteria in order not to be considered a solid waste. We also noted that comments were submitted on the ANPRM, which described patented processes that remove unwanted carbon from coal fly ash in order for these non-hazardous secondary materials to be used as an ingredient. While these processes—that is, those that separate carbon from fly ash to produce technically compliant fly ash for use in concrete appear to satisfy our processing requirement, we requested that commenters provide additional information explaining how this processing is conducted, and whether this type of fly ash is used as an ingredient in the clinker production process. The proposed rule also requested comment on the extent to which CCRs are recovered from the discard environment (*e.g.,* landfills) and used as ingredients in cement kilns, as well as more information on the extent to which these CCRs are processed.

In addressing the commenter who submitted comments on the ANPRM and argued that CCRs are solid wastes due to their high concentration of contaminants, the proposal noted that the chemical properties of CCRs are influenced to a great extent by the coal burned, the type of combustion unit, and the air pollution controls applied.[144] Acknowledging that fly ash may contain various levels of metals, such as vanadium, zinc, copper, chromium, nickel, lead, arsenic, and mercury,[145] the proposed rule noted that in a 2008 Report to Congress addressing the use of these secondary materials as ingredients in cement and concrete applications, the overall conclusion reached with respect to the perceived safety health risk barriers was a positive one, in that the risk analyses did not identify significant risks to human health and the environment associated with these uses.[146]

The proposed rule also noted that the Agency is studying the possible effects of new air emission control technologies and configurations on the composition of CCRs and requested comment on whether advanced emission control technologies, such as carbon control technologies for mercury and $NO_X$, are resulting or will result in increased levels of contaminants in coal ash to the extent that coal ash would not satisfy our legitimacy criteria.

*Comment:* Almost all commenters agreed that the primary purpose when using CCRs in cement kilns was to utilize these secondary materials as ingredients. Most commenters further asserted that all CCRs, when used in combustion units, should always be classified as ingredients rather than as fuels. (*See* Section V.B.9 for a further discussion on this comment and the Agency's response.) These commenters claimed that any energy value that is recovered is secondary to its value as an ingredient, and argued that classifying CCRs always as ingredients would simplify the waste determinations for these non-hazardous secondary

[142] In a separate rulemaking effort, EPA has proposed regulations that will provide for the safe disposal and management of coal combustion residuals from utility coal-fired power plants (the "Coal Combustion Residuals Proposed Rule"). The proposed rule was published in the **Federal Register** on June 21, 2010. *See* 75 FR 35127. Today's final rule does not affect that rulemaking effort, as our rule considers the use of coal combustion residuals in combustion units as fuels or ingredients, while the coal combustion residual proposed rule is concerned with the safe disposal and management of these residuals in landfills and surface impoundments. For more information on the coal combustion residual proposed rule, *see* Docket ID No. EPA–HQ–RCRA–2009–0640.

[143] For a discussion of CCRs used as fuels in combustion units, *see* Section V.B.9 of this final rule.

[144] For more information on the different types, or ranks, of coal, please refer to the Materials Characterization Paper on Traditional Fuels and Key Derivatives, which is located in the docket of today's final rule.

[145] *See* "Technical Background Document for the Report to Congress on Removing Wastes from Fossil Fuel Combustion: Waste Characterization." U.S. EPA. March 15, 1999.

[146] "Study on Increasing the Usage of Recovered Mineral Components in Federally Funded Projects Involving Procurement of Cement or Concrete to Address the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. Report to Congress." June, 3, 2008. EPA530–R–08–007. When analyzing perceived safety and health risk barriers associated with the beneficial use of recovered mineral components (including CCRs *et al.*), this study concluded that "Findings from [several cited] analyses did not identify significant risks to human health and the environment associated with the beneficial uses of concern. In addition, [EPA] identified no documents providing evidence of damage to human health and the environment from these beneficial uses. Our overall conclusions from these efforts, therefore, are that encapsulated applications, including cement and concrete uses, appear to present minimal risk." *Id.* at 4–11.

materials by clearly establishing the appropriate legitimacy criteria that apply (*i.e.,* facilities would not need to determine whether the fuel or ingredient legitimacy criteria apply based on the primary purpose of the secondary materials).

Some commenters were also concerned that if cement kilns burned high-carbon content fly ash (which has more pronounced fuel content), the provisions of this rule applying to fuels would be triggered, even though these secondary materials have nearly identical characteristics, is managed in an identical manner, and is combusted in the same unit as the material used primarily as an ingredient (*i.e.,* low-carbon content fly ash).

*EPA's Response:* EPA agrees with the commenters that the primary purpose when using CCRs in cement kilns is to utilize it as an ingredient. However, we disagree with those commenters that argued that all CCRs, when used in combustion units, should be categorically defined as ingredients. As some commenters acknowledged (and as we also discussed in Section V.B.9 above), some CCRs are indeed used for their fuel value as opposed to their ingredient value, especially when re-burned, as in the case of their use in combustion units by electric utilities. Therefore, we cannot categorically classify CCRs as ingredients when it is clear that, in some cases, these non-hazardous secondary materials are being burned for their fuel value and/or to produce a new secondary material (*i.e.,* low-carbon fly ash). In cases where the primary purpose of using CCRs is for their fuel value and not for their ingredient value (*e.g.,* by electric utilities), the secondary materials must meet the requirements for fuels, including the legitimacy criteria, in order not to be considered a solid waste.

With respect to the issue of high-carbon fly ash burned in cement kilns, it is not clear the extent to which cement kilns burn high-carbon fly ash or rather if commenters were providing a hypothetical situation in order to highlight potential issues that could arise for secondary materials that could have value as both a fuel and ingredient. It is also unclear whether low-carbon fly ash is required as a substitute ingredient in Portland cement or if cement kilns can also use high-carbon fly ash for its ingredient value. To the extent that these kilns are burning these secondary materials for their fuel value as opposed to their value as an ingredient, these secondary materials would be subject to the requirements for non-hazardous secondary materials used as fuels promulgated in today's final rule.

We note other commenters who describe processes for removing unwanted carbon from fly ash in order to produce concrete quality fly ash (lower carbon content), which could suggest that cement kilns that burn high-carbon fly ash may be using these secondary materials for their fuel value, as well as their ingredient value. These commenters, however, discussed instances where fly ash was used as a fuel only in regards to its use in utility boilers and CBO units—where there is clearly not an ingredient value, as is the case with burning fly ash in cement kilns.

*Comment:* EPA received comments on the ANPRM stating that there are at least four patented processes for removing unwanted carbon from fly and bottom ash that allow the processed ash to produce both technically compliant ash for use in concrete and a separate carbon stream that can be re-introduced into the boiler for its fuel value. One electric utility, commenting on the proposed rule, also mentioned patented processes for using CCRs recovered from landfills. However, neither of these commenters provided specific details regarding how CCRs that are recovered from the discard environment are actually "processed." One other commenter discussed a two-stage process to maintain low carbon content, but was not aware whether the material was used for concrete or clinker production. Another commenter argued that the same processes used for currently generated fly ash to separate high-carbon ash from mineral ash could be applied to reclaimed fly ash and produce similar secondary ingredients. This commenter argued that the processes produce two materials that are chemically distinct from the reclaimed fly ash and should therefore satisfy our proposed processing requirement.

*EPA's Response:* Unfortunately, EPA did not receive information during the comment period describing the types of processing that discarded CCRs undergo prior to being used as an ingredient in a combustion unit and are, thus, unable to make a categorical determination whether the patented processes referenced in the proposed rule would meet the definition of processing being promulgated in today's final rule. Although we did not receive new information regarding how CCRs are processed, as we stated in the proposed rule, certain processes are currently being utilized to recover CCRs from the discard environment that would likely meet our definition of "processing." For example, we are aware of at least one electric utility that recovers ash from ponds or landfills and then separates this secondary material into its fundamental components: Carbon, silicates, and high-density, iron-rich materials. A coarse carbon-fuel product is then recovered by density separation using concentrating spirals. A fine carbon-fuel product is also recovered with flotation cells.[147] We believe that this type of processing is likely to meet our definition of processing, as it appears that these processes in fact remove contaminants and improve the ingredient characteristics of these recovered CCRs. Thus, a determination would need to be made as to whether such processes meet the definition of processing, as codified in § 241.2.

*Comment:* As noted above, we solicited comments in the proposed rule regarding the extent to which CCRs are recovered from the discard environment and used as ingredients in cement kilns. We received a few comments regarding the extent to which CCRs are mined from landfills (*i.e.,* recovered from the discard environment). Most of these comments did not specify, however, whether these recovered CCRs were subsequently used for their fuel or ingredient value.

*EPA's Response:* Based on the comments, it does not appear that it is a common practice for CCRs to be recovered from the discard environment (*e.g.,* landfills) and beneficially used. We respond to these comments in Section V.B.9 (Comments on Specific Materials Used as Fuel-Coal Combustion Residuals).

*Comment:* Regarding the question of whether advanced emission control technologies are resulting or will result in increased levels of contaminants in CCRs, one commenter stated that there was no credible way to know or anticipate this information. Another commenter agreed, stating that there is no data and no way to predict the result of new or future technology on the character of fly ash because of the use of advanced pollution control technology. This commenter also notes that there is no current information available that has proven that advanced emission control technologies directly result in increased contaminant levels.

One state commenter, however, stated that it expects the mercury content of coal fly ash to increase significantly in upcoming years. Consequently, this state commenter described its current efforts to remove a generic, pre-determined beneficial use determination for coal fly ash as an ingredient in

[147] *See* "Materials Characterization Paper on Coal Combustion Residuals—Coal Fly Ash, Bottom Ash, and Boiler Slag." A copy of this document has been placed in the docket for today's rule.

cement manufacturing. Additionally, another commenter stated that when using the CBO process to combust fly ash, essentially 100 percent of the mercury entering the CBO unit as feed ash leaves with the product ash.

*EPA's Response:* EPA recognizes that it is difficult to anticipate what contaminant levels in coal fly ash will result from implementation of future technologies. We also believe, however, that it is important to be studying and anticipating the possible effects of new air pollution control (APC) technologies and configurations on the composition of CCRs to the greatest extent possible. As noted in the proposed rulemaking, EPA has begun publishing a series of reports to analyze this issue further.[148] Based on these reports, EPA believes that changes to APCs at coal-fired power plants (*e.g.,* addition of flue-gas desulfurization (FGD) systems, selective catalytic reduction, and activated carbon injection to capture mercury and other pollutants) are shifting mercury and other pollutants (*e.g.,* metals) from the flue gas to fly ash, FGD gypsum, and other APC residues. The Agency will continue to research the possible effects of APCs on contaminant levels in fly ash. We note that under today's final rule, fly ash used as an ingredient would need to pass the contaminant legitimacy criterion for ingredients in order to not be considered a solid waste.[149]

3. Foundry Sand

Foundry sand is an industrial material generated by the metal-casting industry, which uses the sand to form a physical mold used in the production of metal products. After multiple uses in castings, the sand becomes unsuitable for castings and is either disposed of in landfills or beneficially used in other applications, including use as an ingredient in the manufacture of Portland cement. The proposed rule classified foundry sand as not being a solid waste when used as an ingredient in a combustion unit, so long as it was not discarded in the first instance and satisfies the legitimacy criteria for ingredients. Whether foundry sand remains within the control of the generator or is transferred to another person is not in and of itself indicative of discard, as discussed previously. If foundry sand has been discarded, however, it would be considered a solid waste, unless it has been processed to produce a non-waste ingredient.

*Comment:* We received a few comments regarding the characterization of foundry sand in the proposed rule. One commenter discussed how foundry sand is reused in the metal casting process as part of its argument that foundry sand should not be considered a solid waste, citing a 2001 letter from EPA which indicated that foundry sand reused on-site within the sand loop for mold making is part of a continuous industrial process and, therefore, not a solid waste.[150] The same commenter also discussed how this sand can also be processed on-site in a thermal reclamation unit so that the sand can be returned to the mold- and core-making process. Commenters also discussed a variety of other beneficial uses for foundry sand.

*EPA's Response:* The foundry sand uses evaluated as part of this rulemaking only include their use as an ingredient in combustion, such as cement kilns. We do not consider the reuse of foundry sand in the metal casting operations to constitute the use of a non-hazardous secondary material either as a fuel or ingredient in a combustion system, but rather as a type of beneficial use that is routinely employed by foundries in the production of metal products. As we stated in the referenced 2001 letter, foundry sands that are re-used on-site in the primary production process on a continuous basis in the sand loop are not solid wastes.[151]

We note, however, that the 2001 letter cited by one commenter explicitly states that the Agency is not addressing the status of any thermal processing of sand in the letter. It appears that the purpose of "processing" foundry sand in a thermal reclamation unit is to destroy or dispose of the contaminants so that the foundry sand can be re-used. As such, the burning of foundry sand in a thermal reclamation unit is burning for discard and, thus, would be considered a solid waste if combusted in such a unit, which would be subject to the section 129 CAA standards. Regarding comments that discussed other beneficial uses of foundry sand, we again note that this rule is limited to situations where the non-hazardous secondary material is used as a fuel or ingredient in a combustion unit and, as such, other examples of using foundry sand in other applications is beyond the scope of this rulemaking.

4. Blast Furnace Slag/Steel Slag

Blast furnace slag and steel furnace slag (steel slag) are by-products of iron and steel manufacturing in both iron and steel mills. Slags are used as ingredients in cement clinker manufacturing, bituminous concrete, road building and construction, among other beneficial uses. The proposed rule indicated that blast furnace and steel slag used as ingredients in combustion units that are not discarded in the first instance would not be considered a solid waste provided they satisfy the legitimacy criteria for ingredients. Whether blast furnace and steel slag remains within the control of the generator or is transferred to another person is not in and of itself indicative of discard, as previously discussed. However, if blast furnace and steel slag are in fact discarded in the first instance, then they would have to be sufficiently processed into a non-waste ingredient that satisfies the legitimacy criteria in order to be classified as a non-waste ingredient. However, we solicited comments on the level of processing that these materials undergo before determining whether such operations would meet our definition of processing.

*Comment:* We received few comments specifically on blast furnace and steel slag. One commenter discussed the use of blast furnace slag as a raw material substitute in the glass manufacturing process. Another commenter discussed how blast furnace and steel slag are typically returned to the iron and steel making processes and are not discarded in the first instance. The same commenter also discussed slag piles that were previously discarded and the processing that these non-hazardous secondary materials go through. Specifically, such processing includes extraction, passing the slag through grizzlies, removal of iron bearing scrap using magnets, and then screening to

[148] A series of reports have been and are being developed by U.S. EPA's Office of Research Development. To date, three documents have been finalized, including: (1) "Characterization of Mercury-Enriched Coal Combustion Residuals from Electric Utilities Using Enhanced Sorbents for Mercury Control." EPA–600/R–06/008. Feb. 2006; (2) "Characterization of Coal Combustion Residuals from Electric Utilities Using Wet Scrubbers for Multi-Pollutant Control." EPA–600/R–08/077. July 2008; and (3) "Characterization of Coal Combustion Residuals from Electric Utilities Using Multi-Pollutant Control Technology—Leaching and Characterization Data." EPA–600/R–09/151. December 2009. Ongoing work to complete this research includes: (1) Probabilistic assessment of the leaching source term for plausible CCR management scenarios, (2) Leach-XS Lite which is free software providing electronic access to data from this research, and (3) test methods for the Leaching Environmental Assessment Framework (LEAF).

[149] We also note that CCRs used as fuels must also meet the contaminant legitimacy criterion in order not to be considered a solid waste.

[150] March 28, 2001 letter from Elizabeth Cotsworth, Director, EPA's Office of Solid Waste to Ms. Amy J. Blankenbiller, American Foundry Society. A copy of this letter can be found in the docket to today's rule.

[151] For more information on the reuse of foundry sands as molds, *see* "Revisions to the Definition of Solid Waste" Final Rule at 73 FR 64705. October 30, 2010.

size the aggregate. Some commenters also asserted that because these slags are reused as part of a continuous process, the application of the legitimacy criteria are inappropriate.

*EPA's Response:* We agree with the commenters that blast furnace and steel slag that are reused as an ingredient, either in the iron and steel making processes or in the manufacturing of glass, are not solid wastes provided they have not been discarded in the first instance and meet the legitimacy criteria. However, we disagree with the commenters, who argued that because they are reusing these slags in a "continuous process," the application of the legitimacy criteria do not apply. EPA has a long-standing policy that the recycling of secondary materials, both hazardous and non-hazardous, including as part of a continuous industrial process, must be legitimate. The legitimacy provisions in today's rule are designed to distinguish between real recycling activities and "sham" recycling, an activity undertaken by an entity to avoid certain requirements, which in this case would be to avoid triggering the section 129 CAA requirements for solid waste incinerators. Because of the economic advantages in managing the non-hazardous secondary material as a non-waste ingredient as opposed to a solid waste ingredient, there is an incentive for some handlers to claim they are recycling, when, in fact, they are conducting waste disposal. Therefore, blast furnace and steel slag used as an ingredient in a combustion unit, including as part of a continuous industrial process, must satisfy all of the legitimacy criteria in order to not be considered a solid waste.

Regarding the description provided by the commenter on the extent of processing conducted on slags that have been previously discarded, it appears that this level of processing would meet our definition of processing, as the processing includes not only rigorous operations to extract the slag from the discard environment, but also the concerted removal of constituents through magnetic separation. Assuming the processed slag meets the legitimacy criteria for ingredients, the slag resulting from the processing operation would constitute a non-waste ingredient and would not be considered a solid waste.

### *D. Comments on Legitimacy Criteria for Fuels*

Non-hazardous secondary materials used as fuels in combustion units must meet the legitimacy criteria specified in § 241.3(d)(1) in order to be considered a non-waste fuel. To meet the fuel legitimacy criteria, the non-hazardous secondary material must be managed as a valuable commodity, have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy, and contain contaminants at levels comparable to or lower than those in traditional fuels which the combustion unit is designed to burn. Details on each criterion as outlined in the proposed rule and the comments received are discussed below.

#### 1. Managed as a Valuable Commodity

Under the proposed rule, non-hazardous secondary materials used as fuels must be managed as valuable commodities, including being stored for a reasonable time frame. Where there is an analogous fuel, the non-hazardous secondary material used as a fuel must be managed in a manner consistent with the management of the analogous fuel or otherwise be adequately contained so as to prevent releases to the environment. Where there is no analogous fuel, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment. An "analogous fuel" is a traditional fuel for which the non-hazardous secondary material substitutes, and which serves the same function and has similar physical and chemical properties as the non-hazardous secondary material. In addition to requesting comment on this criterion, the Agency solicited comment on whether it should define a specific "reasonable" time frame or range of time frames for storage as part of this criterion and on the time period or range of time periods that traditional fuels are typically held before they are used as a fuel. Comment was also solicited as to whether the "contained" standard, which is a general performance standard, provides sufficient direction to the regulated community or whether the Agency should include specific technical standards or limit the types of units in which such non-hazardous secondary materials may be managed, in order for them to be considered to be "managed as a valuable commodity."

*Comment:* Recommendations on a reasonable time frame to determine if a non-hazardous secondary material is managed as a valuable commodity brought a range of responses. Many commented that a one-rule-fits-all policy for the reasonable time frame of storage of non-hazardous secondary materials is impractical and arbitrary, since the definition of what is "reasonable" will vary by secondary material, industry, and facility. Instead, they argued that facilities should be allowed to determine what constitutes the most reasonable time frame, based on what is most economical. The most appropriate time frame will vary depending upon the non-hazardous secondary material and the industry and may reflect the rate at which the non-hazardous secondary material at issue is generated. If a non-hazardous secondary material is generated continuously, then use and storage is predictable and can be kept consistent. However, some non-hazardous secondary materials are stored for long periods and may be removed only once or twice per year.

While many commenters rejected the idea of a specific storage time limit, a limited number were supportive of such an approach. For example, one commenter recommended that no more than 180 days of inventory using the design process rate be stored at any given time and no more than 49 percent of the inventory be in storage for more than 2 years. These time frames allow the energy/material recovery facility a reasonable amount of time to make arrangements to establish, buy, and sell the non-hazardous secondary material. Other commenters recommended a time frame of one year, consistent with the hazardous waste requirements for speculative accumulation.

*EPA's Response:* After further evaluation, EPA agrees with the majority of commenters that "reasonable time frame" should not be specifically defined as such time frames vary according to the non-hazardous secondary material and industry involved. The "reasonable time frame" is an appropriate standard considering the large number of non-hazardous materials that may be subject to this rule, and is flexible enough to allow accumulation of these materials to be cost-effective. In addition, persons will need to document in their records the "reasonable time frame" selected and the basis for such time frames. (*See* Section VII.I for further discussion on documentation of legitimacy decisions.) The Agency did not receive information that such flexibility would lead to non-hazardous secondary materials being over-accumulated.

*Comment:* The Agency solicited comment on this aspect of this criterion, including whether a "contained" standard, which is a general performance standard, provides sufficient direction to the regulated community. Other approaches that EPA considered were: (1) Providing a more specific definition of "contained" in the rules, or (2) including specific technical standards or (3) limiting the types of units in which such non-hazardous secondary materials may be managed, in

order for them to be considered to be "managed as a valuable commodity."

Several commenters recommended that the definition of "contained" be clarified and to include the concept of maintaining the recyclability of the non-hazardous secondary material. In contrast, other commenters stated that the proposed "contained" standard provides sufficient direction to the regulated community and that the definition of "contained" in the proposed rule adequately describes how and when a non-hazardous secondary material will be considered "contained." They asserted that industry will use this definition as a general guideline for the safe handling and storage of non-hazardous secondary materials and that further "specific" definitions or other approaches would not be beneficial since the current guidance provides clear and sensible direction.

Others commented that the "contained" standard is inadequate to determine whether a material is "valuable" or discarded. They argue that the standard does not explain what adequately contained means nor does it account for differences in the necessary level of containment for different materials.

*EPA's Response:* The Agency recognizes that the "contained" concept can be somewhat difficult to grasp, but also notes that the "contained" standard is to be used only in those situations where there is not an analogous fuel product. That is, if there is an analogous fuel product to the non-hazardous secondary material, then the non-hazardous secondary material must be stored in a similar manner and, since it is indeed a valuable material, EPA could reasonably expect it to be contained so as not to be lost to the environment. In EPA's view, a recycler will value non-hazardous secondary materials that are contributing fuel value to its process or product and, therefore, will manage those non-hazardous secondary materials in a manner consistent with how it manages a valuable fuel. If, on the other hand, the recycler does not manage the non-hazardous secondary materials as it would a valuable fuel, that behavior may indicate that the non-hazardous secondary materials may not be burned as fuel, but rather released into the environment and discarded. This criterion's primary focus is on storage in a manner consistent with the analogous valuable raw material.

However, EPA realizes that in some processes, there is not a raw material that can be called "analogous" and, in order to allow facilities with those processes to evaluate the legitimacy of their recycling, EPA added the requirement that the materials be "contained" if there is no analogous product to achieve the same relative standard of secondary materials being managed as valuable commodities. Furthermore, EPA has explained what it means to be contained in today's preamble and includes that definition in the regulatory text. Specifically, a non-hazardous secondary material is "adequately contained" if it is stored in a manner that adequately prevents releases or other hazards to human health and the environment, considering the nature and toxicity of the secondary material. Thus, we are finalizing the contained standard, as proposed.

Nevertheless, the Agency recognizes that providing greater clarity to this definition may be useful to the regulated community and the public. To this end, EPA has agreed to issue a proposed rule by June 2011 on the definition of solid waste under the hazardous waste provisions of RCRA (*see* Section VIII.C for additional details). One of the issues that EPA will be evaluating as part of that proposal is the "contained" standard, as promulgated in that rule.[152]

*Comment:* Several commenters expressed uncertainty about the meaning of "valuable commodity," noting that the definition of valuable commodity should be clarified, or requested that EPA specify clear criteria for determining whether a non-hazardous secondary material is managed as a valuable commodity.

*EPA's Response:* Given the nature of this legitimacy criterion and the need to apply it to a variety of non-hazardous secondary materials that are managed in various ways, we have determined that it is not appropriate or practicable for EPA to develop specific technical standards. The Agency is using this criterion: Materials must be managed as analogous raw materials or, if there are no analogous raw materials, the materials must be adequately contained; contained is defined to mean "the non-hazardous secondary material is stored in a manner that adequately prevents releases or other hazards to human health and the environment considering the nature and toxicity of the non-hazardous secondary material." This definition provides ample direction and guidance, as a number of commenters argued, while at the same time provides the flexibility needed since this criterion will apply to a large number of non-hazardous secondary materials and industries. As an example, resinated wood residuals are adequately contained since they are pneumatically transferred through enclosed ducts, stored temporarily in a fuel silo, and then utilized in boilers to provide heat to hot presses and dryers (*see* Section V.B.6).

Regarding the term "valuable commodity," EPA's intent with this criterion is that non-hazardous secondary materials are managed in the same manner as materials that have been purchased or obtained at some cost, just as fuels or raw materials are. We expect non-hazardous secondary materials that are used as fuels or ingredients to be managed effectively and efficiently in order that their full value to the combustion process is realized. The standard for management of the non-hazardous secondary materials is reasonable for helping assess whether disposal in the guise of normal manufacturing is occurring. As an example, scrap tires collected under the oversight of established tire collection programs (*see* Section VII.C) would generally be considered managed as a valuable commodity. These programs promote the beneficial use of scrap tires and form established collection infrastructures through coordination with tire dealerships, haulers, processors and end users. On the other hand, scrap tires that are managed in waste tire piles would not be considered to be managed as a valuable commodity because they are stored for long periods of time without any safeguards.

*Comments:* One commenter suggested that the tests to determine if a material is managed as a valuable commodity (determining if it is managed consistent with the management of an analogous ingredient and used within a reasonable time frame) are irrelevant because solid wastes are managed in ways similar to commodities (*i.e.,* solid wastes and solid commodities are stored in piles on the ground, liquid wastes and commodities are stored in tanks and barrels). Another commenter asked that EPA provide clarity on managing a non-hazardous secondary material as a valuable commodity and the kinds of practices a facility must implement to demonstrate that it is managing the non-hazardous secondary material as a valuable commodity.

[152] In a **Federal Register** notice where EPA announced a public meeting on the Definition of Solid Waste under the hazardous waste provisions of RCRA, we specifically identified the definition of "contained" as one of the provisions that EPA was further evaluating. (74 FR 25202, May 27, 2009.) Among other things, the Agency noted that it could "address this issue by setting specific performance or storage standards as a condition of the transfer-based exclusion. Finally, EPA could address this concern by developing more detailed guidance on what might constitute "contained," for different types of units or management practices."

*EPA's Response:* We disagree with the commenter that this criterion is irrelevant because we cannot determine (nor does our experience suggest) that solid wastes and commodities are always managed in a similar manner. Commodities, on the one hand, are handled specifically to prevent the loss of material because of its value. Solid wastes, on the other hand, when they are not highly regarded for a beneficial reuse, are often not managed in a way that minimizes the release of the material itself, but more in a way that protects the surrounding environment from the material. However, we also know that solid wastes, if not properly managed, have created damages to the environment. For example, the over-accumulation of scrap tires is well known and has resulted in massive piles of discarded tires that have contributed to the overall solid waste management problem due to the threat of fires, such as the Rhinehart Tire Fire Dump,[153] and because they provide an ideal breeding ground for mosquitoes and rodents.

As discussed previously, given the nature of this legitimacy criterion and the need to apply it to a variety of non-hazardous secondary materials that are managed in various ways, we are not identifying specific standards or practices for managing a material as a valuable commodity beyond those examples for resinated wood and scrap tires outlined above. If any material, whether a non-hazardous secondary material or a raw material commodity, is mis-managed in a manner that releases significant material to the environment, a waste problem may result. Although the raw material commodity is not subject to the RCRA definition of solid waste, the released material may be. In this rule, where the Agency is dealing with secondary materials that could either be wastes or commodities, if non-hazardous secondary material is being released to the environment, it would not be considered a commodity material. All site-specific practices designed to meet the legitimacy criteria must be documented as outlined in Section VII.I.

Thus, the final rule will retain the proposed approach that non-hazardous secondary materials used as a fuel must be managed in a manner consistent with the management of an analogous fuel (where there is an analogous fuel), or otherwise be adequately contained so as to prevent releases to the environment.

[153] *See* 51 FR 21054, June 10, 1986.

2. Meaningful Heating Value and Use as a Fuel

Under the proposed rule, the non-hazardous secondary material must have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy. In addition to requesting comment on this criterion, the Agency also requested comment on whether it should promulgate a bright-line test for determining what is considered a meaningful heating value in an effort to provide greater certainty to both the regulated community and regulatory officials. For example, the Agency could establish 5,000 Btu/lb or some other value as the bright-line test. In addition, EPA requested comment on whether we should identify a Btu/lb cutoff below which the Agency would declare that the non-hazardous secondary material is being burned for destruction as opposed to energy recovery. Under this approach, non-hazardous secondary materials between this lower level and 5,000 Btu/lb (assuming there is a difference) could pass this criterion provided the facility demonstrates the energy recovery unit can cost-effectively recover meaningful energy from the non-hazardous secondary materials used as fuels; below this lower level, all non-hazardous secondary materials that are burned in a combustion unit would be considered to be burned for destruction and thus a solid waste if combusted.

*Comment:* Many comments related to the establishment of a Btu threshold claimed that any heating value is "meaningful." Other commenters expressed opposition to the imposition of a bright-line test, with one commenter arguing that inflexible Btu/lb cutoffs, as well as "benchmark" values could prevent utilities and other industries from using alternative fuels to recover energy. Another commenter echoed opposition to a bright-line test since the use of a non-hazardous secondary material with any heating value reduces the use of fossil fuels, indicating that any value for the bright line test would be arbitrary and would result in costly impacts to current production systems and would stifle technological advancements in combustion unit designs.

Other commenters stated that a minimum heating value, below which the non-hazardous secondary material would not be considered to have a meaningful heating value will restrict the marketplace, hamper advances and innovation in energy recovery, and add costs where they are not justified from an environmental standpoint. If EPA insists on a minimum heating value, they recommend including a cost effectiveness provision in the rule that would enable facilities to demonstrate the value of using a material below this threshold.

Commenters from state agencies differed somewhat in their positions regarding the 5,000 Btu/lb threshold. Two state agencies requested that EPA lower the minimum Btu threshold from 5,000 Btu/lb to 4,000 Btu/lb, but another State agency supports the 5,000 Btu/lb threshold. Still another state commenter recommends that if EPA establishes a lower threshold, below which the non-hazardous secondary material would not be considered to have a meaningful heating value, that this value be based on innovation in energy recovery technologies from secondary materials with lower heating values. Due to the continuing evolution of energy recovery technologies, this commenter argues that EPA should include a "safe harbor" cut-off level in the rule with a provision for case-by-case approvals based on the most current proven technology. Another commenter recommends that if such a lower threshold is established, that it be based on the high moisture content of wood products that prevent these materials from reaching the minimum 5,000 Btu/lb threshold.

*EPA's Response:* After further evaluation, the Agency agrees with commenters that imposition of a strict bright-line test for minimum heating value could hamper advances and innovation in energy recovery, and add costs where they are not justified. The Agency also did not receive persuasive information that a lower than 5,000 Btu/lb threshold, or entirely eliminating the threshold, would be an appropriate measure in establishing this legitimacy criterion.

As discussed in the proposed rule, the concept of a 5,000 Btu/lb benchmark was addressed in the "comparable fuels" rule (63 FR 33781) for hazardous secondary materials. EPA had previously stated that industrial furnaces (*i.e.,* cement kilns and industrial boilers) burning hazardous wastes with an energy value greater than 5,000 Btu/lb may generally be said to be burning for energy recovery; however, hazardous wastes with a lower Btu content could conceivably be burned for energy recovery due to the devices' general efficiency of combustion. At the same time, EPA is trying to avoid sham situations where non-hazardous secondary materials with low Btu value are burned for destruction in lieu of proper disposal.

Thus, the 5,000 Btu/lb limit is a general guideline, which is being adopted in this final rule, but allows

some flexibility. To allow such flexibility for facilities with energy recovery units that use non-hazardous secondary materials as fuels with an energy content lower than 5,000 Btu/lb, as fired, a person may demonstrate (see Section VII.I Determining That Non-Hazardous Secondary Material Meets the Legitimacy Criteria) that a meaningful heating value is derived from the non-hazardous secondary material if the energy recovery unit can cost-effectively recover meaningful energy from the non-hazardous secondary materials used as fuels. Factors that may be appropriate in determining whether an energy recovery unit can cost-effectively recover energy from the non-hazardous secondary material include, but are not limited to, whether the facility encounters a cost savings due to not having to purchase significant amounts of traditional fuels they otherwise would need, whether they are purchasing the non-hazardous secondary material to use as a fuel, whether the non-hazardous secondary material they are burning can self-sustain combustion, and whether their operation produces energy that is sold for a profit (*e.g.,* a utility boiler that is dedicated to burning a specific type of non-hazardous secondary material that is below 5,000 Btu/lb could show that their operation produces electricity that is sold for a profit).

3. Have Contaminants at Comparable Levels or Lower Than Traditional Fuels

Under the proposed rule, non-hazardous secondary materials must contain contaminants at levels comparable to or lower than those in traditional fuels which the combustion unit is designed to burn. Such comparison is to be based on a direct comparison of the contaminant levels in the non-hazardous secondary material to the traditional fuel itself. Contaminants were defined under the proposal as any constituent in non-hazardous secondary materials that will result in emissions of the air pollutants identified in CAA section 112(b), and the nine pollutants listed under CAA section 129(a)(4) when such secondary materials are burned as a fuel or used as an ingredient, including those constituents that could generate products of incomplete combustion.

The Agency specifically solicited comments on how EPA should interpret the "comparable to or lower than" standard. For example, should comparable mean the same as or lower, taking into consideration natural variations in sampling events? Also, instead of requiring that contaminant levels in non-hazardous secondary materials be comparable to traditional fuels, the Agency also requested comment as to whether to adopt a "not significantly higher" standard—that is, contaminants in non-hazardous secondary material used as a fuel in combustion units could not be significantly higher in concentration than contaminants in traditional fuel products.

The Agency also solicited comment on whether the comparison should be based upon the total level of contaminants, or on the level of contaminants per Btu of heat value, whether the list of contaminants should be narrower or broader, or whether the Agency should look at other possible lists. For example, since the Agency is determining which non-hazardous secondary materials are considered solid waste under RCRA, the Agency could consider the list of hazardous constituents promulgated in Appendix VIII of 40 CFR part 261, which is a list of hazardous constituents that have been shown in scientific studies to have toxic, carcinogenic, mutagenic or teratogenic effects on humans and other life forms. Finally, comment was solicited as to whether the comparison should be based on an established "bright line" level of contaminants to those contained in traditional fuels.

*Comment:* Several commenters addressed the "comparable" standard and the "not significantly higher" standard. Many of these comments stated that "comparable" should be understood to mean "similar, higher or lower," not "equal" or the "same." Commenters also requested that EPA clarify the definition of "comparable" and specifically requested that EPA explain the concept in greater detail. Of the comments that expressed a preference for either the "comparable" or "not significantly higher" standard, most preferred the latter, stating that it is more consistent with the approach used by EPA for hazardous waste in the 2008 DSW Final Rule and would not discourage beneficial use as much as the "comparable" standard. Two other commenters argued that instead of using a "not significantly higher" standard, the total environmental impact of using a non-hazardous material should be considered. For example, a non-hazardous secondary material may be lower in all contaminants, except one that may be considered higher than "comparable," but the overall impact is beneficial in terms of less total contaminants and improved emissions.

Other commenters offered suggestions on how to interpret "comparable," but also on how to implement the "comparable" standard. For example, "comparable" should refer to the traditional fuel that would be used if the non-hazardous secondary material was not being burned or allowed to be burned. Another commenter believed that the "comparable" standard should only be used as an initial step to determine if the material is a legitimate fuel. For example, where a material has high levels of a low-impact contaminant or a contaminant is controlled by the emission control device in the incineration unit, there should be a process to see whether the material can still be considered a fuel. Similarly, another commenter also recommended using the "comparable" standard as an initial determination step, with the "not significantly higher" standard being used as a secondary determination step in some situations. These situations would primarily be when there is a low-impact contaminant without environmental, health, or product quality impacts present in concentrations above those found in traditional raw materials.

*EPA's Response:* EPA has retained the legitimacy criterion that non-hazardous secondary materials used as a fuel must contain contaminants at levels that are comparable to or lower than the concentrations found in traditional fuels which the combustion unit is designed to burn. The "comparable to or lower than" standard means any contaminants present in non-hazardous secondary materials that are within a *small* acceptable range, or lower than, the contaminant in the traditional fuel. We have decided to select this standard since we have determined it more closely reflects EPA's intent with respect to this legitimacy criterion than the phrase "not significantly higher," which suggests that contaminants can be present in non-hazardous secondary materials at levels that could reflect discard, especially since we are addressing non-hazardous secondary materials that are being combusted.

EPA recognizes that combustion is an inherently destructive process, even when energy is recovered. If a non-hazardous secondary material contains contaminants that are not comparable to those found in traditional fuels, and those contaminants are related to pollutants that are of concern at solid waste combustion units, then it follows that discard is occurring. The contaminants in these cases could not be considered a normal part of a legitimate fuel and are being discarded, either through destruction in the combustion unit or through releases into the air. Units that burn such materials are therefore most appropriately

regulated under the CAA section 129 standards for solid waste incinerators.

In response to those commenters requesting further guidance on how to interpret the "comparable to or lower than" standard, the following examples are provided.

- A non-hazardous secondary material contains 500 parts per million (ppm) of lead, while the traditional fuel that would or could be burned in the combustion unit contains 475 ppm of lead. These levels would be considered comparable (since it falls within a small acceptable range) and thus, would meet this factor. If, on the other hand, the level of lead in the non-hazardous secondary material was 1,000 ppm, these levels would not be comparable and it may indicate that the non-hazardous secondary material was being burned to dispose of the material and that the activity is sham recycling.
- A traditional fuel contains no detectable amounts of barium, while the non-hazardous secondary material contains a minimal amount of barium (*e.g.,* 1 ppm). In this situation, the levels would be considered comparable since it falls within a small acceptable range. If, however, the barium were at much higher levels in the non-hazardous secondary material (such as 50 ppm), the levels would not be comparable and it may indicate discard of the barium and sham recycling.

EPA does not agree with those commenters who suggest that in evaluating the constituent concentrations in non-hazardous secondary materials, that the total environmental impact should be considered, rather than comparing each constituent to levels found in traditional fuels. Under such an approach, a non-hazardous secondary material may be judged not to present an environmental problem when assessing all contaminants together, although significantly higher levels for one or more contaminants may be present such that they are destroyed or discarded by means of combustion. This, we have determined, is inconsistent with the concept of discard under the statute, since it would allow a solid waste to be subject to the CAA section 112 standards, even though the non-hazardous secondary material has been discarded.

We also disagree with commenters who believe that the comparable standard should only be used as an initial step to determine if the material is a legitimate fuel, particularly in those situations involving low-impact contaminants. Today's rule does not differentiate low-impact contaminants from other contaminants, since such an assessment would require a risk analysis of each chemical. We believe that "comparable" is protective because it ensures that no more contaminants than those found in traditional fuels are released into the environment. EPA has already determined that these contaminants pose a threat to human health and the environment. Therefore, the Agency will finalize the proposed approach of evaluating all of the contaminants to ensure that they are present in the non-hazardous secondary material at levels that are comparable to (or lower than) the concentrations found in traditional fuels that the combustion unit is designed to burn.

*Comments:* Many comments discussed whether contaminants, and their concentrations in the non-hazardous secondary material, should have any bearing on the legitimacy determination for a given non-hazardous secondary material. Many of these commenters expressed opposition to using contaminants, and their concentrations in the non-hazardous secondary material, as a basis for legitimacy decisions. Some of these commenters argued that comparing contaminant levels would impose an unnecessary burden on emissions sources that are already stringently controlled under the CAA regulations. Other comments indicated that it would be more appropriate to compare emissions profiles from the combustion units rather than contaminant levels in the non-hazardous secondary materials themselves using the CAA section 129 pollutant list and the 112 HAP list. Referring to existing stack testing data and the risk assessment performed by the cement industry, the commenter states that "it is accepted that organics in fuels do not survive intact to exit a cement kiln or cause harm to human health and the environment. In addition, stack testing comparing different fuels (tires, waste-derived fuel, coal, coke, etc.) on a single kiln system under normal operating conditions supports the same conclusion."

States offered a range of comments on this issue. One state contends that using the list of contaminants in CAA section 129(a)(4) is inadequate because it does not address all heavy metals or organic hazardous air pollutants. Another commenter argued that while section 112 of the CAA and Appendix VIII of 40 CFR part 261 would be impractical if parameter testing was required, the Appendix VIII list of constituents in 40 CFR part 261 would serve as a useful starting point for evaluating different issues related to those contaminants.

Other commenters suggested that EPA narrow the list of contaminants considered in the legitimacy criteria. One commenter recommends that those constituents that contribute to the secondary material's value as a fuel be excluded from the contaminant list. Another commenter states that the list of contaminants should be limited to only the subset of HAP and pollutants listed in CAA section 129 that have the potential of being present in the emissions from burning the non-hazardous secondary materials. Broadening the list and requiring the evaluation and analysis of more constituents would be unnecessary and a waste of resources. The commenter, therefore, recommends that the list of contaminants be limited to only those pollutants found in section 112 of the CAA. Furthermore, this commenter argued that organic HAP do not need to be included in the legitimacy criteria because the rule is intended to define which non-hazardous secondary materials are non-wastes, as opposed to which HAP emission standards should be developed. The commenter further notes that the Boiler and Process Heater MACT will ensure that the organic HAP are properly controlled. Finally, although not specifically commenting on the legitimacy criterion for contaminants in the contaminant definition, the Agency received several comments that pathogens are present in both manure and sewage sludge, and received specific monitoring data confirming the presence of pathogens in certain varieties of chicken litter.

*EPA's Response:* EPA is defining the term "contaminant," as constituents that will result in emissions of the air pollutants identified in CAA section 112(b) and the nine pollutants listed under CAA section 129(a)(4) when such non-hazardous secondary materials are burned as a fuel or used as ingredients, including those constituents that could generate products of incomplete combustion. EPA has decided that these constituents are appropriate for the comparisons required by this criterion because these are the contaminants identified in the CAA that are to be considered by EPA in evaluating which contaminants to establish emission standards. Thus, we disagree with those commenters who believe that the list should be narrowed, including the commenter who argued that those contaminants that contribute to the material's value as a fuel be excluded from the list of contaminants, as well as all organic HAP since they will be burned during the combustion process. Because EPA is to consider these contaminants as part of the CAA regulations, they should also be

considered in determining whether non-hazardous secondary materials that contain these contaminants are being discarded, and thus, subject to the section 129 CAA standards.

We also disagree with the commenters who argue that the list is not broad enough because it does not address all heavy metals, organic hazardous pollutants or pathogens for the same reasons described above—that is, we should be focusing, in general, on those contaminants identified in the CAA that EPA will be evaluating to determine whether to establish emission standards. The Agency also disagrees that Appendix VIII to 40 CFR part 261 is an appropriate list for determining which contaminants to consider for the purposes of defining non-hazardous solid waste, since the purpose of Appendix VIII is to be used by the Agency to make hazardous waste listing determinations (*see* 40 CFR 261.11(a)(3)) and the chemicals in Appendix VIII would not apply to non-hazardous wastes.

Finally, we disagree with those commenters who argue that we should not be considering the contaminants in the non-hazardous secondary materials themselves as part of the legitimacy criteria, but, if considered necessary, compare the emissions profiles from the combustion units. In order for a non-hazardous secondary material to be considered a non-waste fuel, it must be similar in composition, whereas comparing the emissions profiles between combustion units that burn traditional fuels and non-hazardous secondary materials only tells one how well the combustion unit is operating, not what the secondary material is that is being burned. Thus, while the Agency recognizes that such data can be useful in determining whether or not burning such secondary materials present a risk to human health or the environment, such a concept says nothing in terms of whether or not the non-hazardous secondary material is a legitimate non-waste commodity fuel.

Moreover, when contaminants have no fuel value, and are being destroyed, they do not have an energy recovery intention. Burning is an inherently destructive process, even if there is a beneficial use. Therefore, the Agency needs to be cautious in evaluating whether burning a non-hazardous material for energy recovery, also has a waste destroying intention.

*Comment:* Some commenters believe the approach of measuring contaminants per Btu was more scientifically sound, while one commenter argued that comparisons of contaminants should focus on the loading of contaminants to the process rather than concentrations, which they believe is similar to measuring contaminants per Btu in ingredients. For example, the commenter indicates that coal fly ash is utilized in place of bauxite in cement manufacturing. Because coal fly ash may contain only 20 percent of the alumina found in bauxite, the process requires five times more coal fly ash than alumina for a given quantity of cement product. Under this scenario, even if coal fly ash contains a mercury concentration comparable to bauxite, the loading of mercury to the combustion unit would be five times higher than that if traditional feedstock was used. The commenter maintains that the rule should be changed to require a comparison of loading rates rather than concentrations.

Another commenter argues that any comparison between contaminant levels in the non-hazardous secondary material and contaminant levels in traditional fuels should consider the entire characteristics of the material. Some non-hazardous secondary materials may have high concentrations of some constituents and low concentrations of others, relative to traditional fuels. Thus, decisions regarding legitimacy will not always be clear cut and the overall characteristics need to be considered qualitatively. In addition, given the variability of constituent concentrations in traditional fuels and non-hazardous secondary materials, solid waste determinations which requires a comparison, should allow for such variability in a reasonable manner. The commenter supports the method that looks at constituent concentrations (*e.g.,* percent by weight or ppm by weight) as a reasonable approach that limits the impact of variability, whereas using lb/MMBtu compounds the impacts of variability. Since either the Boiler/Process Heater MACT or CISWI rule will adequately limit emissions from combustion of non-hazardous secondary materials, there is no justification for evaluating contaminant comparisons on a heating value basis.

*EPA's Response:* The Agency agrees with commenters that a lb/MMBtu approach can serve to normalize contaminant concentration comparisons across a range of material loading scenarios. At this time, however, the Agency lacks sufficient lb/MMBtu information for all non-hazardous secondary materials under consideration. Accordingly, this approach is not being adopted for today's final rule. As guidance is developed for implementation, a lb/MMBtu approach may be further considered. Thus, in today's final rule, the assessment of whether the non-hazardous secondary material has contaminants comparable to traditional fuel products is to be made by directly comparing the numerical contaminant levels in the non-hazardous secondary material to the contaminant levels in traditional fuels based on the total level of contaminants, and not on contaminants per Btu of heat value. This approach is most appropriate because contaminant information is readily available to the respondent.

The Agency recognizes that variability in constituent levels exist in non-hazardous secondary materials and traditional fuels, generally based on the source and geographic region that the material came from. Thus, we agree that such considerations can be taken into account in a reasonable manner when comparing constituent levels in the non-hazardous secondary material and the traditional fuel.

We disagree with the commenters that comparison between contaminant levels in the non-hazardous secondary material and contaminant levels in traditional fuels should consider the entire characteristics of the material. Such an approach would suggest that contaminants can be present in the non-hazardous secondary material at levels that are not comparable in concentration to those contained in traditional fuel products, which could result in contaminants being combusted as a means of discarding them.

*Comment:* Commenters disagreed about whether to implement a bright-line test for contaminants. One commenter supports the delineation of bright-line contaminant levels that would apply regardless of the type of traditional fuel burned, while another commenter maintains that it would not be appropriate to compare contaminant concentrations between non-hazardous secondary materials and traditional fuels based on a bright line approach. Another commenter states that the need to classify non-hazardous secondary materials as waste or non-waste may dictate the need for a bright line test rather than emissions testing from combustion units, given that emissions controls and limits are established in permits. Other commenters also disagreed with the establishment of a bright-line level comparison, with one commenter objecting to the establishment of any other contaminant level comparison, arguing that such a comparison would provide no benefit to the regulated community and arbitrarily assigns levels of contaminants without

accounting for differences in materials and/or facilities.

*EPA's Response:* EPA recognizes that the "bright line" approach may provide greater clarity and predictability to the regulated community, but that in both cases, the Agency would have to establish a line for what is acceptable and the line may either be somewhat arbitrary or it may exclude materials that, if carefully considered, should be considered legitimate. Based on the comments received on those approaches, we are convinced that they would not be workable. On the other hand, case-by-case comparisons by each person evaluating this legitimacy criterion can take into account the wide variety of non-hazardous secondary materials, as well as the appropriate traditional fuel to which it is being compared. Because this factor must apply to various different recycling activities and industries, the case-by-case approach is most appropriate.

*E. Comments on Legitimacy Criteria for Ingredients*

In the proposed rule, non-hazardous secondary materials used as an ingredient in combustion units must meet the legitimacy criteria specified in 241.3(d)(2) in order to be considered a non-waste ingredient. To meet the ingredient legitimacy criteria, the non-hazardous secondary material must be handled as a valuable commodity, must provide a useful contribution to the production or manufacturing process, must be used to produce a valuable product or intermediate, and must result in products that contain contaminants at levels that are comparable in concentration to or lower than those found in traditional products that are manufactured without non-hazardous secondary materials.

1. Managed as Valuable Commodities

Because the criterion "managing as a valuable commodity" for non-hazardous secondary materials used as an ingredient (storage not exceeding reasonable time frames, manage it consistent with an analogous ingredient or adequately contain to prevent release) are the same as those for non-hazardous secondary materials used as a fuel, EPA indicated that if changes are made to the criteria with respect to those non-hazardous secondary materials that are used as fuels, we would likewise make the same changes with respect to those non-hazardous secondary materials used as ingredients. We did solicit comments, however, on whether using these criteria for managing as valuable commodities (similar to the type of criteria for fuels) are appropriate for ingredients.

*Comment:* As discussed in the section on legitimacy criteria for fuels, one commenter suggested that the criterion that a non-hazardous secondary material be managed as a valuable commodity (determining if it is managed consistent with the management of an analogous ingredient and used within a reasonable time frame) is irrelevant because solid wastes are managed in ways similar to commodities (*i.e.,* solid wastes and solid commodities are stored in piles on the ground, liquid wastes and commodities are stored in tanks and barrels). Another commenter requested that EPA provide clarity on managing a non-hazardous secondary material as a valuable commodity and the kinds of practices a facility must implement to demonstrate that it is managing the material as a valuable commodity.

*EPA's Response:* The final rule will retain the proposed approach that this legitimacy criterion for non-hazardous secondary material used as ingredients (*i.e.,* that they must be managed as valuable commodities) will be consistent with that of fuels. As we noted previously, we disagree with the commenter that solid wastes and commodities are always managed in a similar manner. That is, commodities, on the one hand, are handled specifically to prevent the loss of the material because of its value. Solid wastes, on the other hand, when they are not highly regarded for a beneficial reuse, are often not managed in a way that minimizes the release of the material itself, but more in a way that protects the surrounding environment from the material. However, we also know that solid wastes, if not properly managed have created damages to the environment. Thus, non-hazardous secondary materials used as an ingredient must be managed in a manner consistent with the management of an analogous ingredient (where there is an analogous ingredient), or otherwise be adequately contained so as to prevent releases to the environment. For example, non-hazardous secondary materials that are used as ingredients in cement kilns must be managed in a manner consistent with the analogous ingredients that these secondary materials are replacing. An "analogous ingredient" is defined as a manufacturing process ingredient for which the secondary material substitutes and which serves the same function and has similar physical and chemical properties as the non-hazardous secondary material. Where there is no analogous ingredient, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment. However, the Agency may provide further guidance on what we consider to be managed as a valuable commodity.

2. Useful Contribution

EPA received comments on the five ways the proposed rule states that a non-hazardous secondary material can add value and usefully contribute to a recycling process (based on criteria initially developed for hazardous secondary materials): (i) The non-hazardous secondary material contributes valuable ingredients to a product or intermediate; or (ii) replaces a catalyst or carrier in the recycling process; or (iii) is the source of a valuable constituent recovered in the recycling process; or (iv) is recovered or regenerated by the recycling process; or (v) is used as an effective substitute for a commercial product. The proposed rule stated that we believe that only items (i) and (v) are specifically relevant to our assessment of whether these non-hazardous secondary materials provide a useful contribution in combustion scenarios. We requested comment, however, on whether the non-hazardous secondary materials we are assessing as ingredients can provide useful contributions in other ways.

*Comment:* A commenter requested that the EPA remain flexible and acknowledge that there may be other ways to demonstrate a secondary materials' useful contribution.

*EPA's Response:* The Agency was unable to identify, and commenters did not identify any other way a non-hazardous secondary material could contribute to the recycling process, so the language in the final rule was not changed. The two ways to determine if the material provides a useful contribution are sufficiently flexible and will provide for accurate assessments. Thus, the final rule will continue to maintain that non-hazardous secondary materials contribute valuable ingredients to a product or intermediate and that non-hazardous secondary materials are used as an effective substitute for a commercial product will be used to determine if a material provides a useful contribution as an ingredient.

3. Quantifying an Ingredient's Contribution to Production/Manufacturing Activity

Not all of the constituents or components of the non-hazardous secondary material have to make a contribution to the production/manufacturing activity. EPA solicited comments on whether the Agency

should quantitatively define how much of the non-hazardous secondary material must provide a useful contribution, or alternatively, the quantity of constituents or components in a non-hazardous secondary material there would need to be before the non-hazardous secondary material would not be considered to provide a useful contribution.

*Comment:* Generally, commenters disagreed with the establishment of a quantitative definition as to how much of a material must provide a useful contribution. One state agency is opposed to a quantitative definition because the numbers will vary by non-hazardous secondary material. Similarly, another state commenter also opposed a nationwide definition or percentage stipulating what constitutes a "useful contribution" because of the different possible reuse processes that may vary in terms of the amount of material that is deemed useful. One other commenter also objected to the establishment of any limits, but specifically commented on the establishment of a quantitative definition. They explain that a given non-hazardous secondary material can have several useful components, but the ability to use those components is dependent on the available manufacturing process or technology type. This variation would make it difficult and inefficient to apply a general quantitative rule of useful contribution.

*EPA's Response:* We agree with the commenters that quantifying the amount that all non-hazardous secondary materials must contribute to a production/manufacturing activity would be a challenge, if at all possible, given the breadth and depth of ways that non-hazardous secondary materials may be used as ingredients in combustion processes. As the non-hazardous secondary materials vary significantly in their character, composition and uses, trying to define useful contribution quantitatively would not, in our view, be practical. The complexities of defining "useful contribution" so that it can be determined through a bright-line test, and remain appropriate across industries, different recycling processes, and a variety of recycled non-hazardous secondary materials are too great for the Agency to design in a simple and straightforward manner so as to be used in making such determinations. In addition, legitimacy determinations are best made on a case-by-case basis, with the facts of a specific situation in hand. Thus, we have not defined a quantitative amount that non-hazardous secondary materials must contribute.

In general, the regulated community should look to typical industry recovery rates in similar manufacturing processes to determine if the recycling recovery rates are reasonably efficient in terms of the ingredient making a useful contribution to the recycling process or product. In addition, it should be noted that EPA would generally look at the quantity required, the duration, and the extent of processing, and/or the rate of recovery of the overall process, not the recovery rate of a single step in the process, when analyzing this criterion for legitimacy. For example, if one step in the process recovers a small percentage of the constituent, but the overall process recovers a much larger percentage, the Agency would consider the overall efficiency of the recycling process in determining whether the non-hazardous secondary materials are providing a useful contribution. This assumes that there is enough of the target constituent or component present in the non-hazardous secondary materials to contribute meaningfully as an ingredient to the recycling process.

In addition, the Agency is reiterating its longstanding position that not every constituent or component in a non-hazardous secondary material would have to contribute to a recycled product or intermediate or to the recycling process in order for there to be an overall contribution. Thus, we agree with commenters who raised questions about this and have restated our position in this preamble to the final rule.

4. Contaminants in Ingredients

The Agency requested comments on whether we should have a different definition of contaminants that applies specifically to ingredients. That is, since contaminant comparisons for the contaminant legitimacy criterion apply to a comparison of products rather than to the non-hazardous secondary material, we requested comment on whether a different list of contaminants should apply or whether we should generically define contaminants to be constituents that may be a concern with respect to the product that is produced.

*Comment:* Commenters suggested that when comparing the products derived from non-hazardous secondary materials and traditional raw materials, the Agency be mindful of the fact that the concentrations of contaminants can vary geographically. In terms of cement production, a few commenters said that the current stringent product standards effectively keep cement kilns from using contaminated ingredients. One state supports the use of the same contaminant list for non-hazardous secondary material fuels and ingredients, but notes that EPA should recognize that constituent concentrations for a given virgin fuel or feedstock can vary dependent on the geographic region of where it is produced. Another commenter said that since all processes differ, the states should be allowed to establish a petition process for ingredients where industry can demonstrate that the higher contamination in a given non-hazardous secondary material will not result in harm to human health or the environment (*i.e.,* through either risk assessment or handling restrictions). Another commenter argued that using the list of contaminants in CAA section 129(a)(4) is inadequate because it does not address all heavy metals or organic hazardous air pollutants. Still, another commenter suggested that although the CAA section 112 HAP list and the list of constituents in Appendix VIII of 40 CFR part 261 would be impractical if parameter testing was required, Appendix VIII of 40 CFR part 261 would be a good starting point for evaluating different issues related to those contaminants. Finally, one state agency recommends the Agency develop a list of currently acceptable non-hazardous secondary materials used as ingredients for quick reference and develop guidance to assess materials not on the list.

*EPA's Response:* EPA is defining the term "contaminant" to include constituents that may result in emissions of air pollutants identified in CAA section 112(b) and the nine pollutants listed under CAA section 129(a)(4)) when such non-hazardous secondary materials are burned as a fuel or used as an ingredient, including those constituents that could generate products of incomplete combustion. These constituents are appropriate for the comparisons required by this criterion because these are the contaminants identified in the CAA that are to be considered by EPA in evaluating which contaminants to establish emission standards. That is, the contaminants to be considered in the legitimacy criteria should generally be the same that EPA is to consider in establishing emission standards. Thus, we disagree with the commenter who argues that this list is not broad enough because it does not address all heavy metals or organic hazardous pollutants. Appendix VIII to 40 CFR Part 261 is also not an appropriate list for determining which contaminants to consider for the purposes of defining non-hazardous

solid waste, since the purpose of Appendix VIII is to be used by the Agency to make hazardous waste listing determinations (*see* 40 CFR 261.11(a)(3)) and the chemicals in Appendix VIII would not apply to non-hazardous wastes. Please see the related response on usage of the Appendix VIII list with regard to fuels (Section V.D.3).

With that said, the Agency recognizes and agrees with the commenters that variability in constituents exist between non-hazardous secondary materials based on the source and geographic region that it may come from. Thus, such considerations can be taken into account in determining which contaminants to evaluate. Regarding the comments dealing with state program involvement, EPA's response to these comments is described in Section IX. "State Authority." Finally, with respect to the commenter who requested that EPA develop a list of acceptable non-hazardous secondary materials that are used as ingredients for quick reference and develop guidance to assess non-hazardous secondary materials on this list, we have made some general conclusions throughout the preamble on which non-hazardous secondary materials when used as an ingredient in a combustion process would generally meet the legitimacy criteria. Persons may also refer to the various Materials Characterization Papers that are in the docket to today's rule. However, each person will need to confirm that such non-hazardous secondary material ingredients meet the legitimacy criteria and provide documentation, as required in the CAA rules.

5. Comparing Contaminant Levels in Products

EPA requested comment on whether, instead of requiring that contaminant levels in products manufactured from non-hazardous secondary material ingredients be *comparable* in concentration than those found in traditional products, that the Agency adopt a criterion under which contaminants in the product could not be *significantly higher* than found in the traditional products that are manufactured without the non-hazardous secondary material.

*Comment:* A number of commenters disagree with the contaminant comparison criteria for non-hazardous secondary material ingredients to the final product. One commenter asserts that EPA should not use the term "contaminant" in connection with the legitimacy criteria for ingredients. Instead, the Agency should refer to constituents that may actually be a concern with respect to the product that is produced. The same commenter also recommends that the "toxics along for the ride" criterion only should be considered and not required, and that the Agency should adopt a "not significantly higher" standard. Also, while the Agency should retain the focus of the "toxics along for the ride" criterion upon products, that criterion should refer to constituents that may actually be a concern with respect to the products that are produced and should not use the defined term "contaminant."

Other commenters oppose any limits on contaminants in ingredients. It was argued that portland cement is manufactured to meet strict chemical and performance specifications under such organizations as ASTM and the American Association of State Highway and Transportation Officials (AASHTO). These specifications dictate, to a large degree, the ingredients that can be used in cement manufacturing. There are a wide range of raw materials and fuels that can be used to meet cement manufacturing quality objectives. The levels of contaminants in these traditional raw materials and fuels can vary significantly. These variations occur within materials taken from the same source (*e.g.,* single quarry) and also between different sources. For the purpose of comparing levels of contaminants found in non-hazardous secondary materials with levels found in traditional products, the non-hazardous secondary material contaminant should be allowed to be compared to multiple sources of the traditional raw materials that are available across the market to the facility. Such a comparison should be allowed regardless of whether or not the traditional material is being used by the facility at the time of the comparison. Doing so would allow for the variability of constituent levels to be properly accounted for when going through the comparison process. Variability needs to be considered because multiple sources of a single traditional material are typically available to a facility

*EPA's Response:* In today's action, EPA is finalizing this criterion as a part of the legitimacy requirement because it is essential in determining whether a non-hazardous secondary material that is combusted is in fact being legitimately used or is essentially being discarded—that is destroyed, in the name of legitimate recycling. EPA is also retaining the requirement that the recycling process must result in products that contain contaminants at levels that are comparable to (or lower than) concentrations found in traditional products that are manufactured without the non-hazardous secondary material. Establishing "comparable to or lower than" contaminant levels more closely reflects its intent that non-hazardous secondary materials that are legitimately used must have levels of contaminants within a small acceptable range of those found in traditional products than the phrase "not significantly higher." (*See* Section V.D.3 for further discussion of this issue and EPA's response.) With that said, we agree with those commenters who argue that there are a wide range of raw materials and fuels that can be used and that the level of contaminants in these secondary materials can also vary. Thus, for purposes of comparing levels of contaminants found in non-hazardous secondary materials to traditional products, a person can make that comparison with traditional raw materials and fuels that come from multiple sources, provided such sources can be used in the combustion unit. Such a comparison, as the commenters argue, would account for the natural variability that needs to be considered in making such a comparison.

With respect to the comment requesting that EPA change the word "contaminant" to "constituent" when referring to the legitimacy criteria, EPA is retaining the use of the word "contaminant" in this criterion as it has been defined in this rule and accurately describes which individual constituents EPA is seeking to control in this criterion. The selection of that term was originally discussed in the ANPRM and was chosen since it refers to the constituents in secondary materials that may be of a concern when burned as a fuel or used as an ingredient.

Finally, EPA notes that industry specifications can be very useful in making a legitimacy determination and, in particular, in evaluating compliance with this criterion. However, EPA cannot rely solely on product specifications to cover all possible situations and is including the contaminant comparison between products as a critical part of the legitimacy requirement.

*F. Comments on Non-Waste Determination Petitions*

The proposed rule established a non-waste determination process that would provide persons with an administrative process for receiving a formal determination from the EPA Regional Administrator that non-hazardous secondary materials that are burned as a fuel in a combustion unit and have not been managed within the control of the generator, have not been discarded in the first instance, and are

indistinguishable in all relevant aspects from a fuel product are not solid wastes. This assumes all the criteria for the non-waste determination at § 241.3(c) are met.

Industry and state agencies both submitted a number of comments on the non-waste determination process included in the proposed rule. While many of these comments supported the idea of a non-waste determination process in order to include appropriate fuels, many commenters suggested that the process would be difficult to implement since the requirements are vague, and too resource intensive. Many commenters did not want the process at all for opposing reasons; some said it was too lenient in that the process could allow the inappropriate use of non-hazardous secondary materials, while others said it was unnecessary in that CAA section 112 third-party combustors should be able to use appropriate comparable fuels without the inconvenience of a petition process. The specific comments are detailed below. The overview of the petition process is described in Section VII.G. The petition requirements in today's rule are found at § 241.3(c).

*Comment:* A large number of commenters (including many from state agencies) argued that state agencies should be provided the authority to make non-waste determinations as part of the petition process. Some commenters suggested that States be allowed to grant such petitions under their existing beneficial use programs and encouraged EPA to allow the States' existing regulatory structures to remain in place. Many commenters expressed a preference for the approach currently used by States to determine the acceptability of used materials for beneficial use whereby specific classes of non-hazardous secondary materials considered wastes (in that State) are assessed and, if determined acceptable, are considered non-waste or exempt from the State waste licensing, permitting and other requirements. State procedures for beneficial use determinations vary, some requiring more extensive characterization of materials and uses than others, and some requiring a degree of processing and others not. Some beneficial use designations are more stringent than others since they are material-specific.

Many commenters, including state agencies were still concerned that this rule could jeopardize or interfere with the State beneficial use designations and procedures and requested that EPA clearly indicate that today's rule applies only for purposes of determining CAA 129 applicability to non-hazardous secondary materials that are burned for energy recovery. They do not want today's rule to set a precedent or interfere with their ongoing programs to allow and encourage the beneficial use of secondary materials which otherwise would be waste.

*EPA's Response:* CAA section 129 states that the term "solid waste" shall have the meaning "established by the Administrator pursuant to the Solid Waste Disposal Act" *Id.* at 7429(g)(6). Accordingly, the Administrator (or Regional Administrator) must establish the meaning and make the determinations, and the states' definition of solid waste would not be applicable for purposes of the definition of solid waste under RCRA for establishing emissions standards under the CAA. No federal approval procedures for state adoption of today's rule are included in this rule under RCRA subtitle D. Although EPA does promulgate criteria for solid waste landfills and approves state municipal solid waste landfill permitting programs, RCRA does not provide EPA with authority to approve state programs beyond municipal solid waste landfill permitting programs.

With that said, EPA would like to utilize the expertise and interest residing in the state beneficial use programs to bolster Agency decisions on non-waste determination petitions. The Agency may request the assistance of states or may utilize the information and contaminant data from state beneficial use determinations if it is applicable to the non-hazardous secondary material when used as a fuel or an ingredient in combustion units. These state beneficial use programs have been developed to encourage recycling and reuse, provided that the uses maintain the specified state's acceptable level of risk, protect human health and the environment, and are managed in accordance with the conditions of the determination.

Generally, when a state beneficial use determination has been granted (thus no longer a solid waste within that state), it may have chemical and physical properties that are comparable to the raw material it is replacing or, when incorporated into a product, its use is beneficial to the final product. Assuming the data to support the beneficial use determination remains available, it could help support EPA's investigation of the contaminant concentrations for the purpose of making the legitimacy criteria determination.

State beneficial use determinations and procedures will continue intact for purposes of State laws, regulations, and programs. Thus, we do not expect that this rule will set a precedent or interfere with the States' solid waste programs and the States will continue to employ their procedures to assess and regulate the management and use of non-hazardous secondary materials for purposes of State laws and regulations. In addition, as we have stated elsewhere in today's preamble, this rule is limited for purposes of determining CAA 129 applicability for non-hazardous secondary materials that are burned for energy recovery or as an ingredient in a combustion unit. Thus, EPA will not be making any determination that non-hazardous secondary materials are or are not solid wastes for other possible beneficial uses. Such beneficial use determinations are generally made by the state for these other beneficial uses and EPA will continue to look to the states to make such determinations (*e.g.,* land application, reuse as non-waste, etc.).

*Comment:* Commenters indicated that the petition process does not consider potential scheduling issues regarding compliance with the section 112 Boiler MACT or the 129 CISWI standards. Therefore, the non-waste determination petition process should include deadlines for both petition submissions and rulings from regulators so that the applicant would know which emission standards requirements they would be subject to—that is, the CAA section 112 standards or the CAA section 129 standards. Some commenters (including many state agencies) also expressed concern that EPA would not have the resources necessary to address such non-waste determination petitions within a schedule consistent with State deadlines for their air permits (*e.g.,* 90 days). In addition, a few commenters questioned the environmental benefits of shifting the burden of determination to EPA instead of the generators in question.

*EPA's Response:* EPA is not imposing deadlines for the petition decisions, either for the submission of such petitions or on EPA making decisions on petitions that are submitted, since the Agency believes that before a final decision is made, that the necessary information be submitted, and the public afforded an opportunity to comment on such draft decisions. Setting a time limit may make it difficult to make such informed decisions. Nevertheless, EPA commits to work with the State (where the combustor is located) in an effort to not hold up, to the extent practicable, the State air permitting process. We recognize that the non-waste determination decision should be finalized prior to any related State air

permit. We would also note that EPA's responsibility for the petition decisions in the final rule should maintain national consistency, while recognizing the state's interest and expertise in this area.

*Comment:* If EPA maintains authority for non-waste determinations, commenters request that EPA Regional offices notify States when requests and determinations are made. In addition, several environmental groups requested that the public notification be required for any petitions for non-waste classification.

*EPA's Response:* Today's rule outlines the petition process for the Regional Administrator to follow. As part of that process, the draft decision will be published in local media and will be available on EPA's Web site, and thus, all draft decisions will be available to the public for comment. In addition, although not in the regulations, EPA will inform the State Agency of a petition request in their states, and work with them, to the extent practicable.

*Comment:* State Agencies recommended that EPA maintain a state or publicly available database of non-waste determination decisions if the Agency maintains decision-making authority under the petition process.

*EPA's Response:* EPA agrees that it would be appropriate for EPA to maintain a database that is a compilation of decisions made on non-hazardous secondary material non-waste determinations. This would allow decisions made in one EPA Region, including the basis for the decision, to be available to other EPA Regions pertaining to the same or similar non-hazardous secondary materials and would support national consistency and minimize redundant efforts. Thus, the Agency expects to put together such a database and will make it available not only to its Regions, but will also make such a database publicly available.

*Comment:* Some commenters said States (or non-State Agencies) should be able to submit a non-waste determination on behalf of the petitioner.

*EPA's Response:* As stated in the proposal and in the final rule, states, or private entities, can submit non-waste determination petitions to the EPA Regional Administrator on behalf of petitioners. They can petition for a single combustor or a class of combustors (*e.g.,* a specific usage of a non-hazardous secondary material in a particular state).

*Comment:* Many commenters did not want the petition process included in the rule. Some commenters said it was too lenient in that the process could allow the inappropriate use of non-hazardous secondary materials.

*EPA's Response:* We disagree with the commenters since the petition process provides a vehicle to accommodate those instances where it is not apparent that the non-hazardous secondary material is not discarded and that it complies with the legitimacy criteria and thus, is not a solid waste under RCRA. Those requirements would be documented in addition to the other petition requirements. This would provide the needed assurance that it is an appropriate non-waste fuel. In addition, all draft decisions will be made available to the public (local newspaper advertisement or radio broadcast and on EPA's Web site) and the Regional Administrator may hold public hearings, such that the public will be informed and has the opportunity to comment and be involved in the process.

*Comment:* Commenters mentioned that the process will be difficult to implement since the requirements in proposed § 241.3(c) are too vague. A few commenters mentioned that they preferred the clarity in state determinations where they have criteria specific to each secondary material they regulate or make specific beneficial use determinations, as opposed to this petition process where all non-hazardous secondary materials have to comply with the same guidelines. Commenters requested that we create clear guidance on the petition process and on related implementation.

*EPA's Response:* We disagree with the commenters who argue that the petition process is vague and will be difficult to implement. All petitions that are submitted must clearly explain how the non-hazardous secondary material has not been discarded and meets the other relevant criteria, including the legitimacy criteria. All draft decisions will also be subject to notice and comment, so any particular issues or concerns can be raised for the Agency's consideration. With that said, the Agency expects to develop additional guidance to assist petitioners in the implementation of the petition process.

### *G. Comments on the Other Approaches for Defining Solid Wastes*

In addition to the proposed approach, EPA also identified and solicited comment on two other approaches for defining which non-hazardous secondary materials are solid wastes when combusted. One approach, which was called the "alternative approach," was intended to be broader than the proposed approach, but still consistent, in the Agency's judgment, with RCRA and relevant case law. Under the alternative approach, non-hazardous secondary materials that are burned in a combustion unit would be considered solid wastes, unless such non-hazardous secondary materials would remain within the control of the generator and meet the legitimacy criteria; in this limited instance, the non-hazardous secondary materials would not be considered solid wastes. Thus, under the alternative approach, fuels and ingredients that are generated from the processing of discarded non-hazardous secondary materials would be considered a solid waste, as well as non-hazardous secondary materials used as ingredients that are combusted at facilities that are not within the control of the generator. In addition, the alternative approach did not provide for a non-waste determination petition process, as described elsewhere in this preamble. The proposed rule noted that this approach could be adopted in a final rule if warranted by information presented during the public comment period and solicited comment on all aspects of the alternative approach.

The other approach on which we requested comment was to identify all non-hazardous secondary materials that are burned in combustion units for energy recovery or as an ingredient as solid wastes and thus, all non-hazardous secondary materials would be subject to the section 129 CAA requirements. The proposal noted that while the Agency believes there are legal constraints to taking such a broad approach in defining solid waste under RCRA, we solicited comment on this approach and specifically requested that commenters provide the basis for their position, in light of the existing case law on the issue of "discard."

*Comment:* All commenters addressing the alternative approach were opposed to the Agency adopting such an approach in the final rule. Several commenters argued generally against any approach that would allow any non-hazardous secondary material to ever be burned as non-waste fuels or ingredients, regardless of whether or not the secondary materials remained within the control of the generator. These commenters strongly urged the Agency to adopt a final rule that considers all non-hazardous secondary materials burned in a combustion unit for energy recovery or used as an ingredient to be included within the definition of solid waste and therefore, subject to the CAA section 129 requirements. These commenters argue that non-hazardous secondary materials that are burned in combustion units fall within the unambiguous meaning of the

term "discarded material," and therefore, both EPA's proposed and alternative approach are unlawful, as well as arbitrary and capricious.

On the other hand, industry commenters generally contended that the alternative approach was unacceptable as a matter of law and policy, but for different reasons. These commenters, who also disagreed with the proposed approach's classification that non-hazardous secondary materials used as fuels which did not remain within the control of the generator are solid waste unless granted a non-waste determination, strongly opposed the alternative approach for many of the same reasons. Of particular concern of the commenters was their disagreement with EPA that one may not look to a material's transfer between entities to determine whether the non-hazardous secondary material has been discarded and constitutes a solid waste under RCRA, a concept which would apply equally to non-hazardous secondary materials being used as ingredients, as well as to non-hazardous secondary materials used as fuels. In addition, these same commenters also strongly disagreed with the other approach on which the Agency solicited comment—that is, the approach that would characterize all non-hazardous secondary materials as solid waste when burned in a combustion unit for energy recovery or as an ingredient. These commenters argued that this would exceed the Agency's authority to regulate secondary materials that have not been discarded.

*EPA's Response:* Although some commenters supported a broader definition of solid waste than described in the alternative approach, the Agency did not receive any support for the alternative approach, and has therefore decided not to adopt it in this final rule. Regarding comments that advocated for all non-hazardous secondary materials burned in a combustion unit for energy recovery or as an ingredient to be discarded and, thus, solid waste, EPA has replied to this comment above in Section V.A. The Agency presumes that these commenters would like neither our proposed approach nor any alternative that allows any non-hazardous secondary material to be burned as other than a waste.

Regarding industry comments which opposed the alternative approach because its characterization that all non-hazardous secondary materials that do not remain within the control of the generator are solid waste, we respond to the issue of transferring non-hazardous secondary materials off-site in Section V.A.

EPA continues to believe that today's final rule is a reasonable interpretation of the statutory definition of discard to consider that non-hazardous secondary materials under the control of its generator that are legitimately burned as fuels are not solid waste, that certain non-hazardous secondary materials (*i.e.,* scrap tires under the oversight of established tire collection programs and resinated wood) that are not discarded and are legitimately used as fuels or ingredients are not solid waste, that non-hazardous secondary materials that are legitimately burned as ingredients are not solid wastes, and that fuels and ingredients that are produced from the processing of discarded non-hazardous secondary materials are not solid wastes.

## VI. Summary of Major Differences Between the Proposed Rule and Final Rule

The basic framework outlined in the proposed rule is being adopted in today's final rule. However, as indicated in the discussions in Section VII, the Agency has made several significant changes to the proposal regarding: (1) The status of scrap tires when they are combusted and used as a fuel; (2) the status of resinated wood residuals when they are combusted and used as a fuel; (3) the status of coal refuse that has been previously discarded, but has been processed in the same way as coal is today; and (4) the definition of traditional fuel and several other terms to clarify their meaning in the final rule. Specifically,

- Under the proposed rule, scrap tires were considered to be solid waste when combusted and used as a fuel unless they were sufficiently processed into a non-waste fuel product. Today's rule continues to include this concept of processing of scrap tires that have been discarded, particularly for tires in waste tire piles. However, after reviewing the comments, as well as reviewing the approach that was discussed in the ANPRM for scrap tires, the Agency has concluded that scrap tires used as fuel in a combustion unit that are removed from vehicles and managed and collected under the oversight of an established tire collection program would not be considered a solid waste In this situation, the scrap tires have not been discarded and therefore, should not be considered a solid waste. See Section VII.C for a full discussion of the rationale and changes to the approach for scrap tires.
- Under the proposed rule, resinated wood residuals that were burned in a combustion unit within the control of the generator and which met the legitimacy criteria was considered a non-waste fuel. However, if such resinated wood residuals were transferred off-site to a different company, there were considered a solid waste when burned in a combustion unit, unless they were "sufficiently processed to produce a non-waste fuel. However, after reviewing the comments, the Agency has concluded that resinated wood residuals when burned in a combustion unit (whether within the control of the generator or outside the control of the generator) would not be a solid waste, provided the resinated wood residuals met the legitimacy criteria. In this situation, the Agency finds that the resinated wood residuals have not been discarded and therefore, should not be considered a solid waste. See Section VII.D for a full discussion of the rational and changes to the approach for resinated wood residuals.
- Under the proposed rule, coal refuse that has been previously abandoned and was processed, even if such processing was the same as coal is processed today, was considered a solid waste and, if combusted, would be subject to the CAA section 129 emission standards. However, after reviewing the comments and after further evaluation, we have decided that coal refuse that is processed the same as coal is today, which serves to both increase its energy value, as well as reduce the level of contaminants in coal refuse, should not be considered a solid waste. (Of course, prior to such processing, the coal refuse that has been abandoned is a solid waste and would be subject to appropriate federal, state and local laws and regulations.) This change is based on the fact that coal refuse is distinctive from other non-hazardous secondary materials at issue in today's rule in that it is in fact raw material coal (even if it has been previously abandoned) that is generated as a result of coal mining operations whose primary product is a fuel.
- In response to comments received on the proposal, under today's rule, we have added an "alternative fuels" category to the definition of traditional fuels, so the definition now includes "alternative traditional fuels" and "historically managed" traditional fuels. EPA is recognizing that changes in technology and in the energy market over time have resulted in additional materials being economically viable to be used as alternative "traditional" fuels. In addition, to provide clarity in the application and the meaning of traditional fuel and clean cellulosic biomass, we have codified these definitions in § 241.2. The new definition of traditional fuel also

clarifies that traditional fuels are not secondary materials and are not solid wastes unless discarded.

## VII. Detailed Discussion and Rationale for Today's Final Rule

As indicated previously, today's final rule identifies those non-hazardous secondary materials that, when burned in a combustion unit, are solid wastes. In general, EPA defines non-hazardous secondary materials that are used as fuels or ingredients in combustion units as solid waste unless: [154]

- The non-hazardous secondary material is used as a fuel and remains within the control of the generator (whether at the site of generation or another site the generator has control over) and it meets the legitimacy criteria;
- They are the following materials that meet the legitimacy criteria when used as a fuel (by the generator or outside the control of the generator):
  - Scrap tires removed from vehicles under the oversight of established tire collection programs;
  - Resinated wood;
- The non-hazardous secondary material is used as an ingredient (whether by the generator or outside the control of the generator) and it meets the legitimacy criteria;
- The discarded non-hazardous secondary material is sufficiently processed to produce legitimate fuel or ingredient products and it meets the legitimacy criteria;
- The non-hazardous secondary material is used as a fuel and is handled outside the control of the generator where it is determined through a case-by-case non-waste determination petition process that the material has not been discarded and is indistinguishable in all relevant aspects from a fuel product.

The following sections discuss in detail the rationale and regulations being promulgated today in 40 CFR part 241 for the identification of non-hazardous secondary materials that are solid waste when used in combustion units. We use this rationale to support the final rule based on information the Agency has received and public comments. To the extent we have decided not to alter our supporting reasoning or have rejected comments received on the proposed rule, we also discuss these matters in Section V. Reasoning, information and arguments provided in the ANPRM and proposed rule that support these decisions are also incorporated into the reasoning for the final decisions.

[154] Traditional fuels are not secondary materials or solid waste, unless discarded.

### *A. Traditional Fuels* [155]

As discussed in Section V, the definition of traditional fuels has been modified in today's final rule. The new definition encompasses two categories of fuels: (1) "Historically managed" fuels, as identified in the proposed rule, and (2) "alternative" fuels, as described in the ANPRM. Through this revised definition, EPA is recognizing that changes in technology and in the energy market over time have resulted in additional materials being economically viable, or for policy reasons, to be used as alternative "traditional" fuels. Thus, "traditional fuels" is defined in today's final rule as materials that are produced as fuels and are unused products that have not been discarded and therefore, are not solid waste including: (1) Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials, including fossil fuels (*e.g.,* coal, oil and natural gas), their derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas) and cellulosic biomass (virgin wood); and (2) alternative fuels developed from virgin materials that can now be used as valuable fuel products rather than waste materials. Alternative fuels include used oil which meets the specifications outlined in 40 CFR 279.11; currently mined coal refuse that previously had not been usable coal; and clean cellulosic biomass. Clean cellulosic biomass is defined as those residuals that are akin to traditional cellulosic biomass, such as forest-derived biomass (*e.g.,* green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, and tree harvesting residuals from logging and sawmill materials), corn stover and other biomass crops used specifically for energy production (*e.g.,* energy cane, other fast growing grasses), bagasse and other crop residues (*e.g.,* peanut shells), wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. Clean biomass is defined as biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials. Such historically managed traditional fuels and alternative fuels are not secondary materials or solid wastes unless discarded. The revised definition also clarifies that clean wood includes, similar to clean disaster debris, clean construction and demolition material.

Both clean cellulosic biomass and on-specification used oil were identified in the proposed rule definition as historically managed traditional fuels. However, as the viability of these materials as fuels reflects relatively recent changes in market conditions and technology, they are more appropriately characterized as alternative traditional fuels.

The new definition also adds currently generated coal refuse as an alternative traditional fuel. As discussed in Section V.B.8., this material is distinctive among the other non-hazardous secondary materials. Coal refuse is in fact raw material coal that is generated as a result of coal mining operations whose primary product is fuel. We consider currently generated coal refuse to be more akin to a raw material that, due to technological developments, can now be processed and utilized to produce a marketable fuel. Coal refuse is different from other non-hazardous secondary materials, such as scrap tires or resinated wood residuals, in that it is generated in the production of a traditional fuel and can be used, itself, as fuel.

The definition goes on to clarify that traditional fuels are not secondary materials and are not solid wastes unless discarded. In response to comments received on the proposal and to provide clarity in the application and the meaning of traditional fuel, both the new definition of traditional fuels and the definition of clean cellulosic biomass are codified in § 241.2

Recommendations from commenters to the proposed rule on specific materials that should be considered traditional fuels are discussed in Section V.B. That section also includes responses to the Agency's request for comment regarding a possible petition process to make determinations on traditional fuels.

### *B. Non-Hazardous Secondary Materials Used as Fuel That Remain Within the Control of the Generator*

#### 1. Scope and Applicability

Non-hazardous secondary materials used as a fuel in combustion units that remain within the control of the generator and that meet the legitimacy criteria specified in § 241.3(d)(1) would not be solid waste. Such non-hazardous secondary materials are referred to as legitimate (non-waste) fuel products.

As discussed previously in Section V.A, if the non-hazardous secondary material remains within the control of

[155] While the Agency believes that traditional fuels are not secondary materials, we believe it appropriate to provide a general definition and description of what is considered a traditional fuel.

the generator, it is more likely to be material that is saved and not thrown away. The Agency has explained that case law would not allow it to determine that secondary material is a waste if it is recycled as a fuel within a continuous industrial process. EPA cannot evaluate every non-hazardous secondary material, but considers that this standard would cover all such non-hazardous secondary materials that are recycled as a fuel within a continuous process. EPA, however, acknowledges that this may capture certain non-hazardous secondary materials which may be a waste, but is unlikely. Thus, this is a reasonable interpretation of the statutory definition of discard to consider non-hazardous secondary materials that are managed within the control of its generator and legitimately burned as fuels to not be solid waste.

The Agency also recognizes that there may also be non-hazardous secondary materials transferred to another party that are not discarded in the first instance, and thus may not be a solid waste. EPA is dealing with those categories of non-hazardous secondary materials on a case-by-case basis by specifically identifying such non-hazardous secondary materials in the regulations (*see* discussions in Section VII.C on scrap tires managed under an established tire collection program and Section VII.D for resinated wood or through the non-waste determination process (Section VII.G).

Non-hazardous secondary materials used as fuels remain within the control of the generator under two scenarios (*See* § 241.2). As such, the regulation consists of two parts in determining whether these non-hazardous secondary materials qualify for being "within the control of the generator." The first part applies to non-hazardous secondary materials generated and used as fuels at the generating facility. For purposes of this criteria, "generating facility" means all contiguous property owned, leased, or otherwise controlled by the secondary material generator; "secondary material generator" means any person whose act or process produces non-hazardous secondary materials at the generating facility.

If a generator hires or contracts with a different company to use the non-hazardous secondary materials at the generator's facility as fuel, either temporarily or permanently, these materials remain within the control of the generator. However, generators sometimes contract with a second company to collect non-hazardous secondary materials at the generating facility and such materials are subsequently used as fuels in a combustion unit at another facility. In that situation, if the facility that burns the non-hazardous secondary material is not "within the control of the generator" as defined below in the second part of the definition, then the non-hazardous secondary material fuel would be considered a solid waste unless a non-waste determination has been granted pursuant to the petition process.

The second part of the definition applies to non-hazardous secondary materials generated and used as fuels at a different facility that is controlled by the generator (or if a person as codified in § 241.2 controls both the generator and the facility using the fuel in a combustion unit). For purposes of this criterion, "control" means the power to direct the policies of the facility, whether by ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as codified in § 241.2 shall not be deemed to "control" such facilities. Thus, when a contractor operates two facilities, each of which is owned by a different company, the non-hazardous secondary materials generated at the first facility and used as a fuel at the second facility is not considered "within the control of the generator."

In the proposed rule, the Agency also indicated that the 2008 DSW Final Rule included a third part in the definition of "within the control of the generator;" specifically, hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and a toll manufacturer and legitimately reclaimed by the tolling contractor. For purposes of that exclusion, a tolling contractor is a person who arranges for the production of a product or intermediate made from specified raw or virgin materials through a written contract with a toll manufacturer. We did not propose to include this arrangement as being "within the control of the generator" as we viewed this as a specific type of arrangement used in the production of materials, and were unaware of these types of contractual arrangements where both products and secondary material fuel are sent to what we are calling tolling contractors. Nevertheless, the Agency requested comment on whether to include this option in the final rule. We have decided not to include this option in the final rule. See Section V.A.1.

2. Restrictions and Requirements

a. Legitimate Use

Under this rule, non-hazardous secondary materials used as fuels in combustion units that remain within the control of the generator must meet the legitimacy criteria in § 241.3(d)(1) to be considered a non-waste fuel. To satisfy the legitimacy criteria, the non-hazardous secondary material (non-waste) fuel must be handled as a valuable commodity, have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy, and contain contaminants at levels comparable to (or lower than) those in traditional fuels which the combustion unit is designed to burn as discussed in Section VII.H.

b. Notification

We are not requiring facilities that use non-hazardous secondary material fuels within the control of the generator and that meet the legitimacy criteria to notify EPA under this rule. This notice would be duplicative of the notification and recordkeeping requirements being promulgated for boilers and process heaters at major sources of air toxics. That is, the CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers combusting non-hazardous secondary materials are also found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers.

Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 requires basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous secondary materials that are not solid wastes. Owners or operators of commercial or industrial facilities that combust non-hazardous secondary materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. These records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria, and that requiring notification under this rule is not necessary.

*C. Non-Hazardous Secondary Materials That Have Not Been Discarded: Scrap Tires Collected Under Established Tire Collection Programs*

1. Scope and Applicability

EPA has determined that scrap tires removed from vehicles and managed under the oversight of state and other established tire collection programs are not "discarded in the first instance." Such tires (including both whole tires and tires that have been shredded—with or without metal removal [156]) are non-waste when legitimately used as a fuel in combustion units. These collection programs (codified in § 241.2) ensure that the scrap tires are not discarded en route to the combustor for use as a fuel and are handled as a valuable commodity (§ 241.3(d)(1)(i)).

State programs and other established tire collection programs promote the collection of scrap tires in coordination with tire dealerships, haulers, processors, and end users, forming an established collection infrastructure. These established tire collection programs together with state bans on landfilling in most states [157] effectively result in the beneficial reuse of tires (as fuel or used in other scrap tire markets) as the sole [158] end use option for scrap tires in those states.

While the Agency recognizes that there will be differences between the various established tire collection programs, at a minimum, the following components would need to be included as part of any established tire collection program: (1) A comprehensive system that prevents tires from being abandoned when the scrap tires are harvested from vehicles and collected at the various businesses where they are removed; these tires are not considered "discarded in the first instance" per this rule; and (2) standards for the scrap tires to be managed as a valuable commodity. These programs would ensure storage does not exceed reasonable time frames, the scrap tires are managed in a manner consistent with the analogous fuel (coal), and a system is in place to prevent scrap tires from being discarded (according to the plain language definition) en route to the combustor (and during any processing prior to combustion).

An example of this type of program is a tire dealership that has pre-arranged agreements where the combustor pays for the delivery of the tires harvested from automobiles and can track the delivery and has contractual obligations for a safe delivery. Another example is the Texas system where tires are not seen as waste, but have specifications for tracking and safe delivery to the end use markets.

In essence, these programs are ones that neither allow for an opportunity for scrap tires intended as a fuel to be discarded in the first place nor discarded in transit. A definition of established tire collection programs is codified in today's rule at § 241.2. According to the plain English meaning of discard, these tires would not have been "disposed of, abandoned, or thrown away" through the initial process of removing them from cars or collecting them under established tire collection programs.

In reaching this position, the Agency considered several factors:

a. Some Specific Types of Secondary Materials Are More Like Valuable Commodities Than Solid Wastes

As noted above, when non-hazardous secondary material fuels are transferred to another party, the secondary material is generally discarded since the generator has relinquished control of the secondary material and the entity receiving such materials may not have the same incentives to manage them as a useful product, which results in the materials being discarded. At the same time, EPA acknowledges that some specific types of secondary materials are more like valuable commodities than solid wastes, and the mere act of transferring them to a third-party does not automatically involve discard.

After reviewing the comments on the proposal and all other information in the rulemaking record, EPA has determined that, unlike the historic management of scrap tires that resulted in many waste tire piles, the annually generated scrap tires that are removed from vehicles under established tire collection programs shows that they are not being discarded, as evidenced by the dramatic decrease in the number of tires in waste tire dumps. Fewer than one million tires remain in tire piles, as compared to an estimate of one billion tires in 1990. In addition, scrap tires have nearly the highest percentage of reuse, recycling, or otherwise being beneficially used in the markets. That is, of the 300 million scrap tires being generated every year, nearly 90% of those tires go to beneficial use markets. The change in market conditions since the historic management of scrap tires in piles have helped ensure that scrap tires collected as part of established tire collection programs are not discarded.

Under the scrap tire program, oversight starts at the point the tires are removed from the vehicle and continues until they are used as a fuel at combustion units (or used in other scrap tire markets), ensuring that discard does not occur. Although we mentioned in the proposed rule that there was a pattern of discard at third party-off site reclaimers, based on the information in the record, we understand that it is no longer the case for scrap tires, while acknowledging that there was a problem in the past.

In regard to the proposed rule statement that state environmental agencies often consider tires to have entered the "waste stream" and were concerned about conflicting interpretations, we recognize that states [159] typically call tires a waste until beneficially used. As described above, discard is not occurring (according to the plain language definition since they have not been abandoned, disposed of, or thrown away) for tires collected from vehicles under established tire collection programs (as defined). Secondly, this rule is specifically for use of non-hazardous secondary materials as fuels and ingredients (including scrap tires) in combustion units and this rule has different criteria than State Agency definitions for general use of scrap tires. These issues are discussed further in Sections IX (State Authority) and in Section V.B.5 (Response to Comments on Scrap Tires).

Typically, the state and private programs work together to encourage processing, reuse, and/or recycling, that would result in a market demand for scrap tires to be collected; however, the market for fuel use is more independently sustainable in the free market, while other markets for scrap tire reuse and recycling often need to function with state subsidies to support them.[160]

[156] If scrap tires are not discarded in the first place, they do not have to be processed per the standards in today's rule, but can be converted to rough shreds or processed into TDF chips at the discretion of the combustor and still be non-waste fuel. If the scrap tires were discarded, they have to be processed (with metal removal, *see* Section V.B.5) per the standards in today's rule in order to be a non-waste fuel.

[157] A few states allow tires cut up in smaller pieces to be landfilled, while fewer still allow whole tires in landfills.

[158] Note, a commenter has indicated that some states are considering revoking their tire landfill ban if combustors are no longer choosing to use tires for fuel based on the outcome of this rule.

[159] There are many variations on how scrap tires are regarded in State Environmental Agencies, of note, Texas considers that tires are non-waste, but that the shipments have to be documented. For details, please refer to comments by the Texas Commission on Environmental Quality (TCEQ), commenter ID EPA–HQ–RCRA–2008–0329–1306.

[160] The recovery and management of scrap tires that are recovered from tire piles are largely supported or subsidized by State Agencies and these whole tires are considered discarded and

b. Beneficial Use of Whole Scrap Tires

Since most combustion units will continue to use tires that have been processed into TDF chips, the biggest change in the final rule (with regard to the use of scrap tires) is that cement kilns will be able to use whole tires as non-waste fuels if those tires are removed from vehicles under established tire collection programs. In particular, cement kilns operate at much higher temperatures and need, not only the fuel from the tires, but also the non-combustible portions in order to produce cement clinker, creating a strong market for this type of beneficial use. Whole tires removed from vehicles under established tire collection programs still meet the legitimacy criteria and using whole tires for their fuel value would lead to an overall decrease in the emissions of HAP or the section 129 pollutants in the CAA when replacing traditional fuel sources (*e.g.,* coal) in cement kilns due to the contaminant levels and combustion properties. Many state environmental agencies and cement kilns supplied data and support for use of whole tires in cement kilns.

Since cement kilns' use of whole tires as a non-waste would be a change from the proposal, EPA considered potential environmental justice impacts. The assessment of the demographic analysis at the cement kilns using scrap tires showed a decreased chance of impacting environmental justice communities based on the demographic analysis at cement kilns versus the alternative sites. The demographics at cement kilns showed that they were sited in areas that were lower in minority and had less poverty that the alternative CISWI combustors, tire processors, or disposal sites. In addition, scrap tires are prevented from being disposed of in states that ban whole tires from landfills [161] and that have an established collection infrastructure. Not all states have programs that prevent landfilling and tires recovered from tire dumps are not always suitable for market use. However, as we have noted previously, scrap tires have nearly the highest percentage of reuse, recycling, or are otherwise being beneficially used in the markets to ensure that scrap tires collected as part of established tire collection programs are not discarded.

2. Restrictions and Requirements

a. Legitimate Use

Consistent with other non-hazardous secondary materials used as a non-waste fuel, scrap tires collected pursuant to established tire collection programs must meet the legitimacy criteria in § 241.3(d)(1) to be considered a non-waste fuel under this rule. Specifically:

- Scrap tires are considered to be handled as a valuable commodity when they are collected from vehicles under established scrap tire collection programs. If at any point these tires or tires that otherwise qualify to be non-waste (processed or petitioned) are not managed as a valuable commodity, they would become a solid waste. *See* § 241.3(d)(1)(i).
- Scrap tires (whole or TDF chips) have an exceptionally high heating value; they are considered to meet the legitimacy criteria for meaningful heating value established in today's rule at § 241.3(d)(1)(ii). In fact, the heating value of scrap tires (12,000 Btu/lb to 16,000 Btu/lb) is higher than typical coal values and other solid fuels.
- EPA's analysis of the contaminant concentrations in scrap tires shows that it is comparable to the traditional fuel it replaces (*i.e.,* coal); therefore, it is considered to meet the legitimacy criteria for comparable contaminants established in today's rule at § 241.3(d)(1)(iii). The comparison to the contaminant concentrations is given in the scrap tire response to comments. *See* Section V.B.5.

b. Notification

We are not requiring facilities that use scrap tires collected under established tire collection programs and that meet the legitimacy criteria to notify EPA under this rule. This notice would be duplicative of the notifications and recordkeeping requirements being promulgated for boilers and process heaters at major sources of air toxics. That is, the CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers combusting non-hazardous secondary materials are also found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers.

Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 requires basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous secondary materials that are not solid wastes. Under the provisions of § 60.2175(w), for combustors burning scrap tires, a certification must be maintained stating that the scrap tires combusted under § 241.3(b)(2)(i) were obtained through an established tire collection program.

Owners or operators of commercial or industrial facilities that combust materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. These records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria, and that requiring notification under this rule is not necessary.

*D. Non-Hazardous Secondary Materials That Have Not Been Discarded: Resinated Wood Residuals*

1. Scope and Applicability

Resinated wood (also referred to as resinated wood residuals) is another secondary material that, upon examination, is not discarded when used on-site or transferred off-site. EPA would consider resinated wood used as a fuel in a combustion unit as not being a solid waste, provided these materials satisfy the specified legitimacy criteria for fuels (§ 241.3(d)(1)).

The definition of "resinated wood" has been codified in § 241.2 and means wood products (containing resin adhesives) derived from primary and secondary wood products manufacturing and comprised of such items as board trim, sander dust, and panel trim. Wood products manufacturers in many cases have constructed their facilities to utilize resinated wood residuals as fuels. Specialized burners specifically to fire sander dust and replace oil and natural gas were developed and were integral to the growth of the industry. This secondary material is routinely transferred between either intra- or inter-company facilities and used as either "furnish" (*i.e.,* raw materials) or fuel at the receiving facilities. This material when transferred off-site is used and handled in the same manner that resinated wood residuals are used when generated on-site, such that it is impossible to distinguish between

waste when used as fuel, unless they are sufficiently processed.

[161] A few states allow tires cut up in smaller pieces to be landfilled, while fewer states still allow whole tires in landfills.

materials that are being used as a raw material and those that are being used as a fuel.

Consistent with the approach taken for scrap tires, EPA recognizes that some specific types of non-hazardous secondary materials, such as resinated wood residuals, are more like valuable commodities than solid wastes, and per the holding of the *Safe Food* case, the act of transferring them to a third-party does not automatically involve discard. Consistent with *Safe Food,* EPA's determination that resinated wood is not a solid waste, even if it is transferred between industries or ownership of the material is relinquished, "is reasonable and consistent with the statutory purpose." 35 F.3d at 1269.

2. Restrictions and Requirements

a. Legitimate Use

As we have noted above, the combustor of these secondary materials would still need to demonstrate that such residuals meet the legitimacy criteria. Thus, they would need to show the material is handled as a valuable commodity, has meaningful heating value and is used as a fuel in a combustion unit that recovers energy, and contains contaminants at levels comparable to (or lower than) those in traditional fuels for which the combustion unit is designed to burn.

b. Notification

We are not requiring facilities that use resinated wood residuals and that meet the legitimacy criteria to notify EPA under this rule. This notice would be duplicative of the notifications and recordkeeping requirements being promulgated for boilers and process heaters at major sources of air toxics. That is, the CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers combusting non-hazardous secondary materials are also found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers.

Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 requires basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous secondary materials that are not solid wastes. Owners or operators of commercial or industrial facilities that combust materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. These records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria, and that requiring notification under this rule is not necessary.

*E. Non-Hazardous Secondary Materials Used as Ingredients*

1. Scope and Applicability

Non-hazardous secondary materials used as ingredients in combustion units would not be solid wastes provided they satisfy the legitimacy criteria discussed in § 241.3(d)(2). We are not differentiating between ingredients that are used within the control of the generator from those that are not since the use of non-hazardous secondary materials as ingredients is more integral or akin to use in a commercial manufacturing process and thus, these non-hazardous secondary materials should not be considered discarded provided they satisfy the legitimacy criteria. However, non-hazardous secondary materials that are used as ingredients, but have been discarded in the first instance (*e.g.,* landfilled) would be considered a solid waste unless processed into a new ingredient product.

The Agency received comments on the proposed rule that ingredients should not be included in this rule since ingredients are not "combusted," but rather, are incorporated into the product. As explained in the response to comments in Section V.A, this issue is not relevant to this regulation, which determines whether non-hazardous secondary materials are a solid waste, or not under RCRA. EPA has clear authority to interpret RCRA to decide whether non-hazardous secondary materials are solid wastes or not. Whether EPA may cover ingredients used in combustors under section 129 of the CAA is a matter for regulations under that statute.

The proposal identified a number of non-hazardous secondary materials that are currently being used as ingredients in combustion processes that would not be considered solid waste, provided they meet the legitimacy criteria for ingredients and were not discarded in the first instance (*e.g.,* blast furnace slag; CKD; the coal combustion residual group (fly ash, bottom ash, and boiler slag); and foundry sand). For example, coal fly ash can be added to the raw material feed in clinker manufacturing to contribute specific required elements, such as silica, alumina, and calcium, in the final composition of cement, with such levels of key metals needing to be carefully calibrated with other ingredients to ensure that the final cement product has the correct mineral and metal content. There is every incentive for the company to ensure that the metals content are within specifications to ensure that the clinker product meets specifications. In clinker manufacture, coal fly ash partially offsets the need for raw materials, such as silica, iron, and alumina sources. This reduction of raw feedstock materials can result in reduced emissions of certain pollutants.[162]

Another non-hazardous secondary material used as an ingredient, CKD, can be directly reused in a closed-loop process back into the cement kiln for clinker manufacture. In fact, the cement industry is estimated to recycle more than 75 percent of its CKD each year. Significant increases in U.S. clinker capacity are expected over the 2008 to 2012 period resulting in an anticipated increase in CKD production and usage. In clinker manufacture, CKD partially offsets the need for raw material feed, such as limestone and natural constituents (rock), thus avoiding the energy usage and emissions related to their extraction and processing.

2. Restrictions and Requirements

a. Legitimate Use

Under this rule, non-hazardous secondary materials used as ingredients in combustion units cannot be discarded in the first instance and must meet the legitimacy criteria in § 241.3(d)(2) to be considered a non-waste ingredient. To satisfy the legitimacy criteria, the non-hazardous secondary material (non-waste) ingredient must: be managed as a valuable commodity, provide a useful contribution to the production or manufacturing process, used to produce a valuable product, and result in products that contain contaminants at concentrations comparable to or lower than those found in traditional products

[162] For more detailed information on the benefits of using coal fly ash and other recovered mineral components in manufacturing processes, please see: "Study on Increasing the Usage of Recovered Mineral Components in Federally Funded Projects Involving Procurement of Cement or Concrete to Address the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users." June 23, 2008. (EPA530–R–08–007)

manufactured without the non-hazardous secondary material.

b. Notification

We are not requiring facilities that use non-hazardous secondary materials as ingredients to notify EPA under this rule. This notice would be duplicative of the notification and recordkeeping requirements being promulgated for boilers and process heaters at major sources of air toxics. That is, the CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers using non-hazardous secondary materials as ingredients are also found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers.

Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 requires basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous secondary materials that are not solid wastes. Owners or operators of commercial or industrial facilities that combust non-hazardous secondary materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. These records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria, and that requiring notification under this rule is not necessary.

*F. Discarded Non-Hazardous Secondary Materials That Have Undergone Processing To Produce Legitimate Fuel or Ingredient Products*

1. Scope and Applicability

Fuel or ingredient products that result from the processing of discarded non-hazardous secondary materials and that meet the legitimacy criteria as discussed below are not solid wastes. Because the resulting fuel/ingredient products are, in effect, reclaimed or extracted products from a recycling process, EPA considers such materials to be "new" products that have not been discarded and therefore are not solid wastes. Until the non-hazardous secondary materials have been processed into a non-waste fuel or ingredient product meeting the legitimacy criteria, the discarded non-hazardous secondary material are generally assumed to be solid wastes.

As discussed in the proposed rule, the basic principle that must be satisfied is that the discarded non-hazardous secondary material must undergo a sufficient level of processing that produces either a new fuel or ingredient product (the definition of processing is codified in § 241.2). Specifically, processing includes, but is not limited to, operations that: remove or destroy contaminants; significantly improves the fuel characteristics of the material, *e.g.,* sizing or drying the material in combination with other operations, chemically improve the as-fired energy content, or improve the ingredient characteristics. On the other hand, processing operations that are minimal, such as operations that result only in modifying the size of the non-hazardous secondary material, would not constitute processing for purposes of today's rule. In addition, the new product must have properties that provide the end user the assurance that the fuel or ingredient product consistently satisfies the legitimacy criteria based on the type of combustion unit the non-hazardous secondary material is used in (*e.g.,* as a fuel in a boiler or as an ingredient in a cement kiln).

• The principle that products can be produced from a waste is common to industrial processes and commercial recycling markets. Newspaper and aluminum cans discarded by consumers are then collected, sorted and processed into new recycled paper and aluminum products that are not considered solid waste. Collected plastic is generally sent to a reclaimer, who will sort, grind, and clean the plastic. The cleaned and sorted plastic is sent to a manufacturer who will use it as feedstock. These are clear examples where discarded materials are processed into legitimate non-waste products.

Recycled fuel products are no different from recycled paper and aluminum cans with respect to discard. If non-hazardous secondary materials that are discarded by being abandoned, disposed of or thrown away, but are later collected, segregated, and processed into a homogenous fuel product that is marketed and sold as a valuable commodity and is no different from traditional fuels used today, then they should no longer be considered solid waste, just as recycled paper is not a solid waste.

There are other examples beyond consumer recycled materials where discarded secondary materials are processed into new products. These examples include specific exclusions from the hazardous waste regulations, which provide insight into how secondary materials can be processed into valuable products. For instance, discarded spent solvents are commonly recycled via distillation into legitimate, newly usable solvents. These regenerated solvents are clearly considered to be products, not wastes. See 50 FR 634, January 4, 1985.

Another example is scrap tires retrieved from waste tire piles that have been shredded/chipped into TDF with the wire removed. In this instance, the scrap tires have been sufficiently processed and thus, the TDF would not be considered a solid waste when burned as a fuel. On the other hand, scrap tires from waste tire piles that have been shredded/chipped without the metal wire removed, would not be considered to have been sufficiently processed, and any TDF that is generated in such a fashion would be considered a waste-derived fuel. For a full discussion of processing of scrap tires, *see* Section V.B.5, which discusses the comments received on this issue, as well as EPA's responses.

Coal refuse generated from legacy piles is another example of a discarded material that has been processed into a fuel product, although, as discussed in Section V.B.8, the nature of the material results in a somewhat different processing scenario. Specifically, coal refuse that has been discarded in waste piles is unique since it was a material generated during the fuel production process and then thrown away (discarded). Over time, combustion technology changes allowed this raw material to be "re-mined" as raw material coal. The level of processing that occurs for this "re-mined" coal refuse is no different than the level of processing that occurs for raw material coal today. In fact, this same material is generated in current-day coal mining operations and processed into a fuel product today.

In that sense, we do not consider coal refuse to fit within what we would normally consider to be a "secondary material" (*i.e.,* material that is not the primary product of a manufacturing or commercial process), since the primary product of coal mining operations is in fact fuel As a result, raw materials that are generated in the fuel production process that have been discarded, but that are then subsequently processed no differently from raw materials processed into fuels today, would be considered to

undergo an adequate level of processing to render it a non-waste. This would not apply to other discarded materials, such as scrap tires, since they are truly secondary materials whose ultimate use as a fuel is in fact "secondary in nature." Off-spec used oil is another example of a secondary material which we believe is discarded, but can be processed into a non-waste product (*see* Section V.B.7). Once the used oil is determined to be on-spec, we do not view it to be a solid waste since it is no longer regulated under the used oil management standards of 40 CFR part 279 and can be managed as an alternative fuel.

Synthesis gas (or syngas as it is commonly referred) produced from the gasification of solid waste is another material that can also meet the requirements of a fuel product produced from the processing of discarded non-hazardous secondary materials, provided the syngas has been adequately processed to remove contaminants. Gasification is a chemical production process that converts carbonaceous material into a synthesis gas that can be used for energy production (or as a building block for other chemical manufacturing processes). In general, gasification systems are designed to react carbon-containing materials and steam at high temperatures to produce a synthesis gas composed mainly of carbon monoxide and hydrogen.

Gasification systems include two basic components. The first is the reactor or gasifier and the second is a gas cleanup or polishing system used to remove various contaminants from the raw (un-polished) synthesis gas. At a minimum, syngas cleanup generally includes removal of sulfur and metals. These two components work together producing a synthesis gas that can be used as a fuel in a combustion turbine.

Coal fines, biomass, and other materials can be mixed and processed into pellets (or other forms) that have the consistency and handling characteristics of coal. For example, the K–Fuel process employs heat and pressure to transform coal into a cleaner, more efficient fuel by removing water and polluting impurities, thus increasing combustion efficiency. When applied to different lower-rank sub-bituminous and lignite coals, the K–Fuel process removes, on average, almost 70 percent of the coal's elemental mercury.[163] As discussed in Section V.B.2, manure that has been sufficiently processed (for example, by anaerobic digesters) would also be considered a legitimate non-waste fuel that has been processed from a non-hazardous secondary material provided processed material meets the legitimacy criteria.

2. Restrictions and Requirements

a. Legitimate Use

Discarded non-hazardous secondary materials that are sufficiently processed to produce legitimate fuel or ingredient products must still pass the applicable legitimacy criteria to be considered a non-waste fuel or ingredient product. To be considered a legitimate fuel, the fuel product must meet the criteria identified in § 241.3(d)(1), while to be considered a legitimate ingredient, the ingredient product must meet the criteria in § 241.3(d)(2).

b. Notification

We are not requiring facilities that use discarded non-hazardous secondary materials that are sufficiently processed to produce legitimate fuel or ingredient products to notify EPA under this rule. This notice would be duplicative of the notifications and recordkeeping requirements being promulgated for boilers and process heaters at major sources of air toxics. That is, the CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers using non-hazardous secondary materials as ingredients are also found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers.

Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 require basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous secondary materials that are not solid wastes. Owners or operators of commercial or industrial facilities that combust materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. The Agency believes that these records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria, and that requiring notification under this rule is not necessary.

*G. Non-Waste Determination Petitions*

1. Description of the Petition Criteria for the Non-Waste Determination

The final rule establishes a non-waste determination petition process that provides persons with an administrative process for receiving a formal determination from the EPA Regional Administrator that non-hazardous secondary materials that are burned as a fuel and have not been managed within the control of the generator, have not been discarded, and is indistinguishable in all relevant aspects from a fuel product is not a solid waste when used as a legitimate fuel in a combustion unit. For example, a facility combusting non-hazardous secondary materials that is not affiliated or within the control of the generator of the non-hazardous secondary material (and thus is "outside the control of the generator") can petition EPA that such non-hazardous secondary materials they burn as fuel is not a solid waste pursuant to the various criteria.

This petition process is voluntary. That is, facilities may choose to petition EPA to receive a case-specific non-waste determination. However, any petition that is submitted to EPA that requests a non-waste determination must demonstrate that the non-hazardous secondary material has not been previously discarded and that it satisfies the five criteria outlined in today's rule at § 241.3(c). In addition, the petitioner must also demonstrate that the non-hazardous secondary material meets the legitimacy criteria in 241.3(d)(1).

To demonstrate that the non-hazardous secondary material that is to be burned as a fuel has not been discarded in the first instance, the petitioner would need to demonstrate that it was not initially abandoned or thrown away by the generator of the non-hazardous secondary material. After demonstrating that the non-hazardous secondary material has not been discarded in the first instance, the petitioner must then demonstrate that the material is indistinguishable in all relevant aspects from a fuel product by showing that it satisfies all of the following five criteria: (1) Whether market participants handle the non-hazardous secondary material as a fuel rather than a waste; (2) whether the chemical and physical identify of the non-hazardous secondary material is comparable to a commercial fuel; (3) whether the capacity of the market would use the non-hazardous secondary

[163] Evergreen Energy Company Web site. *http://www.evgenergy.com/k_fuel.php.*

material in a reasonable time frame; (4) whether the constituents in the non-hazardous secondary material are released to the air, water or land from the point of generation to the point just prior to combustion of the non-hazardous secondary material at levels comparable to what would otherwise be released from traditional fuels; and (5) other relevant factors. These five criteria are listed in today's rule at § 241.3(c)(1).

Specifically, the first criterion for a non-waste determination is whether market participants treat the non-hazardous secondary material as a fuel rather than a solid waste. This would include consideration of likely markets for the non-hazardous secondary material (*e.g.,* based on the current positive value of the secondary material, stability of demand, and any contractual arrangements). This evaluation of market participation is a key element for determining whether companies view these non-hazardous secondary materials like fuels rather than as negatively-valued wastes.

The second criterion for a non-waste determination is the chemical and physical identity of the non-hazardous secondary material and whether it is comparable to commercial fuels. This "identity principle" is a key factor that the Court of Appeals for the DC Circuit cited in *Safe Food* in determining whether a non-hazardous secondary material is indistinguishable from a product. It is important to note that the identity of a material can be comparable to a fuel product without being identical. However, to qualify for a non-waste determination, any differences between the non-hazardous secondary material in question and the commercial fuel contaminants should be within a small acceptable range. In addition, the comparison must be of the secondary material itself to the commercial fuels and not of the emissions from the combustion unit. The Agency also recognizes, however, that emissions data may be used to augment data from the material in cases where such emissions data is useful in making legitimacy determinations and demonstrating that constituents in the material are being used in energy recovery and not disposed of through sham recycling.

The third criterion for making a non-waste determination is the capacity of the market to use the non-hazardous secondary material as a fuel in combustion units in a reasonable time frame and ensure that it will not be abandoned. For the non-waste determination, a person must provide sufficient information about the non-hazardous secondary material and the market demand for it to demonstrate that such non-hazardous secondary materials will in fact be used as a fuel in combustion units in a reasonable time frame. EPA is not explicitly defining "reasonable time frame" because such time frames could vary according to the non-hazardous secondary material and the industry involved, and therefore determining this time frame should be made on a case-specific basis.

The fourth criterion for a non-waste determination is whether the constituents in the non-hazardous secondary material fuels that could be considered contaminants are at concentrations comparable to what would otherwise be released from traditional fuels from the point of generation of the non-hazardous secondary material, its management and storage prior to combustion. The Agency believes that the release to the environment of contaminants contained in the non-hazardous secondary material is a possible indicator of risk and discard. The Agency recognizes that combustion using traditional fuels also result in a certain level of release and, in evaluating this criterion, would not deny a non-waste determination if such release is comparable to those traditional fuel releases. However, when relatively high levels of the contaminants are released to the environment from the point of generation to the point just prior to combustion then that may be an indication that the non-hazardous secondary material is not being handled as a commercial fuel.

The fifth and final criterion for a non-waste determination includes any other relevant factors that demonstrate that the non-hazardous secondary material is not discarded and thus is not a solid waste. This catch-all criterion is intended to allow the petitioner to provide any case-specific information considered important and relevant in making the case that its non-hazardous secondary material used as a fuel in a combustion unit is not a solid waste.

Any non-hazardous secondary material used as a fuel must also satisfy the legitimacy criteria (§ 241.3(d)(1)) in order to be considered a non-waste fuel. We note that there may be some overlap between the legitimacy criteria and the five petition criteria discussed above. Thus, the same rationale used to demonstrate that the non-hazardous secondary material contains contaminants at levels comparable to (or lower than) traditional fuels in combination with the argument that such non-hazardous secondary material contains meaningful heating value can be used to satisfy the petition criterion number two above.

2. Non-Waste Determination Petition Process

In order to obtain a non-waste determination, a facility must apply to the Regional Administrator for the EPA Region where the facility combusting the non-hazardous secondary material is located per the procedures described in today's rule at § 241.3(c). The application must address the relevant criteria discussed above. The Regional Administrator will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the combustion unit is located. The Regional Administrator will accept public comment on the tentative decision for at least 30 days, and may also hold a public hearing upon request or at his discretion. The Regional Administrator will issue a final decision after consideration of comments and after the hearing (if any). The Regional Administrator may draw upon the states expertise as discussed below.

After a formal non-waste determination has been granted, if a change occurs that affects how the non-hazardous secondary material meets the relevant criteria contained in today's rule at § 241.3(c)(1), or affects its meeting the legitimacy criteria in § 241.3(d)(1), persons must re-apply to the Regional Administrator for another formal determination that the non-hazardous secondary material continues to meet the relevant criteria and is not discarded and therefore, not a solid waste. The same criteria and procedures described above would be used for any re-application of the non-hazardous secondary material.

As petition decisions are made by the Agency, they will be made available on an Agency Web site so the petition can be referenced when similar requests are submitted. This will support national consistency and minimize redundant efforts.

3. Petition Decisions Utilizing State Environmental Agency Program's Input

When analyzing a non-waste determination petition request, the EPA Regional Administrator may request or rely on information generated through a state's beneficial use program that certain non-hazardous secondary materials are or are not solid waste. The state beneficial use programs have been developed to encourage a variety of uses for many non-hazardous secondary

materials. The process ensures that non-hazardous secondary materials do not endanger human health and the environment, and that they are managed in accordance with the conditions of the determination. Generally, when a beneficial use determination has been granted (thus, no longer considered a solid waste under a state's laws or regulations), it would document that the chemical and physical properties are similar to the raw material it is replacing or, when incorporated into another product, would be beneficial to the final product.

State Agencies may also submit a non-waste determination request on behalf of the regulated applicant for EPA to evaluate under the non-waste determination criteria in today's rule at § 241.3(c)(1). States may petition for a whole category of non-hazardous secondary materials in their state for a particular type of combustor, or for specific individual combustors.

*H. Legitimacy Criteria*

1. Legitimacy Criteria for Fuels

Non-hazardous secondary materials used as non-waste fuels in combustion units must meet the legitimacy criteria specified in § 241.3(d)(1). To meet the legitimacy criteria, the non-hazardous secondary material must be managed as a valuable commodity, have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy, and contain contaminants at concentrations comparable to (or lower than) those in traditional fuels which the combustion unit is designed to burn.

In applying the legitimacy criteria, we would note that there are two overall questions that the Agency needs to answer: (1) Whether or not the non-hazardous secondary material is a fuel product or ingredient product, or whether the material has been discarded and is therefore a solid waste, which includes waste-derived fuels or ingredients; and (2) whether the non-hazardous secondary material is being legitimately and beneficially used or recycled.

With respect to the legitimacy question, EPA believes it important and crucial to apply a set of legitimacy criteria to make sure that the fuel product is being legitimately and beneficially used and not simply being discarded via sham recycling. The definition of legitimate recycling developed for the subtitle C hazardous secondary materials carefully considered the history surrounding the uses of these secondary materials, as well as the applicable case law with respect to the meaning of discard. Likewise, those same principles are pertinent to how a non-hazardous secondary material is determined not to be a solid waste. Therefore, we are codifying general legitimacy criteria that use the same basic framework that has been established for the subtitle C hazardous waste regulations, but that are also tailored specifically for application to non-hazardous secondary materials that are used as fuels in combustion units. *See* 40 CFR 241.3(d) for the proposed regulatory text of the legitimacy criteria and, for comparison, *see* 40 CFR 260.43 in final regulations for the DSW hazardous waste legitimacy provisions.

Specific legitimacy criteria for fuels are discussed below:

a. Manage as a Valuable Commodity

Non-hazardous secondary materials used as fuels must be managed as valuable commodities, including being stored for a reasonable time frame. *See* § 241.3(d)(1)(i). Where there is an analogous fuel, the non-hazardous secondary material must be managed in a manner consistent with the management of the analogous fuel or otherwise be adequately contained so as to prevent releases to the environment. Where there is no analogous fuel, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment. An "analogous fuel" is a traditional fuel for which the non-hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the non-hazardous secondary material.

With respect to how long a non-hazardous secondary material can be stored before the material is not considered to be "managed as a valuable commodity," we are requiring that the non-hazardous secondary material be stored for a reasonable time frame. While EPA took comment on whether it should provide a specific time-frame (*e.g.,* one-year) as opposed to the general standard of "reasonable time frame," based on comments submitted, the Agency has decided not to specifically define "reasonable time frame," primarily because such time frames could and will vary according to the non-hazardous secondary material and industry involved. (*See* Section V. D.1 for a discussion of the comments received and EPA's response.)

This legitimacy factor applies to the non-hazardous secondary materials burned under the generator-controlled exclusion, to legitimate fuel products that have been produced from discarded non-hazardous secondary materials that have been sufficiently processed to produce a non-waste fuel, and to the non-hazardous secondary materials used as fuel that have not been discarded when used outside control of the generator (*i.e.,* scrap tires under tire collection programs and resinated wood residuals). For the generator-controlled provision and for those non-hazardous secondary materials that are used as a fuel that have not been discarded when used outside the control of the generator (*i.e.,* scrap tires under tire collection programs and resinated wood residuals), the non-hazardous secondary material must be managed as a valuable commodity upon generation through its end use as a fuel—that is, from the initial point of generation of the non-hazardous secondary material to the time it is actually burned as a fuel. For discarded non-hazardous secondary materials that are processed to produce a non-waste fuel, the fuel must be managed as a valuable product from the point that it is first produced as a non-waste fuel through the time that it is actually burned. As noted previously, before the non-waste fuel product is produced from discarded non-hazardous secondary materials, the non-hazardous secondary material is a solid waste, and must comply with any federal, state, or local requirements.

This criterion requires that the non-hazardous secondary material be managed appropriately before its end use as a fuel. In EPA's view, a company will value non-hazardous secondary materials used as non-waste fuels that provide an important contribution and, therefore, will manage those secondary materials in a manner consistent with how it manages traditional fuels. If, on the other hand, a company does not manage the non-hazardous secondary material as it would a traditional fuel, that behavior may indicate that the non-hazardous secondary material is being discarded.

This factor addresses the management of non-hazardous secondary materials used as fuels in two distinct situations. The first situation is when the non-hazardous secondary material is analogous to a traditional fuel that otherwise could be burned. In this case, the non-hazardous secondary material must be managed prior to use as a fuel in a similar manner to how traditional fuels are managed or otherwise must be "contained" so as to prevent releases to the environment. For example, for liquid non-hazardous secondary materials that are used as a non-waste fuel that are similar to liquid fossil fuels, the Agency would expect that such non-hazardous secondary materials would be managed in tanks or similar type devices that are structurally

sound to control the release of the non-hazardous secondary materials. The Agency would also expect that the types of controls that would typically be part of a tank or similar type device for liquid fossil fuels would also be part of any tank system that is used to manage the non-hazardous secondary material. For example, if liquid fossil fuels are stored in tanks with covers or they provide for secondary containment, the Agency would expect that the non-hazardous secondary material would also be stored in tanks with covers, with secondary containment so as to prevent releases to the environment.

The second situation addresses the case where there is no analogous traditional fuel that otherwise could be burned. This could be either because the process is designed around a particular non-hazardous secondary material fuel, such as resinated wood residuals, or because physical or chemical differences between the non-hazardous secondary material and the traditional fuel are too significant for them to be considered "analogous." Non-hazardous secondary materials that have significantly different physical or chemical properties when compared to traditional fuels would not be considered analogous even if they serve the same function because it may not be appropriate to manage them in the same way. In this situation, the non-hazardous secondary material would have to be "contained" so as to prevent releases to the environment for this criterion to be met. A non-hazardous secondary material is "contained" if it is stored in a manner that both adequately prevents releases or other hazards to human health and the environment, considering the nature and toxicity of the non-hazardous secondary material.[164]

b. Meaningful Heating Value and Use as a Fuel

Non-hazardous secondary materials must have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy. *See* § 241.3(d)(1)(ii). That is, since this legitimacy criterion is intended to apply only to non-hazardous secondary materials that have a specific end use (in this case, use as a fuel in an energy recovery device), we believe it appropriate to highlight that point by adding that restriction directly to the legitimacy criterion. Thus, non-hazardous secondary materials having a meaningful heating value must also be burned in a combustion device specifically to recover energy; otherwise the unit that combusts such secondary materials are considered incinerators and thus, are solid wastes.[165] We recognize that incinerators and similar type units may accept non-hazardous secondary materials with a meaningful heating value and use that fuel value to limit the other types of fuels it needs to burn. However, the intent of an incinerator, and similar type units, is to destroy wastes, and thus, non-hazardous secondary materials that are burned in such units are considered discarded, and thus, solid waste.

With respect to the requirement that the non-hazardous secondary material have a meaningful heating value, in the context of the RCRA subtitle C hazardous waste regulations, EPA addressed this concept—that is, whether a hazardous secondary material has a meaningful heating value, in the "comparable fuels" rule (63 FR 33781) by defining it with a benchmark Btu content of 5,000 Btu/lb. EPA has also previously stated that industrial furnaces (*e.g.,* cement kilns and industrial boilers) burning hazardous wastes with an energy value greater than 5,000 Btu/lb may generally be considered to be burning for energy recovery; however, we have also indicated that hazardous wastes with a lower Btu content could conceivably be burned for energy recovery due to the devices' general efficiency of combustion. "Thus, the 5,000 Btu level is not an absolute bright line measure of burning for energy recovery * * *" (*see* 62 FR 24251, May 2, 1997).

These same concepts are also appropriate in determining whether a non-hazardous secondary material has a meaningful heating value since traditional fuels in general have a range of heating values from 4,000 to 23,000 Btu/lb. However, we also recognize that new technologies may be developed in the future that can cost-effectively produce energy from such non-hazardous secondary materials with lower energy content. As a result, for purposes of meeting this legitimacy criterion, we would consider non-hazardous secondary materials with an energy value greater than 5,000 Btu/lb, as-fired, to have a meaningful heating value. In addition, for facilities with energy recovery units that use a non-hazardous secondary material as a fuel with an energy content lower than 5,000 Btu/lb, as-fired, a person may demonstrate[166] that a meaningful heating value is derived from the non-hazardous secondary material if the energy recovery unit can cost-effectively recover meaningful energy from the non-hazardous secondary material used as a fuel. Factors that are important in determining whether an energy recovery unit can cost-effectively recover energy from the non-hazardous secondary material include, but are not limited to, whether the facility encounters a cost savings due to not having to purchase significant amounts of traditional fuels they otherwise would need, whether they are purchasing the non-hazardous secondary material to use as a fuel, whether the non-hazardous secondary material they are burning can self-sustain combustion, and whether their operation produces energy that is sold for a profit (*e.g.,* a utility boiler that is dedicated to burning a specific type of non-hazardous secondary material that is below 5,000 Btu/lb, but can show that their operation produces electricity that is sold for a profit).

While not specifically included in § 241.3(d)(1), EPA views this legitimacy criterion to encompass the concept of the "useful contribution and valuable product" legitimacy factors used to evaluate hazardous secondary materials in the 2008 DSW final rule. In that rule, with respect to useful contribution, EPA said that legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process. *See* § 260.43(b)(1). In today's final rule, this criterion expresses the principle that non-hazardous secondary materials should contribute value to the manufacturing process—legitimate use is not occurring if the secondary materials being used do not add anything to the process. This criterion is intended to prevent the practice of using non-hazardous secondary materials in a manufacturing operation simply as a means of disposing or discarding them.

With respect to the legitimacy criterion of producing a valuable product or intermediate, the product or intermediate is valuable if it is (i) sold to a third party or (ii) used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process. See § 260.43(b)(2). In today's final rule, this criterion

[164] Examples of materials that are adequately contained would include liquid fuels stored in a tank.

[165] We note that incinerators that burn waste for purposes of destruction that have a waste heat recovery boiler would not be considered a combustion unit that satisfies this legitimacy criterion.

[166] Such demonstration would be included in the recordkeeping and reporting requirements for boiler units combusting materials considered to be non-wastes in accordance with 40 CFR 241.3 as specified in 40 CFR 63.7530(a) and 63.7555. *See* Section VII.I in today's rule for a further discussion of these reporting and recordkeeping requirements.

expresses the principle that the non-hazardous secondary material should be a material of value, as demonstrated by someone purchasing the material, or using it as an effective substitute for a commercial product that it would otherwise have to buy or obtain for its industrial process. We believe non-hazardous secondary materials that have meaningful heating value that are used as non-waste fuels in combustion units provide a useful contribution and are valuable products since they are replacing traditional fuels that otherwise would have to be burned.

c. Contaminant Levels

Today's rule includes a legitimacy criterion under which non-hazardous secondary materials used as non-waste fuels in combustion units must contain contaminants at levels that are comparable to (or lower than) those in traditional fuel products which the combustion unit is designed to burn (*e.g.,* cellulosic biomass, fossil fuels and their derivatives, as identified elsewhere in this preamble). *See* § 241.3(d)(1)(iii). This criterion is important to ensure that a non-hazardous secondary material being used as a fuel is not being combusted or otherwise released to the environment wholly or in part for the purpose of disposing of or discarding of unwanted materials. The combustion of non-hazardous secondary materials with elevated levels of contaminants results in the contaminants being discarded either through incineration, or by being released to the environment. We also believe that requiring that the non-hazardous secondary material have contaminants at concentrations that are comparable to or lower than traditional fuels would ensure that the burning of any non-hazardous secondary material in combustion units will not result in increased releases to the environment that could impact the health and environment of the local community. Thus, ensuring that the level of contaminants in the non-hazardous secondary material is comparable to (or lower than) those in traditional fuels which the combustion unit is designed to burn would be at least as protective of human health and the environment as burning traditional fuels.

The Agency took comment on a criterion where such contaminants could not be significantly higher in concentration than contaminants in traditional fuels, as this is the standard that is in the 2008 DSW Final Rule regarding the reclamation of hazardous secondary materials. However, we have decided not to adopt that standard in this rule because we are concerned that contaminants that are "not significantly higher" in non-hazardous secondary materials could be seen as "discarding" such contaminants, even if the non-hazardous secondary material, when combusted, did not present a risk to human health and the environment. (*See* Section V.D.3 for a discussion of the comments received and EPA's response regarding the level at which contaminants should be present in such non-hazardous secondary materials.)

The term "contaminants," as proposed, was defined to mean the HAP listed under section 112(b) of the CAA, as well as the nine pollutants required to be regulated under section 129(a)(4) of the CAA. We believe that this was reasonable because this legitimacy criterion is intended to ensure that such non-hazardous secondary materials are not being combusted as a means of disposing of them, so the health and environmental impacts of concern will be those resulting from the air emissions of concern identified in the CAA, including the listed HAP, as well as the section 129 pollutants. (*See* Section V.D.3 for a discussion of the comments received and EPA's response regarding the meaning of "contaminants.")

In determining which traditional fuel(s) the owner or operator of the boiler unit would make a comparison to with respect to contaminant levels, the Agency will allow any traditional fuel(s) that can be or is burned in the particular type of boiler. For example, if the boiler burns fuel oil, the level of contaminants to be compared would be the level of contaminants in fuel oil or other liquid traditional fuels that is or can be burned in such unit. For gas-fired boilers, the level of contaminants in the non-hazardous secondary material fuels would be compared to natural gas or other gaseous traditional fuels. The Agency believes that this approach is most appropriate since the non-hazardous secondary material would be replacing the use of a particular type(s) of fuel. In addition, as discussed in the preamble to the boiler MACT, boilers designed to combust different types of fuels (*e.g.,* coal vs. oil) cannot easily be modified to burn another fuel. Therefore we have determined that any comparison of the contaminants in a non-hazardous secondary material should be to the type(s) of fuel that are (or can be) used in the boiler.

EPA is not establishing specific numerical maximum contaminant levels that a non-hazardous secondary material would have to meet, but rather the rule allows the owner or operator to make the comparison based on information he has or can acquire regarding the level of contaminants found in the traditional fuels he burns or could burn. The assessment of whether the non-hazardous secondary material has contaminants comparable to (or lower than) traditional fuel products is to be made by directly comparing the numerical contaminant levels in the non-hazardous secondary material to the contaminant levels in traditional fuels.

The legitimacy criterion is tailored specifically to the use of these non-hazardous secondary materials as fuels in combustion units. As a result, we believe that contaminant levels in non-hazardous secondary materials must be comparable in concentration to (or lower than) those levels in traditional fuels to be legitimately used as a non-waste fuel product. While the Agency did solicit comment on whether or not it should establish a bright line level or establish a set of levels in the final rule in defining comparable, the Agency has concluded that establishing such levels would be difficult since the level of any contaminant in a particular type of fossil fuel or other traditional fuels can vary quite a bit. Thus, the Agency is defining "comparable to or lower than" to mean any contaminants present in the non-hazardous secondary materials that are within a small acceptable range of the concentrations found in traditional fuels. See Section V.D.3 for a discussion of the comments received and EPA's response regarding establishing specific levels in defining a comparable fuel.

2. Legitimacy Criteria for Ingredients

Non-hazardous secondary materials used as ingredients in combustion units must meet the legitimacy criteria specified in 40 CFR 241.3(d)(2). As discussed for the legitimate fuels criteria, EPA believes it important and crucial to apply a set of legitimacy criteria to make sure that the ingredient products are being legitimately and beneficially used and not simply being discarded via sham recycling. Specifically, a non-hazardous secondary material used as an ingredient in a combustion unit must be managed as a valuable commodity, provide a useful contribution, be used to produce a valuable product or intermediate, and must result in products that contain contaminants at levels that are comparable in concentration to (or lower than) those found in traditional products that are manufactured without the non-hazardous secondary material. Our reasoning for establishing the particular criteria is discussed below.

a. Managed as Valuable Commodities

Non-hazardous secondary materials used as ingredients must be managed as

valuable commodities, including being stored for a reasonable time frame. *See* § 241.3(d)(2)(i). Where there is an analogous ingredient, the non-hazardous secondary material must be managed in a manner consistent with the management of the analogous ingredient or otherwise be adequately contained so as to prevent releases to the environment. Where there is no analogous ingredient, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment. An "analogous ingredient" is an ingredient for which the non-hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the non-hazardous secondary material.

With respect to how long a non-hazardous secondary material can be stored before the material is not considered to be "managed as a valuable commodity," we are requiring that the non-hazardous secondary material be stored for a reasonable time frame. While EPA took comment on whether it should provide a specific time frame (*e.g.,* one-year) as opposed to the general standard of "reasonable time frame," based on comments submitted, the Agency has decided not to specifically define "reasonable time frame," primarily because such time frames could and will vary according to the non-hazardous secondary material and industry involved. (*See* Section V.D.1 for a discussion of the comments received and EPA's response.)

For discarded non-hazardous secondary materials that are processed to produce a non-waste ingredient, the ingredient product must be managed as a valuable product from the point that it is first produced as a non-waste through its use in the combustion unit. As noted previously, before the non-waste product is produced, the non-hazardous secondary material is a solid waste, and must comply with any federal, state, or local requirements.

This criterion requires that the non-hazardous secondary material be managed appropriately before its end use as an ingredient. In EPA's view, a company will value non-hazardous secondary materials used as ingredients that provide an important contribution and, therefore, will manage those non-hazardous secondary materials in a manner consistent with how it manages traditional ingredients. If, on the other hand, a company does not manage the non-hazardous secondary material as it would traditional ingredients, that behavior may indicate that the non-hazardous secondary material is being discarded.

This factor addresses the management of non-hazardous secondary materials used as ingredients in two distinct situations. The first situation is when the non-hazardous secondary material is analogous to a traditional ingredient that otherwise could be burned. In this case, the non-hazardous secondary material must be managed prior to use as an ingredient in a similar manner to how traditional ingredients are managed or otherwise must be "contained" so as to prevent releases to the environment. For example, for liquid non-hazardous secondary materials that are used as a non-waste ingredient that are similar to traditional ingredients, the Agency would expect that such non-hazardous secondary materials would be managed in tanks or similar type devices that are structurally sound to control the release of the non-hazardous secondary materials. The Agency would also expect that the types of controls that would typically be part of a tank or similar type device for traditional ingredients would also be part of any tank system that is used to manage the non-hazardous secondary material. For example, if traditional ingredients are stored in tanks with covers or they provide for secondary containment, the Agency would expect that the non-hazardous secondary material would also be stored in tanks with covers, with secondary containment so as to prevent releases to the environment.

The second situation addresses the case where there is no analogous traditional ingredient that otherwise could be burned. This could be either because the process is designed around a particular non-hazardous secondary material ingredient, or because physical or chemical differences between the non-hazardous secondary material and the traditional ingredient are too significant for them to be considered "analogous." Non-hazardous secondary materials that have significantly different physical or chemical properties when compared to traditional ingredients would not be considered analogous even if they serve the same function because it may not be appropriate to manage them in the same way. In this situation, the non-hazardous secondary material would have to be "contained" so as to prevent releases to the environment for this criterion to be met. A non-hazardous secondary material is "contained" if it is stored in a manner that both adequately prevents releases or other hazards to human health and the environment, considering the nature and toxicity of the non-hazardous secondary material.[167]

b. Useful Contribution

We are requiring that non-hazardous secondary materials used as ingredients in combustion units provide a useful contribution to the production/manufacturing process. See § 241.3(d)(2)(ii). A non-hazardous secondary material used as an ingredient in combustion systems provides a useful contribution if it contributes valuable ingredients to the production/manufacturing process or to the product or intermediate of the production/manufacturing process. This criterion is an essential component in the determination of legitimacy because legitimate use is not occurring if the non-hazardous secondary material doesn't add anything to the process, such that the non-hazardous secondary material is basically being disposed of or discarded. This criterion is intended to prevent the practice of "sham" recycling by adding non-hazardous secondary materials to a manufacturing operation simply as a means of disposing of them.

For purposes of satisfying this criterion, not every constituent or component of the non-hazardous secondary material has to make a contribution to the production/manufacturing activity. For example, non-hazardous secondary materials used as ingredients may contain some constituents that are needed in the manufacturing process, such as, for example, zinc in non-hazardous secondary materials that are used to produce zinc-containing micronutrient fertilizers, while other constituents in the non-hazardous secondary material, such as lead, do not provide a useful contribution. Provided the zinc is at levels that provides a useful contribution, we believe the non-hazardous secondary material would satisfy this criterion, although we would note that the constituents not directly contributing to the manufacturing process could still result in the non-hazardous secondary material not meeting the contaminant part of the legitimacy criteria. The Agency is not quantitatively defining how much of the non-hazardous secondary material needs to provide a useful contribution for this criterion to be met, since we believe that defining such a level would be difficult and is likely to be different, depending on the non-hazardous secondary material. The Agency recognizes that this could be an issue if

[167] Examples of materials that are adequately contained would include liquids stored in a tank.

persons argue that a non-hazardous secondary material is being legitimately used as an ingredient, but in fact, only a small amount or percentage of the non-hazardous secondary material is used. Because of the differences in the emissions standards that the non-hazardous secondary material would be subject to—between CAA sections 112 and 129, persons may argue that such non-hazardous secondary materials are not wastes, when in fact, the operation is really discard, and therefore, sham recycling. Thus, as part of the recordkeeping requirements under the CAA, persons need to provide the basis or rationale on why the particular non-hazardous secondary material meets the legitimacy criteria, including how the secondary material provides a useful contribution.

c. Valuable Product

We are requiring that non-hazardous secondary materials used as ingredients in combustion units must be used to produce a valuable product or intermediate. *See* § 241.3(d)(2)(iii). The product or intermediate is valuable if it is (i) sold to a third party or (ii) used as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

This criterion expresses the principle that the product or intermediate of the manufacturing/production process should be a material of value, either to a third party who buys it from the manufacturer, or to the same manufacturer that subsequently uses it as a substitute for another material that it would otherwise have to buy or obtain for its industrial process. This criterion is an essential component of the concept of legitimacy because legitimate use cannot be occurring if the product or intermediate is not of use to anyone and, therefore, has no real value. This criterion is intended to prevent the practice of introducing a non-hazardous secondary material through an industrial process to make something just for the purpose of avoiding the costs of disposal. Such a practice would be sham recycling.

One way that the use of the non-hazardous secondary material as an ingredient in the production/manufacturing process can be shown to produce a valuable product would be to have documentation on the sale of the product to a third party. Such documentation could be in the form of receipts or contracts and agreements that establish the terms of the sale or transaction. This transaction could include money changing hands or, in other circumstances, may involve trade or barter. A manufacturer that has not yet arranged for the sale of its product to a third party could also establish value by demonstrating that it can replace another product or intermediate that is available in the marketplace.

Production/manufacturing processes that use non-hazardous secondary materials as ingredients may produce outputs that are not sold to another party, but are instead used by the same manufacturer. These products or intermediates may be used as a feedstock in a manufacturing process, but have no established monetary value in the marketplace. Such products or intermediates would be considered to have intrinsic value, though demonstrating intrinsic value may be less straightforward than demonstrating value for products that are sold in the marketplace. Demonstrations of intrinsic value could involve showing that the product or intermediate of the production/manufacturing process replaces another material that would otherwise have to be purchased or could involve a showing that the non-hazardous secondary material meets specific product specifications or specific industry standards. Another approach could be to compare the non-hazardous secondary material's physical and chemical properties or efficacy for certain uses with those of comparable products or intermediates made from raw materials.

Some production/manufacturing processes that use non-hazardous secondary materials as ingredients may consist of multiple steps that may occur at separate facilities. In some cases, each processing step will yield a valuable product or intermediate. When each step in the process yields a valuable product or intermediate that is salable or usable in that form, the activity would conform to this criterion.

d. Contaminant Levels

We are requiring that non-hazardous secondary materials used as an ingredient must result in products that contain contaminants at levels that are comparable in concentration to (or lower than) those found in traditional products that are manufactured without the non-hazardous secondary material. *See* § 241.3(d)(2)(iv). The term "contaminants" refers to constituents in non-hazardous secondary materials that will result in emissions of the air pollutants identified as HAP listed under CAA section 112(b), the nine pollutants listed under CAA section 129(a)(4).

The assessment of whether the products produced from the use of non-hazardous secondary materials that have contaminants that are comparable to (or lower) in concentration can be made by a comparison of contaminant levels in the ingredients themselves to the traditional ingredients they are replacing, or by comparing the contaminant levels in the product itself with and without the use of the non-hazardous secondary material. In determining which traditional ingredient(s) the owner or operator of the unit would make a comparison to with respect to contaminant levels, the Agency believes that any traditional ingredient that can be or is used in the particular type of unit is appropriate. For example, for cement kilns, if the ingredient is CKD, the level of contaminants to be compared would be the level of contaminants in limestone or other ingredients that can be used in such unit. Alternatively, a product comparison can be made. See Section V.E for a further discussion of the comments received regarding the legitimacy criteria for ingredients, as well as our responses to those comments.

*I. Determining That Non-Hazardous Secondary Materials Meet the Legitimacy Criteria*

Owners and operators of affected facilities combusting non-hazardous secondary materials that are not considered solid wastes must ensure that the non-hazardous secondary materials meet the legitimacy criteria in § 241.3(d) (and continue to meet those criteria) when combusted. Non-hazardous secondary materials that no longer meet these legitimacy criteria would be considered solid wastes and the units combusting those non-hazardous secondary materials would be considered a commercial or industrial solid waste incineration (CISWI) unit (*see* 40 CFR 60.2875).

The CAA section 112 rule requires notifications and recordkeeping, including documentation as to how the non-hazardous secondary material meets the legitimacy criteria, and satisfies the definition of processing and/or the requirements for the petition process. (40 CFR 63.7530 and 63.7555). Specific recordkeeping requirements for area source boilers combusting non-hazardous secondary materials are found at 40 CFR 63.11225(c)(2)(ii) under the CAA section 112 rule for area source boilers. Additionally, regulations at 40 CFR 60.2175(v) promulgated for commercial and industrial solid waste incinerators under CAA section 129 require basic recordkeeping to establish whether materials combusted in a commercial or industrial unit meet the standards and procedures for identification of non-hazardous

secondary materials that are not solid wastes. Owners or operators of commercial or industrial facilities that combust materials that are not traditional fuels are directed to the CAA section 112 regulations for boilers and process heaters, and the CAA section 129 regulations for commercial and industrial incinerators, to determine the recordkeeping provisions related to the definition of solid waste that may apply to them. The Agency believes that these records and notifications under the CAA regulations provide assurance that facilities will apply the legitimacy criteria.

## VIII. Effect of Today's Final Rule on Other Programs

The construct of this rule is to determine which non-hazardous secondary materials are solid wastes when combusted either as a fuel or ingredient in order to determine CAA section 129 applicability. Thus, this rules applicability is to the universe of combustion facilities using non-hazardous secondary materials as fuels or ingredients.

### *A. Clean Air Act*

The definition of solid waste incineration unit in CAA section 129(g)(6) states that the term "solid waste" will have the meaning established by the Administrator of EPA under RCRA. Today's rule would establish under RCRA which non-hazardous secondary materials constitute "solid waste" when used as a fuel or an ingredient. This definition of "solid waste" is being used by EPA to establish CAA emissions standards for CISWI units (under CAA section 129) and boilers and process heaters (under CAA section 112). Any unit combusting "solid waste" is subject to the emission standards for "solid waste incineration units" under CAA section 129. The waste determinations in this rule do not subject combustion units to the CAA section 129 standards if the units are exempt under CAA section 129(g)(1).[168]

### *B. Renewable Energy*

This rule may impact how some non-hazardous secondary materials could be used to help supply renewable energy to the U.S. and through state programs. Congress has passed several laws, such as the Energy Independence and Security Act of 2007 (Pub. L. 110–140), that supports the development and use of renewable sources of energy, both for power generation and for the production of transportation fuels. Qualified sources would include wind, solar, and geothermal power, but could also include power generated by the combustion of biogenic materials, which may include some non-hazardous secondary materials burned for energy recovery. Biogenic materials are materials that result from the activity of living organisms. A number of non-hazardous secondary materials are partially or completely biogenic. For example, woody biomass contains recoverable energy and would be considered biogenic in origin. Energy from biogenic sources is generally preferable to fossil fuels.

In addition to these federal programs that may be impacted, Renewable Portfolio Standards (RPS) currently provide states with a mechanism to increase renewable energy generation using renewable energy sources (including biofuels) and a cost-effective, market-based approach. An RPS requires electric utilities and other retail electric providers to supply a specified minimum amount of customer load with electricity from eligible renewable energy sources. The goal of an RPS is to stimulate market and technology development so that, ultimately, renewable energy will be economically competitive with conventional forms of electric power. States create RPS programs because of the energy, environmental, and economic benefits of renewable energy and sometimes other clean energy approaches, such as energy efficiency and combined heat and power.

If these renewable energy sources or biogenic fuels qualify as clean cellulosic biomass, they are an alternative fuel (*see* the full definition in today's rule at § 241.2) and are not subject to the section 129 CAA standards, but rather, would be subject to the section 112 CAA standards.

### *C. Subtitle C Hazardous Waste Program*

The result of this rule will have no effect on the RCRA subtitle C hazardous waste program because it does not address hazardous waste. The RCRA subtitle C hazardous waste federal program has a long regulatory history in defining "solid waste" for purposes of the hazardous waste regulations. However, the 40 CFR 261.2 definition of solid waste explicitly applies only to wastes that also are hazardous for purposes of the subtitle C regulations (*see* 40 CFR 261.1(b)(1)). CAA section 129 also specifically excludes subtitle C combustion units from coverage under that section.

RCRA section 7003 gives EPA the authority to compel actions to abate conditions that may present an "imminent and substantial endangerment" involving both solid and hazardous wastes. EPA uses this authority on a case-by-case basis. The Agency can determine in a specific factual context whether a non-hazardous secondary material which causes an endangerment is discarded. RCRA sections 3007 and 3008 establish EPA's inspection and Federal enforcement authority to address violations of the subtitle C hazardous waste regulations. Nothing in this rule shall impact EPA's ability to act pursuant to RCRA sections 3007, 3008 and 7003. The rule also does not limit or otherwise affect EPA's ability to pursue potentially responsible persons under section 107 of CERCLA for releases or threatened releases of hazardous substances.

Finally, we would note that on October 30, 2008, EPA issued a final rule excluding certain hazardous secondary materials from the definition of solid waste issued under the hazardous waste provisions found in RCRA subtitle C (73 FR 64688). EPA is currently re-examining these exclusions, and as part of a settlement agreement with Sierra Club, EPA will issue a proposed rule by June 2011. This proposal will address, at minimum, issues raised in an administrative petition filed by the Sierra Club, including the four issues discussed in a public meeting, which was announced in a **Federal Register** notice (74 FR 25200, May 27, 2009). The four issues are (1) the definition of "contained," (2) notification before operating under the exclusion (3) the definition of "legitimacy" and (4) the transfer-based exclusion. Many of the issues to be addressed in the upcoming subtitle C definition of solid waste proposal are similar to the issues addressed in today's final rule. However, there are

[168] CAA 129 (g)(1).

"(1) * * * The term "solid waste incineration unit" does not include

(A) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals,

(B) qualifying small power production facilities, as defined in section 796 (17)(C) of title 16, or qualifying cogeneration facilities, as defined in section 796 (18)(B) of title 16, which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or

(C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule. * * *"

significant differences between today's final rule and the scope of the planned June 2011 subtitle C definition of solid waste proposal. The planned proposal will only address the regulation of hazardous secondary materials (not non-hazardous secondary materials) going to reclamation (not burning for energy recovery) under RCRA subtitle C (not subtitle D). In developing the planned subtitle C proposal, EPA will carefully consider the difference in scope between the two rulemakings and address it as appropriate.

## IX. State Authority

Subtitle D of RCRA establishes a framework for state, federal, and local government cooperation in controlling the management of non-hazardous solid waste. The federal role in this arrangement is to establish the overall regulatory direction, by providing minimum nationwide standards for protecting human health and the environment, and to provide technical assistance to states for planning and developing their own solid waste management practices. The actual planning and direct implementation of solid waste programs under RCRA subtitle D, however, remains largely a state and local function, and states have authority to devise programs to deal with state specific conditions and needs.

EPA has not promulgated detailed regulations of what is included in the definition of solid waste for the RCRA subtitle D (non-hazardous waste) programs. State environmental agencies have promulgated their own laws and regulations as to what constitutes a solid waste and have interpreted those laws and regulations to determine what types of non-hazardous secondary material activities involve the management of a solid waste for the purposes of their authorities. Many states have a process or promulgated regulations to determine when these materials are wastes, and when they can be used beneficially and safely in products in commerce.

Through this rulemaking, EPA is articulating a definition of which non-hazardous secondary materials are or are not solid waste when used as a fuel for energy recovery in combustion units or as an ingredient in combustion units. We are not imposing solid waste requirements for determining other possible secondary material end uses nor does this rulemaking apply to general materials management in state programs.

### *A. Applicability of State Solid Waste Definitions and Beneficial Use Determinations*

CAA section 129 states that the term "solid waste" shall have the meaning "established by the Administrator pursuant to the Solid Waste Disposal Act" *Id.* at 7429(g)(6). Accordingly, the states' definition of solid waste would not be applicable in determining whether the CAA section 129 standards apply. Specifically, state determinations regarding a material's beneficial use that may exempt a non-hazardous secondary material from the state solid waste standards would not necessarily impact the status of such non-hazardous secondary materials under EPA's solid waste definition as it relates to which combustion units are subject to the CAA section 129 standards. Likewise, combustion units that use non-hazardous secondary materials as fuels or ingredients that are not solid waste under today's rule would not be subject to the solid waste incineration standards under CAA section 129, even though the state standards may define the same material as solid wastes for their recycling and waste management programs.

If a non-waste determination is sought by petition at a combustion unit, the Agency (EPA Regional Administrator or delegate) will make the decision to grant or deny the petition. The Agency can, however, utilize the information and contaminant data from state beneficial use determinations if it is applicable to the non-hazardous secondary material when used as a fuel or as an ingredient. These state beneficial use programs have been developed to encourage recycling and reuse, provided that such use maintains the specified state's acceptable level of risk and are managed in accordance with the conditions of the determination. Generally, when a beneficial use determination has been granted, it would have chemical and physical properties that are comparable to the raw material it is replacing or, when incorporated into another product, its use would be beneficial to the final product. If the data to support the beneficial use determination was available, it could help support the research on contaminant concentrations for the legitimacy criteria in order to make the petition decision.

A discussion on state program involvement in the petition process and on states submitting petitions in lieu of a regulated applicant is described in Section V.F. Implementation and enforcement issues related to state programs are covered in Section VII.I.

### *B. State Adoption of the Rulemaking*

No federal approval procedures for state adoption of today's rule are included in this rule under RCRA subtitle D. Although EPA does promulgate criteria for solid waste landfills and approves state municipal solid waste landfill permitting programs, RCRA does not provide EPA with authority to approve state programs beyond municipal solid waste landfill permitting programs. While states are not required to adopt today's rule, some states incorporate federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, EPA anticipates that, if required by state law, the changes in today's rule will be incorporated (or possibly adopted by authorized state air programs) consistent with the state's laws and administrative procedures.

### *C. Clarifications on the Relationship to State Programs*

State Agencies that responded to the proposal requested further clarification in the final rule. Specifically, the Federal rule applies only to the RCRA subtitle D definition of solid waste for determining use as a fuel or ingredient in combustion units (as regulated by the CAA). Today's rule does not preempt a State's statutory or regulatory definition of solid waste, and only applies for purposes of determining which facilities must comply with the CAA section 129 standards.

Non-hazardous secondary materials may be simultaneously regulated as a non-waste fuel or ingredient for use in combustion units under § 241.3, but as a solid waste by the State's solid waste programs for management purposes. Also, *see* the discussion in the beginning of this Section (IX. State Authority). Combustors using non-hazardous secondary materials that are designated as a non-waste when used as a fuel or ingredient, would not be subject to the CAA section 129 standards, even though the state standards may define the non-hazardous secondary material as a solid waste.

Finally, owners and operators of affected facilities combusting non-hazardous secondary materials considered to be non-wastes based on the non-waste determination petition process, and the application of the criteria outlined in § 241.3(c) must ensure that the non-hazardous secondary materials continue to meet those provisions when combusted. Non-hazardous secondary materials that no longer meet those criteria, even though

they may be in compliance with state recycling and management requirements, would require the combustor to re-apply for the non-waste determination (per § 241.3(c)(2)(iv)) through the EPA Regional Administrator (otherwise they would be considered solid wastes and the units combusting those non-hazardous secondary materials would be subject to the commercial or industrial solid waste incineration (CISWI) regulations (see 40 CFR 60.2875)).

## X. Cost and Benefits of the Final Rule

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. This final rule alone does not directly invoke any costs [169] or benefits. This rule is published as part of a four-rule package that includes the Boiler MACT and CISWI rules.[170] Costs to the regulated community and corresponding benefits to human health and the environment are captured under those rules. As such, the Agency has not prepared a separate economic assessment in support of this final rule.

The costs and benefits indirectly associated with this action are the corresponding impacts assessed in the regulatory impact analyses prepared in support of the Boiler MACT and CISWI rules. These independent regulatory impact analyses measure, among other factors, the estimated net change in social welfare associated with these actions. In the development of these analyses, EPA worked to ensure that the methodologies and data applied in these assessments captured appropriate RCRA related costs (*e.g.,* secondary material diversions). These assessments were designed to adhere to EPA and Office of Management and Budget guidelines and procedures. These documents are available in the docket established for this action.

## XI. Statutory and Executive Order Reviews

### *A. Executive Orders 12866 and 13563: Improving Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), and EO 13563 (76 FR 3821, January 21, 2011), this action is a "significant regulatory action." Pursuant to the terms of the Orders, the Agency, in conjunction with the Office of Management and Budget (OMB), has determined that this rule is a significant regulatory action because it contains novel policy issues, as defined under part 3(f)(4) of EO 12866. Accordingly, EPA submitted this action to OMB for review. Any changes made in response to OMB recommendations have been documented in the docket for this action.

### *B. Paperwork Reduction Act*

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

This rule establishes a voluntary non-waste determination petition process for non-hazardous secondary materials identified as solid wastes. Facilities claiming this solid waste exclusion are required to seek approval from the Agency through the submission of a petition prior to operating under this exclusion. Sufficient information about the non-hazardous secondary material and the market demand for this material will be necessary to demonstrate that the non-hazardous secondary material in fact has not been discarded and is a legitimate non-waste fuel or ingredient in the combustion process. Specifically, the petition will need to contain information to assess the following criteria: (1) Whether market participants handle the non-hazardous secondary material as a fuel rather than a waste; (2) whether the chemical and physical identities of the non-hazardous secondary material is comparable to a commercial fuel; (3) whether the capacity of the market would use the non-hazardous secondary material in a reasonable time frame; (4) whether the constituents in the non-hazardous secondary material are not discarded to the air, water or land from the point of generation to the point just prior to combustion of the non-hazardous secondary material at levels comparable to what would otherwise be released from traditional fuels; and (5) other relevant factors.

The facility-level burden associated with this voluntary petition option is estimated to have an average total burden of each non-waste determination petition of approximately 149 hours per facility, with a total cost per facility of approximately $10,100. The total number of facilities likely to take advantage of this option is undetermined, but we would expect that only a limited number of facilities may submit such a petition. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9. EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

### *C. Regulatory Flexibility Act*

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

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

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. No small entities are directly regulated by this final rule (*see* discussion above under costs and benefits). Any potential impacts to small entities in these or any other potentially affected sectors are addressed in the regulatory flexibility analyses prepared in support of the CAA rules that are linked to this action.[171]

Although this final rule will not have a significant economic impact on a

[169] Excluding minor administrative burden/cost (*e.g.,* rule familiarization) and costs related to submitting a voluntary petition.

[170] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters; and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units.

[171] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters; and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units.

substantial number of small entities, EPA, nonetheless, has tried to reduce the impact of this rule on small entities through the careful and targeted identification of which non-hazardous secondary materials are solid wastes. In addition, we have established a voluntary petition process that allows for material-specific non-waste determinations.

*D. Unfunded Mandates Reform Act*

This final 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. Because this action is linked to the CAA rules, this rule alone will not result in significant economic impacts on States, local and tribal governments, in the aggregate, or the private sector in any one year. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As described above, this action alone does not result in unique effects, or significant economic impacts.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule, independent of the CAA rules, will not result in substantial direct effects on the states. Furthermore, this rule will not preempt state laws related to the affected non-hazardous secondary materials. States will remain free to manage these non-hazardous secondary materials, as appropriate under their existing regulatory programs, including their solid waste programs. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed action from State and local officials.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. The rule may have minor indirect tribal implications to the extent that entities generating or burning solid wastes on tribal lands could be affected in response to the corresponding CAA rules.[172] EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in support documents prepared for the CAA section 129 CISWI and section 112 Boiler MACT rules.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action, independent of the CAA rules,[173] is not expected to directly affect energy use or use patterns. The purpose of this rule is to determine which non-hazardous secondary materials are solid waste when combusted. On its own, this rule will not lead to direct changes in the ability of facilities to use non-hazardous secondary materials as a source of energy. However, the Agency acknowledges that interactions between this rule and the section 112 and section 129 CAA emission standards rules being promulgated today may affect the use of non-hazardous secondary materials as a source of energy. We refer persons to the dockets for those rules for information on these energy impacts.

*I. National Technology Transfer Advancement Act*

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

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

[172] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters; and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units.

[173] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters; and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. The four-rule package that consists of this rule plus the three CAA rules [174] will generally result in an improved level of environmental protection. No disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population is expected.

Because the four rules are fully interdependent, isolating the environmental justice impacts of each of the four rules individually may result in a distorted assessment. For example, the emissions standards established in the three air rules depend on which non-hazardous secondary materials are considered solid wastes. As a result, any changes in the way that combustion units manage non hazardous secondary materials (*i.e.* switching to an alternative fuel) will depend upon the costs of implementing the various emissions standards. Furthermore, the demographic characteristics of areas experiencing changes in environmental effects will determine whether the rules result in adverse and disproportionate impacts to low-income and minority populations.

We have developed a broad environmental justice assessment, looking at the four rules together, that accounts for the combined impacts on minority and low income communities. Any environmental justice impacts that may result from these four interdependent rules are likely to include one or more of the following: (1) Changes in emissions from regulated combustion units, (2) changes in emissions from the potential diversion of non hazardous secondary materials away from combustion units to alternative recycling or landfills, and, (3) other impacts related to material diversion (*e.g.,* noise, aesthetics, water pollution, etc.). Based on our assessment of the emissions changes and other environmental impacts of the rules, and the demographics of populations near affected combustion units and waste management facilities, our main conclusions with respect to the environmental justice impacts of the four rules indicate the following:

1. Emissions changes from affected combustion units are unlikely to lead to adverse and disproportionate impacts on low-income and minority populations. Following implementation of the CISWI, Boiler MACT, and Area Source rules, emissions from affected facilities are likely to decline. As a result, populations near these facilities, overall, are likely to experience positive impacts (*e.g.,* reduced incidence of adverse health effects). The demographic data for the Census blocks near the Boiler MACT and CISWI facilities [175] suggest that the percentages of low-income and minority populations are generally higher than the national average in these areas.

2. Low-income and minority populations located near non combustion waste management facilities (*e.g.,* recyclers, landfills) are higher, proportionally, than the national average. Our analysis of the demographic characteristics of populations living within three miles of these facilities suggests that they are located in areas with high low-income and minority populations. Therefore, to the extent that non hazardous secondary materials diverted to alternative recycling or landfills may lead to adverse environmental impacts, low-income and minority populations could be adversely affected. However, we believe that any such increases would be negligible relative to the reductions achieved due to the Boiler MACT and CISWI controls. Furthermore, considering the low quantity of materials potentially diverted,[176] the extent of any negative impacts is expected to be minimal, and will likely vary significantly by material and facility type.

A comprehensive discussion of these findings is presented in the document: "Summary of Environmental Justice Impacts for the Non-Hazardous Secondary Material (NHSM) Rule, the 2010 Commercial and Industrial Solid Waste Incinerator (CISWI) Standards, the 2010 Major Source Boiler NESHAP, and the 2010 Area Source Boiler NESHAP." This document is available in the Docket established for today's action.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on May 20, 2011.

**List of Subjects in 40 CFR Part 241**

Environmental protection, Air pollution control, Waste treatment and disposal.

Dated: February 21, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations, is amended by adding part 241 to read as follows:

## PART 241—SOLID WASTES USED AS FUELS OR INGREDIENTS IN COMBUSTION UNITS

### Subpart A—General

Sec.
241.1 Purpose.
241.2 Definitions.

### Subpart B—Identification of Non-Hazardous Secondary Materials That Are Solid Wastes When Used as Fuels or Ingredients In Combustion Units

Sec.
241.3 Standards and procedures for identification of non-hazardous secondary materials that are solid wastes when used as fuels or ingredients in combustion units.

**Authority:** 42 U.S.C. 6903, 6912, 7429.

## Subpart A—General

### § 241.1 Purpose.

This part identifies the requirements and procedures for the identification of

[174] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters; and, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units

[175] The CISWI facility list contains combustors projected to combust waste after the rules are finalized (some were not regulated as CISWIs prior to these rules). The demographic assessment does not include area source facilities.

[176] Review of Costs, Benefits, Economic Impacts, Environmental Justice, and Other Impacts for the Following Interrelated Proposed Rules: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; RIN 2060–AO12, National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; RIN 2060–AM44, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters; RIN 2060–AG69, Identification of Non-hazardous Secondary Materials That Are Solid Waste RIN 2050–AG44. April 29, 2010. (*See* Exhibit 14).

solid wastes used as fuels or ingredients in combustion units under section 1004 of the Resource Conservation and Recovery Act and section 129 of the Clean Air Act.

**§ 241.2 Definitions.**

For the purposes of this subpart:

*Clean cellulosic biomass* means those residuals that are akin to traditional cellulosic biomass such as forest-derived biomass (*e.g.,* green wood, forest thinnings, clean and unadulterated bark, sawdust, trim, and tree harvesting residuals from logging and sawmill materials), corn stover and other biomass crops used specifically for energy production (*e.g.,* energy cane, other fast growing grasses), bagasse and other crop residues (*e.g.,* peanut shells), wood collected from forest fire clearance activities, trees and clean wood found in disaster debris, clean biomass from land clearing operations, and clean construction and demolition wood. These fuels are not secondary materials or solid wastes unless discarded. Clean biomass is biomass that does not contain contaminants at concentrations not normally associated with virgin biomass materials.

*Contaminants* means any constituent in non-hazardous secondary materials that will result in emissions of the air pollutants identified in Clean Air Act section 112(b) or the nine pollutants listed under Clean Air Act section 129(a)(4)) when such non-hazardous secondary materials are burned as a fuel or used as an ingredient, including those constituents that could generate products of incomplete combustion.

*Contained* means the non-hazardous secondary material is stored in a manner that adequately prevents releases or other hazards to human health and the environment considering the nature and toxicity of the non-hazardous secondary material.

*Control* means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in this section shall not be deemed to "control" such facilities.

*Established tire collection program* means a comprehensive collection system that ensures scrap tires are not discarded and are handled as valuable commodities in accordance with section 241.3(b)(2)(i) from the point of removal from the vehicle through arrival at the combustion facility.

*Generating facility* means all contiguous property owned, leased, or otherwise controlled by the non-hazardous secondary material generator.

*Ingredient* means a non-hazardous secondary material that is a component in a compound, process or product.

*Non-hazardous secondary material* means a secondary material that, when discarded, would not be identified as a hazardous waste under Part 261 of this chapter.

*Person* is defined as an individual, trust, firm, joint stock company, Federal agency, corporation (including government corporation), partnership, association, State, municipality, commission, political subdivision of a state, or any interstate body.

*Processing* means any operations that transform discarded non-hazardous secondary material into a non-waste fuel or non-waste ingredient product. Processing includes, but is not limited to, operations necessary to: Remove or destroy contaminants; significantly improve the fuel characteristics of the material, *e.g.,* sizing or drying the material in combination with other operations; chemically improve the as-fired energy content; or improve the ingredient characteristics. Minimal operations that result only in modifying the size of the material by shredding do not constitute processing for purposes of this definition.

*Resinated wood* means wood products (containing resin adhesives) derived from primary and secondary wood products manufacturing and comprised of such items as board trim, sander dust, and panel trim.

*Secondary material* means any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap.

*Solid waste* means the term solid waste as defined in 40 CFR 258.2.

*Traditional fuels* means materials that are produced as fuels and are unused products that have not been discarded and therefore, are not solid wastes, including: (1) Fuels that have been historically managed as valuable fuel products rather than being managed as waste materials, including fossil fuels (*e.g.,* coal, oil and natural gas), their derivatives (*e.g.,* petroleum coke, bituminous coke, coal tar oil, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, recovered gaseous butane, and coke oven gas) and cellulosic biomass (virgin wood); and (2) alternative fuels developed from virgin materials that can now be used as fuel products, including used oil which meets the specifications outlined in 40 CFR 279.11, currently mined coal refuse that previously had not been usable as coal, and clean cellulosic biomass. These fuels are not secondary materials or solid wastes unless discarded.

*Within control of the generator* means that the non-hazardous secondary material is generated and burned in combustion units at the generating facility; or that such material is generated and burned in combustion units at different facilities, provided the facility combusting the non-hazardous secondary material is controlled by the generator; or both the generating facility and the facility combusting the non-hazardous secondary material are under the control of the same person as defined in this section.

## Subpart B—Identification of Non-Hazardous Secondary Materials That Are Solid Wastes When Used as Fuels or Ingredients in Combustion Units

**§ 241.3 Standards and procedures for identification of non-hazardous secondary materials that are solid wastes when used as fuels or ingredients in combustion units.**

(a) Except as provided in paragraph (b) of this section, non-hazardous secondary materials that are combusted are solid wastes, unless a petition is submitted to, and a determination granted by, the Regional Administrator pursuant to paragraph (c) of this section. The criteria to be addressed in the petition, as well as the process for making the non-waste determination, are specified in paragraph (c) of this section.

(b) The following non-hazardous secondary materials are not solid wastes when combusted:

(1) Non-hazardous secondary materials used as a fuel in a combustion unit that remain within the control of the generator and that meet the legitimacy criteria specified in paragraph (d)(1) of this section.

(2) The following non-hazardous secondary materials that have not been discarded and meet the legitimacy criteria specified in paragraph (d)(1) of this section when used in a combustion unit (by the generator or outside the control of the generator):

(i) Scrap tires used in a combustion unit that are removed from vehicles and managed under the oversight of established tire collection programs.

(ii) Resinated wood used in a combustion unit.

(3) Non-hazardous secondary materials used as an ingredient in a combustion unit that meet the legitimacy criteria specified in paragraph (d)(2) of this section.

(4) Fuel or ingredient products that are used in a combustion unit, and are produced from the processing of

discarded non-hazardous secondary materials and that meet the legitimacy criteria specified in paragraph (d)(1) of this section, with respect to fuels, and paragraph (d)(2) of this section, with respect to ingredients. The legitimacy criteria apply after the non-hazardous secondary material is processed to produce a fuel or ingredient product. Until the discarded non-hazardous secondary material is processed to produce a non-waste fuel or ingredient, the discarded non-hazardous secondary material is considered a solid waste and would be subject to all appropriate federal, state, and local requirements.

(c) The Regional Administrator may grant a non-waste determination that a non-hazardous secondary material that is used as a fuel, which is not managed within the control of the generator, is not discarded and is not a solid waste when combusted. The criteria and process for making such non-waste determinations includes the following:

(1) Submittal of an application to the Regional Administrator for the EPA Region where the facility combusting the non-hazardous secondary material is located for a determination that the non-hazardous secondary material, even though it has been transferred to a third party, has not been discarded and is indistinguishable in all relevant aspects from a product fuel. The determination will be based on whether the non-hazardous secondary material that has been discarded, is a legitimate fuel as specified in paragraph (d)(1) of this section and on the following criteria:

(i) Whether market participants treat the non-hazardous secondary material as a product rather than as a solid waste;

(ii) Whether the chemical and physical identity of the non-hazardous secondary material is comparable to commercial fuels;

(iii) Whether the non-hazardous secondary material will be used in a reasonable time frame given the state of the market;

(iv) Whether the constituents in the non-hazardous secondary material are released to the air, water or land from the point of generation to the point just prior to combustion of the secondary material at levels comparable to what would otherwise be released from traditional fuels; and

(v) Other relevant factors.

(2) The Regional Administrator will evaluate the application pursuant to the following procedures:

(i) The applicant must submit an application for the non-waste determination addressing the legitimacy criteria in paragraph (d)(1) of this section and the relevant criteria in paragraphs (c)(1)(i) through (v) of this section. In addition, the applicant must also show that the non-hazardous secondary material has not been discarded in the first instance.

(ii) The Regional Administrator will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be published in a newspaper advertisement or radio broadcast in the locality where the facility combusting the non-hazardous secondary material is located, and be made available on EPA's Web site.

(iii) The Regional Administrator will accept public comments on the tentative decision for at least 30 days, and may also hold a public hearing upon request or at his discretion. The Regional Administrator will issue a final decision after receipt of comments and after the hearing (if any).

(iv) If a change occurs that affects how a non-hazardous secondary material meets the relevant criteria contained in this paragraph after a formal non-waste determination has been granted, the applicant must re-apply to the Regional Administrator for a formal determination that the non-hazardous secondary material continues to meet the relevant criteria and, thus is not a solid waste.

(d) Legitimacy criteria for non-hazardous secondary materials.

(1) Legitimacy criteria for non-hazardous secondary materials used as a fuel in combustion units include the following:

(i) The non-hazardous secondary material must be managed as a valuable commodity based on the following factors:

(A) The storage of the non-hazardous secondary material prior to use must not exceed reasonable time frames;

(B) Where there is an analogous fuel, the non-hazardous secondary material must be managed in a manner consistent with the analogous fuel or otherwise be adequately contained to prevent releases to the environment;

(C) If there is no analogous fuel, the non-hazardous secondary material must be adequately contained so as to prevent releases to the environment;

(ii) The non-hazardous secondary material must have a meaningful heating value and be used as a fuel in a combustion unit that recovers energy.

(iii) The non-hazardous secondary material must contain contaminants at levels comparable in concentration to or lower than those in traditional fuels which the combustion unit is designed to burn. Such comparison is to be based on a direct comparison of the contaminant levels in the non-hazardous secondary material to the traditional fuel itself.

(2) Legitimacy criteria for non-hazardous secondary materials used as an ingredient in combustion units include the following:

(i) The non-hazardous secondary material must be managed as a valuable commodity based on the following factors:

(A) The storage of the non-hazardous secondary material prior to use must not exceed reasonable time frames;

(B) Where there is an analogous ingredient, the non-hazardous secondary material must be managed in a manner consistent with the analogous ingredient or otherwise be adequately contained to prevent releases to the environment;

(C) If there is no analogous ingredient, the non-hazardous secondary material must be adequately contained to prevent releases to the environment;

(ii) The non-hazardous secondary material must provide a useful contribution to the production or manufacturing process. The non-hazardous secondary material provides a useful contribution if it contributes a valuable ingredient to the product or intermediate or is an effective substitute for a commercial product.

(iii) The non-hazardous secondary material must be used to produce a valuable product or intermediate. The product or intermediate is valuable if:

(A) The non-hazardous secondary material is sold to a third party, or

(B) The non-hazardous secondary material is used as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(iv) The non-hazardous secondary material must result in products that contain contaminants at levels that are comparable in concentration to or lower than those found in traditional products that are manufactured without the non-hazardous secondary material.

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Part IV

## Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

**[EPA–HQ–OAR–2006–0790; FRL–9273–5]**

**RIN 2060–AM44**

## National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is promulgating national emission standards for control of hazardous air pollutants from two area source categories: Industrial boilers and commercial and institutional boilers. The final emission standards for control of mercury and polycyclic organic matter emissions from coal-fired area source boilers are based on the maximum achievable control technology. The final emission standards for control of hazardous air pollutants emissions from biomass-fired and oil-fired area source boilers are based on EPA's determination as to what constitutes the generally available control technology or management practices.

**DATES:** *Effective Date:* This final rule is effective on May 20, 2011. The incorporation by reference of certain publications listed in this final rule were approved by the Director of the Federal Register as of May 20, 2011.

**ADDRESSES:** EPA established a docket under Docket ID No. EPA–HQ–OAR–2006–0790 for this action. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., 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 through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Eddinger, Energy Strategies Group, Sector Policies and Programs Division, (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541–5426; Fax number (919) 541–5450; e-mail address: *eddinger.jim@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

Btu British thermal unit
CAA Clean Air Act
CBI Confidential Business Information
CEMS Continuous Emission Monitoring System
CFR Code of Federal Regulations
CO Carbon monoxide
ERT Electronic Reporting Tool
FR **Federal Register**
GACT Generally Available Control Technology
HAP Hazardous Air Pollutant
HCl Hydrogen chloride
ICR Information Collection Request
kWh Kilowatt hour
MACT Maximum Achievable Control Technology
MMBtu/h Million Btu per hour
NAICS North American Industry Classification System
NESHAP National Emission Standards for Hazardous Air Pollutants
$NO_X$ Nitrogen oxides
NSPS New Source Performance Standards
PM Particulate matter
$PM_{2.5}$ Fine particulate matter
POM Polycyclic organic matter
ppm Parts per million
RCRA Resource Conservation and Recovery Act
TBtu Trillion British thermal units
tpy Tons per year
$SO_2$ Sulfur dioxide
UPL Upper Prediction limit
VOC Volatile organic compound

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

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## I. General Information

*A. Does this action apply to me?*

The regulated categories and entities potentially affected by the final standards include:

| Category | NAICS code [1] | Examples of regulated entities |
|---|---|---|
| Any area source facility using a boiler as defined in this proposed rule | 321 | Wood product manufacturing. |
| | 11 | Agriculture, greenhouses. |
| | 311 | Food manufacturing. |
| | 327 | Nonmetallic mineral product manufacturing. |
| | 424 | Wholesale trade, nondurable goods. |
| | 531 | Real estate. |
| | 611 | Educational services. |
| | 813 | Religious, civic, professional, and similar organizations. |
| | 92 | Public administration. |
| | 722 | Food services and drinking places. |
| | 62 | Health care and social assistance. |

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in 40 CFR 63.11193 of subpart JJJJJJ (National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers Area Sources). If you have any questions regarding the applicability of this action to a particular entity, consult either the delegated regulatory authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

*B. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of the final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

*C. Judicial Review*

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by May 20, 2011. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. CAA section 307(d)(7)(B) also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER GENERAL INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

## II. Background Information

*A. What is the statutory authority and regulatory approach for this final rule?*

Section 112(d) of the CAA requires us to establish NESHAP for both major and area sources of HAP that are listed for regulation under CAA section 112(c). A major source emits or has the potential to emit 10 tpy or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a HAP-emitting stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy (Strategy), (64 FR 38715, July 19, 1999). Specifically, in the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the "30 urban HAP." CAA section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. A primary goal of the Strategy is to achieve a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources "which provide for the use of generally

available control technologies ["GACT"] or management practices by such sources to reduce emissions of hazardous air pollutants." Additional information on GACT is found in the Senate report on the legislation (Senate Report Number 101–228, December 20, 1989), which describes GACT as:

* * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.

Consistent with the legislative history, we can consider costs and economic impacts in determining GACT, which is particularly important when developing regulations for source categories that may have many small businesses such as these.

Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. We also consider the standards applicable to major sources in the analogous source category to determine if the control technologies and management practices are transferable and generally available to area sources. In appropriate circumstances, we may also consider technologies and practices at area and major sources in similar categories to determine whether such technologies and practices could be considered generally available for the area source categories at issue. Finally, as noted above, in determining GACT for a particular area source category, we consider the costs and economic impacts of available control technologies and management practices on that category.

While GACT may be a basis for standards for most types of HAP emitted from area sources, CAA section 112(c)(6) requires that EPA list categories and subcategories of sources assuring that sources accounting for not less than 90 percent of the aggregate emissions of each of seven specified HAP are subject to standards under CAA sections 112(d)(2) or (d)(4), which require the application of the more stringent MACT. The seven HAP specified in CAA section 112(c)(6) are as follows: Alkylated lead compounds, POM, hexachlorobenzene, mercury, polychlorinated biphenyls (PCBs), 2,3,7,8-tetrachlorodibenzofurans, and 2,3,7,8-tetrachlorodibenzo-p-dioxin.

The CAA section 112(c)(6) list of source categories currently includes industrial coal combustion, industrial oil combustion, industrial wood combustion, commercial coal combustion, commercial oil combustion, and commercial wood combustion. (*See* 63 FR 17849, April 10, 1998.) We listed these source categories under CAA section 112(c)(6) based on the source categories' contribution of mercury and POM. In the documentation for the CAA section 112(c)(6) listing, the commercial fuel combustion categories included institutional fuel combustion. (*See* "1990 Emissions Inventory of Section 112(c)(6) Pollutants, Final Report," April 1998.) As discussed in the preamble to the proposed rule, we concluded we only needed to address mercury emissions from the coal-fueled portion of these categories in order to ensure that 90 percent of the aggregate emissions of mercury would be subject to standards under CAA sections 112(d)(2) or 112(d)(4). (*See* 75 FR 31898, June 4, 2010.) As discussed in this preamble, based on public comments received, we re-examined the emission inventory and the need to address POM emissions from the area source subcategories to meet the CAA section 112(c)(6) 90 percent requirement, and concluded we only need to address POM emissions from the coal-fueled portion of these categories under CAA section 112(d)(2) or 112(d)(4).

With this final rule and the major source boilers rule, we believe that we have subjected to regulation at least 90 percent of the CAA section 112(c)(6) 1990 emissions inventory for mercury and POM. Consequently, we are regulating coal-fired area source boilers under MACT because we need these sources to meet the 90 percent requirement for mercury and POM in CAA section 112(c)(6).

The "MACT" required by CAA sections 112(d)(2) or 112(d)(4) can be based on the emissions reductions achievable through application of measures, processes, methods, systems, or techniques including, but not limited to: (1) Reducing the volume of, or eliminating emissions of, such pollutants through process changes, substitutions of materials, or other modifications; (2) enclosing systems or processes to eliminate emissions; (3) collecting, capturing, or treating such pollutants when released from a process, stack, storage or fugitive emission point; (4) design, equipment, work practices, or operational standards as provided in CAA section 112(h); or (5) a combination of the above.

The MACT floor is the minimum control level allowed for NESHAP and is defined under CAA section 112(d)(3). For new sources, MACT based standards cannot be less stringent than the emission control achieved in practice by the best-controlled similar source, as determined by the Administrator. The MACT based standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best performing 12 percent of existing sources in the category or subcategory (for which the Administrator has emission information) for source categories and subcategories with 30 or more sources, or the best performing 5 sources for categories and subcategories with fewer than 30 sources (CAA section 112(d)(3)(A) and (B)).

Although emission standards are often structured in terms of numerical emissions limits, alternative approaches are sometimes necessary and authorized pursuant to CAA section 112. For example, in some cases, physically measuring emissions from a source may not be practicable due to technological and economic limitations. Section 112(h) of the CAA authorizes the Administrator to promulgate a design, equipment, work practice, or operational standard, or combination thereof, consistent with the provisions of CAA sections 112(d) or (f), in those cases where, in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard. Section 112(h)(2) of the CAA provides that the phrase "not feasible to prescribe or enforce an emission standard" includes "the situation in which the Administrator determines that * * * the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations."

As noted above in this section of the preamble, we listed industrial coal combustion, industrial oil combustion, industrial wood combustion, commercial coal combustion, commercial oil combustion, and commercial wood combustion under CAA section 112(c)(6) based on the source categories' contribution of mercury and POM. We listed these same categories under CAA section 112(c)(3) for their contribution of mercury, arsenic, beryllium, cadmium, lead, chromium, manganese, nickel, POM (as 7-PAH (polynuclear aromatic hydrocarbons)), ethylene dioxide, and PCBs.

We have developed final standards to reflect the application of MACT for mercury and POM from coal-fired area source boilers and have applied GACT for the urban HAP noted above for boilers firing other fuels and for urban

HAP (other than mercury and POM) from coal-fired area source boilers.

*B. What source categories are affected by the standards?*

The source categories affected by the standards are industrial boilers and commercial and institutional boilers. Both source categories were included in the area source list published on July 19, 1999 (64 FR 38721). The inclusion of these two source categories on the CAA section 112(c)(3) area source category list is based on 1990 emissions data, as EPA used 1990 as the baseline year for that listing. We describe above in Section II.A of this preamble the pollutants that formed the basis of the listings.

This rule applies to all existing and new industrial boilers, institutional boilers, and commercial boilers located at area sources. Boiler means an enclosed combustion device having the primary purpose of recovering thermal energy in the form of steam or hot water. The industrial boiler source category includes boilers used in manufacturing, processing, mining, refining, or any other industry. The commercial boiler source category includes boilers used in commercial establishments such as stores/malls, laundries, apartments, restaurants, and hotels/motels. The institutional boiler source category includes boilers used in medical centers (e.g., hospitals, clinics, nursing homes), educational and religious facilities (e.g., schools, universities, churches), and municipal buildings (e.g., courthouses, prisons).

*C. What is the relationship between this rule and other related national emission standards?*

This rule regulates industrial boilers and institutional/commercial boilers that are located at area sources of HAP. Today, in a parallel action, a NESHAP for industrial, commercial, and institutional boilers and process heaters located at major sources is being promulgated reflecting the application of MACT. The major source NESHAP regulates emissions of PM (as a surrogate for non-mercury metals), mercury, HCl (as a surrogate for acid gases), dioxins/furans, and CO (as a surrogate for non-dioxin organic HAP) from existing and new major source boilers.

This rule covers boilers located at area source facilities. In addition to the major source MACT for boilers being issued today, the Agency is also issuing emission standards today pursuant to CAA section 129 for commercial and industrial solid waste incineration units. In a parallel action, EPA is finalizing a solid waste definition rulemaking pursuant to subtitle D of RCRA. That action is relevant to this proceeding because if an industrial, commercial, or institutional boiler located at an area source combusts secondary materials that are "solid waste," as that term is defined by the Administrator under RCRA, those boilers would be subject to section 129 of the CAA, not section 112.

As background, in 2007, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) vacated the "CISWI Definitions Rule" (70 FR 55568, September 22, 2005), which amended the definitions of "commercial and industrial solid waste incinerator (CISWI)," "commercial or industrial waste," and "solid waste" in 40 CFR 60, subparts CCCC and DDDD, and which EPA issued pursuant to CAA section 129. The Court found that the definitions in that rule were inconsistent with the CAA. Specifically, the Court held that the term "solid waste incineration unit" in CAA section 129(g)(1) "unambiguously include[s] among the incineration units subject to its standards any facility that combusts any commercial or industrial solid waste material at all—subject to the four statutory exceptions identified [in CAA section 129(g)(1)]." *NRDC* v. *EPA,* 489 F.3d at 1257–58.

Based on the information available to the Agency, we determined that the boilers that are subject to this area source rule combust predominantly coal, oil, or biomass. We have further determined that the boilers subject to this rule may combust non-hazardous secondary materials that do not meet the definition of "solid waste" pursuant to the rulemaking of subtitle D of RCRA. A boiler located at an area source burning any secondary materials considered "solid waste" would be considered a solid waste incineration unit subject to regulation under CAA section 129. In the final area source boiler rulemaking, EPA is providing specific language to ensure clarity regarding the necessary steps that must be followed for combustion units that begin combusting non-hazardous solid waste materials and become subject to section 129 standards instead of section 112 standards or combustion units that discontinue combustion of non-hazardous solid waste materials and become subject to section 112 standards instead of section 129 standards.

Some of the affected sources subject to this rule may also be subject to the NSPS for industrial, commercial, and institutional boilers (40 CFR part 60, subparts Db and Dc). EPA codified these NSPS in 1986, and revised portions of them in 1999 and 2006. The two NSPS regulate emissions of PM, $SO_2$, and $NO_X$ from boilers constructed after June 19, 1984. Sources subject to the NSPS that are located at area source facilities are also subject to this rule because this rule regulates HAP. In developing this rule, we have streamlined the monitoring and recordkeeping requirements to avoid duplicating requirements in the NSPS.

*D. How did we gather information for this rule?*

We gathered information for this rule from states' boiler inspection lists, company Web sites, published literature, state permits, current state and federal regulations, and from an ICR conducted for the major source NESHAP. After proposal, we received additional emission test reports during the public comment period.

We developed an initial nationwide population of area source boilers based on boiler inspector data-bases from 13 states. The boiler inspector data-bases include steam boilers that are required to be inspected for safety or insurance purposes. We classified the area source boilers to NAICS codes based on the "name" of the facility at which the boiler was located. However, many of the boilers in the boiler inspector data-base could not be readily assigned to an NAICS code and, thus, we did not categorize them.

We reviewed state and other federal regulations that apply to the area sources in the source categories for information concerning existing HAP emission control approaches. For example, as noted above, the NSPS for small industrial, commercial, and institutional boilers in 40 CFR part 60, subpart Dc apply to boilers at some area sources. Similarly, permit requirements established by the Ohio, Illinois, Vermont, New Hampshire, and Maine air regulatory agencies apply to some area sources. We also reviewed standards for boilers at major sources that would be appropriate for and transferable to boilers at area sources. For example, we determined that management practices, such as, tune-ups and operator training applicable to major source boilers are also feasible for boilers at area sources.

*E. How are the area source boiler HAP addressed by this rule?*

As explained in Section II.A of this preamble, industrial coal combustion, industrial oil combustion, industrial wood combustion, commercial coal combustion, commercial oil combustion, and commercial wood combustion are listed under CAA section 112(c)(6) due to contributions of mercury and POM and these same categories are listed under CAA section 112(c)(3) for their contribution of mercury, arsenic, beryllium, cadmium, lead, chromium, manganese, nickel, POM, ethylene dioxide, and PCB.

With respect to the CAA section 112(c)(3) pollutants, we used surrogates because, as explained in this section of the preamble, it was not practical to establish individual standards for each specific HAP. We grouped the CAA section 112(c)(3) pollutants, which formed the basis for the listing of these two source categories, into three common groupings: Mercury, non-mercury metallic HAP (arsenic, beryllium, cadmium, chromium, lead, manganese, and nickel), and organic HAP (POM, ethylene dichloride, and PCB). In general, the pollutants within each group have similar characteristics and can be controlled with the same techniques.

For the non-mercury metallic HAP, we selected PM as a surrogate. The inherent variability and unpredictability of the non-mercury metal HAP compositions and amounts in fuel has a material effect on the composition and amount of non-mercury metal HAP in the emissions from the boiler. As a result, establishing individual numerical emissions limits for each non-mercury HAP metal species is difficult given the level of uncertainty about the individual non-mercury metal HAP compositions of the fuels that will be combusted. An emission characteristic common to all boilers is that the non-mercury metal HAP are a component of the PM contained in the fly ash emitted from the boiler. A sufficient correlation exists between PM and non-mercury metallic HAP to rely on PM as a surrogate for these HAP and for their control.[1] Therefore, the same control techniques that would be used to control the fly-ash PM will control non-mercury metallic HAP. Emissions limits established to achieve control of PM will also achieve control of non-mercury metallic HAP. Furthermore, establishing separate standards for each individual HAP would impose costly and significantly more complex compliance and monitoring requirements and achieve little, if any, HAP emissions reductions beyond what would be achieved using the surrogate pollutant approach.

For organic urban HAP, we selected CO as a surrogate for organic compounds, including POM, emitted from the various fuels burned in boilers. The presence of CO is an indicator of incomplete combustion. A high level of CO in emissions is a potential indication of elevated organic HAP emissions because organic HAP, like CO, are formed as a byproduct of combustion, and both would increase with an increase in the level of incomplete combustion. Monitoring equipment for CO is readily available, which is not the case for organic HAP. Also, it is significantly easier and less expensive to measure and monitor CO emissions than to measure and monitor emissions of each individual organic HAP. We considered other surrogates, such as total hydrocarbon (THC), but lacked data on emissions and permit limits for area source boilers. Therefore, using CO as a surrogate for organic urban HAP is a reasonable approach because minimizing CO emissions will result in minimizing organic urban HAP emissions.

Based on these considerations, we are promulgating GACT standards for PM (as a surrogate for the individual urban metal HAP) for coal, biomass, and oil-fired boilers and CO (as a surrogate pollutant for the individual urban organic HAP) for biomass-fired and oil-fired boilers. We are also establishing MACT standards for mercury and for POM (using CO as a surrogate pollutant) for coal-fired boilers. The MACT standard for POM from coal-fired boilers would also be GACT for urban organic HAP other than POM.

*F. What are the costs and benefits of this final rule?*

EPA estimated the costs and benefits associated with the final rule, and the results are shown in the following table. For more information on the costs and benefits for this rule, see the Regulatory Impact Analysis (RIA).

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER AREA SOURCE RULE IN 2014

[Millions of 2008$] [1]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| **Final MACT/GACT Approach: Selected** | | |
| Total Monetized Benefits [2] | $210 to $520 | $190 to $470 |
| Total Social Costs [3] | $490 | $490 |
| Net Benefits | −$280 to $30 | −$300 to −$20 |
| Non-monetized Benefits; | 1,100 tons of carbon monoxide<br>340 tons of HCl<br>8 tons of HF<br>90 pounds of mercury<br>320 tons of other metals<br>< 1 gram of dioxins/furans (TEQ)<br>Health effects from $SO_2$ exposure<br>Ecosystem effects<br>Visibility impairment | |
| **Proposed MACT Approach: Alternative** | | |
| Total Monetized Benefits [2] | $200 to $490 | $180 to $440 |
| Total Social Costs [3] | $850 | $850 |

[1] In *National Lime Ass'n* v. *EPA,* 233 F. 3d 625, 633 (DC Cir. 2000), the court upheld EPA's use of particulate matter as a surrogate for HAP metals.

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER AREA SOURCE RULE IN 2014—Continued

[Millions of 2008$] [1]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Net Benefits | −$650 to −$360 | −$670 to −$410 |
| Non-monetized Benefits | 1,100 tons of carbon monoxide<br>340 tons of HCl<br>8 tons of HF<br>90 pounds of mercury<br>320 tons of other metals<br><1 gram of dioxins/furans (TEQ)<br>Health effects from $SO_2$ exposure<br>Ecosystem effects<br>Visibility impairment | |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $SO_2$. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope *et al.* (2002) to Laden et al. (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at less than $1 million.

[3] The methodology used to estimate social costs for one year in the multimarket model using surplus changes results in the same social costs for both discount rates.

## III. Summary of This Final Rule

### *A. Do these standards apply to my source?*

This rule applies to you if you own or operate a boiler combusting solid fossil fuels, biomass, or liquid fuels located at an area source. The standards do not apply to boilers that are subject to another standard under 40 CFR part 63 or to a standard developed under CAA section 129.

This rule applies to you if you own or operate a boiler combusting natural gas, located at an area source, which switches to combusting solid fossil fuels, biomass, or liquid fuel after June 4, 2010.

### *B. What is the affected source?*

This final rule affects industrial boilers, institutional boilers, and commercial boilers. The affected source is the collection of all existing boilers within a subcategory located at an area source facility or each new boiler located at an area source facility.

### *C. When must I comply with these standards?*

The owner or operator of an existing source subject to a work practice or management practice standard of a tune-up is required to comply with this final rule no later than March 21, 2012. The owner or operator of an existing source subject to emission limits or an energy assessment requirement is required to comply with this final rule no later than March 21, 2014. The owner or operator of a new source is required to comply on May 20, 2011 or upon startup of the facility, whichever is later. Owners and operators subject to 40 part CFR 60, subpart CCCC or subpart DDDD who cease combusting solid waste must be in compliance with this subpart on the effective date that the unit ceased combusting solid waste, consistent with 40 CFR part 60, subpart CCCC or subpart DDDD.

### *D. What are the MACT and GACT standards?*

Emission standards are in the form of numerical emission limits for new and existing area source boilers. The MACT emission limits for mercury and CO (as a surrogate for POM) are presented, along with the GACT emission limits for PM (as a surrogate for urban metals), in Table 1 of this preamble. The units are pounds of PM or mercury per million British thermal units (lb/MMBtu) and ppm for CO.

TABLE 1—EMISSION LIMITS FOR AREA SOURCE BOILERS

| Subcategory | Heat input (MMBtu/h) | Pollutants | Emission limits |
|---|---|---|---|
| New coal-fired boiler | ≥30 | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | | b. Mercury | 0.0000048 lb per MMBtu of heat input. |
| | | c. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen. |
| | ≥10 and <30 | a. Particulate Matter | 0.42 lb per MMBtu of heat input. |
| | | b. Mercury | 0.0000048 lb per MMBtu of heat input. |
| | | c. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen. |
| New biomass-fired boiler | ≥30 | Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | ≥10 and <30 | Particulate Matter | 0.07 lb per MMBtu of heat input. |
| New oil-fired boiler | ≥30 | Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | ≥10 and <30 | Particulate Matter | 0.03 lb per MMBtu of heat input. |
| Existing coal-Fired boiler | ≥10 | a. Mercury | 0.0000048 lb per MMBtu of heat input. |

TABLE 1—EMISSION LIMITS FOR AREA SOURCE BOILERS—Continued

| Subcategory | Heat input (MMBtu/h) | Pollutants | Emission limits |
|---|---|---|---|
| | | b. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 7 percent oxygen. |

The emission limits for PM apply only to new boilers. The emission limits for mercury and CO apply only to boilers in the coal subcategory; the emission limits for existing area source boilers in the coal subcategory are applicable only to area source boilers that have a designed heat input capacity of 10 million MMBtu/h or greater.

If your boiler burns any solid fossil fuel and no more than 15 percent biomass on a total fuel annual heat input basis, the boiler is in the coal subcategory. If your boiler burns at least 15 percent biomass on a total fuel annual heat input basis, the unit is in the biomass subcategory. If your boiler burns any liquid fuel and is not in either the coal or the biomass subcategory, the unit is in the oil subcategory, except if the unit burns oil only during periods of gas curtailment.

As allowed under CAA section 112(h), a work practice standard is being promulgated for new and existing coal-fired area source boilers with a designed heat input capacity of less than 10 MMBtu/h. The work practice standard for new and existing coal-fired area source boilers requires the implementation of a tune-up program. We are also requiring all biomass-fired and oil-fired area source boilers to implement a tune-up program as a management practice.

An additional standard is being promulgated for existing area source facilities having an affected boiler with a designed heat input capacity of 10 MMBtu/h or greater that requires the performance of an energy assessment, by qualified personnel, on the boiler and its energy use systems to identify cost-effective energy conservation measures.

*E. What are the startup, shutdown, and malfunction (SSM) requirements?*

The United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in EPA's CAA section 112 regulations governing the emissions of HAP during periods of startup, shutdown, and malfunction (SSM). *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), cert. denied, 130 S. Ct. 1735 (U.S. 2010). Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the "General Provisions Rule" (40 CFR 63, subpart A), that EPA promulgated under CAA section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempted sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

Consistent with *Sierra Club* v. *EPA,* EPA has established standards in this rule that apply at all times. EPA has attempted to ensure that we have not incorporated into the regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of an SSM exemption.

In establishing the standards in this rule, EPA has taken into account startup and shutdown periods and, for the reasons explained below, has established different standards for those periods.

EPA has revised this final rule to require sources to meet a work practice standard, including following the manufacturer's recommended procedures for minimizing startup and shutdown periods, to demonstrate compliance with the emission limits for all subcategories of new and existing area source boilers (that would otherwise be subject to numeric emission limits) during periods of startup and shutdown. As discussed in Section V.G of this preamble, we considered whether performance testing, and therefore, enforcement of numeric emission limits, would be practicable during periods of startup and shutdown. With regards to performance testing, EPA determined that it is not technically feasible to complete stack testing—in particular, to repeat the multiple required test runs—during periods of startup and shutdown due to physical limitations and the short duration of startup and shutdown periods. Operating in startup and shutdown mode for sufficient time to conduct the required test runs could result in higher emissions than would otherwise occur. Based on these specific facts for the boilers and process heater source category, EPA has developed a separate standard for these periods, and we are finalizing work practice standards to meet this requirement. The work practice standard requires sources to minimize periods of startup and shutdown following the manufacturer's recommended procedures, if available. If manufacturer's recommended procedures are not available, sources must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *" (40 CFR 63.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. In *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1242 (DC Cir. 2004), the court upheld as reasonable standards that had factored in variability of emissions under all operating conditions. However, nothing in section 112(d) or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards. *See, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (DC Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.").

Further, it is reasonable to interpret CAA section 112(d) as not requiring EPA to account for malfunctions in setting emissions standards. For example, we note that CAA section 112 uses the concept of "best performing" sources in defining MACT, the level of

stringency that major source standards must meet. Applying the concept of "best performing" to a source that is malfunctioning presents significant difficulties. The goal of best performing sources is to operate in such a way as to avoid malfunctions of their units. Similarly, although standards for area sources are generally not required to be set based on "best performers," we believe that what is "generally available" should not be based on periods in which there is a "failure to operate."

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for area source boilers. As noted above, by definition, malfunctions are sudden and unexpected events and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event (*see* 40 CFR 63.2 (definition of malfunction), EPA must determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." (*See* 40 CFR 63.2 (definition of malfunction).)

Finally, EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. (*See, e.g.,* State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (September 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (February 15, 1983)). EPA is therefore adding to this final rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. (*See* 40 CFR 63.11226 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding).) We also have added other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 63.11226. (*See* 40 CFR 22.24.) The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *." The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with 40 CFR 63.11205(a), and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that "[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *" and that "[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *." In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with CAA section 113 of the CAA (*see* also 40 CFR 22.77).

*F. What are the initial compliance requirements?*

For new and existing area source boilers with applicable emission limits, you must conduct initial performance tests to determine compliance with the PM, mercury, and CO emission limits. The performance tests to demonstrate compliance with the mercury emission limit can be either a stack test, which also requires a fuel analysis, or only a fuel analysis.

As part of the initial compliance demonstration, you must monitor specified operating parameters during the initial performance tests that demonstrate compliance with the PM, mercury, and CO emission limits for area source boilers. The test average establishes your site-specific operating levels.

For owners or operators of existing and new coal-fired area source boilers having a heat input capacity of less than 10 MMBtu/h and all existing and new biomass-fired and oil-fired area source boilers, you must submit to the delegated authority or EPA, as appropriate, documentation that a tune-up was conducted.

For owners or operators of existing area source facilities having a boiler with a heat input capacity of 10 MMBtu/h or greater and subject to this rule, you must submit to the delegated authority or EPA, as appropriate, documentation that the energy assessment was performed and the cost-effective energy conservation measures identified.

*G. What are the continuous compliance requirements?*

If you demonstrate initial compliance with the emission limits by performance (stack) tests, then you must conduct stack tests every 3 years. Furthermore, to demonstrate continuous compliance with the PM, CO, and mercury emission limits, you must monitor and comply with the applicable site-specific operating limits.

For area source boilers that must comply with the PM and mercury emission limits, you must continuously monitor opacity and maintain the opacity at or below 10 percent (daily block average) or:

1. If the boiler is controlled with a fabric filter, the fabric filter may be continuously operated such that the alarm on the bag leak detection system does not sound more than 5 percent of the operating time during any 6-month period.

2. If the boiler is controlled with an electrostatic precipitator (ESP), you must maintain the minimum voltage and secondary amperage (or total power input) of the ESP at or above the minimum operating limits established during the performance test.

3. If the boiler is controlled with a wet scrubber, you must monitor pressure drop and liquid flow rate of the scrubber and maintain the daily block averages at or above the minimum operating limits established during the performance test.

4. For boilers with sorbent or carbon injection systems which must comply with an applicable mercury emission limit, you must maintain the daily block averages at or above the minimum sorbent flow rate, as calculated according to 40 CFR 63.11221(a)(5).

If you elected to demonstrate initial compliance with the mercury emission limit by fuel analysis, as determined according to 40 CFR 63.11211(b), you must conduct a monthly fuel analysis and maintain the annual average at or below the limit indicated in Table 1 of this preamble.

For boilers that demonstrate compliance with the PM and mercury emission limits by performance (stack) tests, you must maintain monthly fuel records that demonstrate that you burned no new fuel type or new mixture (monthly average) as set during the performance test. If you plan to burn a new fuel type or new mixture that is different from what was burned during the initial performance test, then you must conduct a new performance test to demonstrate continuous compliance with the PM emission limit and mercury emission limit.

For boilers that must comply with the CO emission limits, you must continually monitor oxygen and maintain an oxygen concentration level, on a 30-day rolling average basis, at no less than 90 percent of the average oxygen concentration measured during the most recent performance test.

Biomass and oil-fired boilers must meet the management practice standards defined in Table 2 to 40 CFR part 63, subpart JJJJJJ.

*H. What are the notification, recordkeeping and reporting requirements?*

All new and existing sources will be required to comply with some requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 6 to subpart JJJJJJ. The General Provisions include specific requirements for notifications, recordkeeping, and reporting. If performance tests are required under subpart JJJJJJ, then the notification and reporting requirements for performance tests in the General Provisions also apply.

Each owner or operator is required to submit a notification of compliance status report, as required by 40 CFR 63.9(h) of the General Provisions. Subpart JJJJJJ rule requires the owner or operator to include in the notification of compliance status report certifications of compliance with rule requirements.

If your unit is subject to an emission limit, then you must prepare, by March 1 of each year, an annual compliance certification report for the previous calendar year certifying the truth, accuracy and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart.

This rule requires records to demonstrate compliance with each emission limit, work practice standard, and management practice. These recordkeeping requirements are specified directly in the General Provisions to 40 CFR part 63.

Records for applicable management practices must be maintained. Specifically, the owner or operator must keep records of the dates and the results of each boiler tune-up.

Records are required for either continuously monitored parameter data for a control device, if a device is used to control the emissions, or continuous opacity monitoring system (COMS) data.

Each owner and operator is required to keep the following records:

(1) All reports and notifications submitted to comply with this final rule;

(2) Continuous monitoring data as required in this final rule;

(3) Each instance in which you did not meet each emission limit, work/management practice, and operating limit (*i.e.*, deviations from this final rule);

(4) Monthly fuel use by each boiler including a description of the type(s) of fuel(s) burned, amount of each fuel type burned, and units of measure;

(5) A copy of the results of all performance tests, energy assessments, opacity observations, performance evaluations, or other compliance demonstrations conducted to demonstrate initial or continuous compliance with this final rule; and

(6) A copy of your site-specific monitoring plan developed for this final rule, if applicable.

Records must be retained for at least 5 years. In addition, monitoring plans, operating and maintenance plans, and other plans must be updated as necessary and kept for as long as they are still current.

*I. Submission of Emissions Test Results to EPA*

Compliance test data are necessary for many purposes including compliance determinations, development of emission factors, and determining annual emission rates. EPA has found it burdensome and time consuming to collect emission test data because of varied locations for data storage and varied data storage methods.

One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for bulky paper copies.

In this action, we are taking a step to improve data accessibility for stack tests (and in the future continuous monitoring data). Boiler area sources are required to submit to WebFIRE (an EPA electronic data base) an electronic copy of stack test reports as well as process data. Data entry requires only access to the Internet and is expected to be completed by the stack testing company as part of the work that it is contracted to perform.

Please note that the requirement to submit source test data electronically to EPA does not require any additional performance testing. In addition, when a facility submits performance test data to WebFIRE, there are no additional requirements for data compilation; instead, we believe industry will greatly benefit from improved emissions factors, fewer information requests, and better regulation development as discussed below. Because the information that is being reported is already required in the existing test methods and is necessary to evaluate the conformance to the test methods, facilities are already collecting and compiling these data. The Electronic Reporting Tool (ERT) was developed with input from stack testing companies, who already collect and compile performance test data electronically. One major advantage of submitting source test data through ERT is that it provides a standardized method to compile and store all the documentation required by subpart JJJJJJ. Another important benefit of submitting these data to EPA at the time the source test is conducted is that these data should reduce the effort involved in data collection activities in the future for these source categories. This results in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests). Finally, another benefit of submitting these data to WebFIRE electronically is that these data will greatly improve the overall quality of the existing and new emissions factors by supplementing the pool of emissions test data upon which emissions factors are based and by ensuring that data are more representative of current industry operational procedures. A common complaint we hear from industry and regulators is that emissions factors are out-dated or not representative of a particular source category. Receiving recent performance test results would ensure that emissions factors are updated and more accurate. In summary, receiving these test data already collected for other purposes and using them in the emissions factors development program will save

industry, state/local/tribal agencies, and EPA time and money.

As mentioned earlier, the electronic data-base that will be used is EPA's WebFIRE, which is a Web site accessible through EPA's TTN (technology transfer network). The WebFIRE Web site was constructed to store emissions test data for use in developing emission factors. A description of the WebFIRE data-base can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*. The ERT will be able to transmit the electronic report through EPA's Central Data Exchange (CDX) network for storage in the WebFIRE data base. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html*.

The ERT can be used to document the conduct of stack tests for various pollutants including PM, mercury, dioxin/furan, and HCl. Presently, the ERT does not accept opacity data or CEMS data.

## IV. Summary of Significant Changes Following Proposal

### *A. Changes to Subcategories*

We have redefined the coal, biomass and oil subcategories for area source boilers to clarify the fuel-type inputs that would define each subcategory. The proposed rule defined the biomass subcategory to include any boiler that burns any amount of biomass, either alone or in combination with a liquid or gaseous fuel. This definition excluded boilers that burned biomass with coal; boilers burning greater than 10 percent coal on an annual fuel heat input basis were defined under the coal-fired subcategory. This final rule defines the biomass subcategory to include any boiler that burns at least 15 percent of biomass on an annual heat input basis.

Similarly, the proposed rule defined the oil subcategory to include any boiler that burns any liquid fuel either alone or in combination with gaseous fuels, and excluded boilers that burned solid fuels. We have revised this final rule to define the oil subcategory to include any boiler that burns any liquid fuel and is not in either the biomass or coal subcategory.

The coal subcategory in this final rule has been revised to include any boiler combusting any solid fossil fuels and no more than 15 percent biomass. This final rule defines solid fossil fuels to include, but not limited to, coal, petroleum coke, and tire derived fuel (TDF).

### *B. Change From MACT to GACT for Biomass and Oil Subcategories*

The proposed rule set MACT-based emission limits for CO (as a surrogate pollutant for the individual urban organic HAP) from new and existing biomass-fired and oil-fired boilers. For POM from area source boilers classified as biomass-fired or oil-fired, as well as with respect to other urban HAP besides POM, we have revised this final rule standards to reflect GACT for these two area source subcategories (*see* Section V.D of this preamble). We are implementing management practice standards, as allowed by CAA section 112(d)(5), for control of POM from new and existing area source boilers in the biomass and oil subcategories. The management practice standard requires the implementation of a tune-up program.

### *C. MACT Floor UPL Methodology/Emission Limits*

At proposal, we used a 99 percent UPL calculation to determine variability. In this final rule, we have determined that 99 percent UPL is appropriate for fuel based HAP and a 99.9 percent UPL is appropriate for combustion dependent HAP (i.e., CO). We have modified our assumptions when results of the skewness and kurtosis tests result in a tie between normal and log-normal calculations, or when there is not enough data to complete the skewness and kurtosis tests, to choose the log-normal results. We have also revised the UPL calculation to convert log-normally distributed data to an arithmetic mean instead of a geometric mean. Further, for fuel based HAP (*i.e.,* mercury), we have implemented an additional fuel variability factor in the emission limits.

### *D. Clarification of Energy Assessment Requirements*

The proposed rule required owners and operators of existing area source boilers with a heat input capacity of 10 MMBtu/h and greater to have an energy assessment performed by a qualified professional. The proposed rule defined an energy assessment as an "in-depth assessment of a facility to identify immediate and long-term opportunities to save energy, focusing on the steam and process heating systems which involves a thorough examination of potential savings from energy efficiency improvements, waste minimization and pollution prevention, and productivity improvement." The requirements for the energy assessment, defined in Table 3 of the proposed rule, included visually inspecting the boiler system, establishing operating characteristics and energy system specifications, identifying the boiler's major energy consuming systems, listing major energy conservation measures, and a comprehensive report detailing the ways to improve efficiency, the cost of specific improvements, and the benefits associated with such.

This final rule requires an energy assessment for all existing boilers with a heat input capacity of 10 MMBtu/h or greater, and clarifies the definition of energy assessment with respect to the requirements of Table 3 of this final rule. The revised definition provides a maximum duration for performing the energy assessment and defines the evaluation requirements for each boiler system and energy use system. These requirements are based on the total annual heat input of the affected boilers.

This final rule requires an energy assessment for facilities with affected boilers using less than 0.3 trillion Btu per year heat input to be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the energy output from the boilers must be evaluated to identify energy savings opportunities within the limit of performing a one-day energy assessment. An energy assessment for a facility with affected boilers using 0.3 to 1 TBtu/year must be three days in length maximum. From these boilers, the boiler system and any energy use system accounting for at least 33 percent of the energy output will be evaluated, within the limit of performing a three day energy assessment. For facilities with affected boilers using greater than 1 TBtu/year heat input, the energy assessment must comprise the boiler system and any energy use system accounting for at least 20 percent of the energy output to identify energy savings opportunities.

We have also added a definition for "energy use systems" to clarify the components, in addition to the boiler system, which must be considered during the energy assessment.

### *E. Revised Subcategory Limits*

The proposed rule set emission limits for PM (as a surrogate for the individual urban metal HAP) for all new area source boilers and CO (as a surrogate pollutant for the individual urban organic HAP) for all new area source boilers and for existing area source boilers with a heat input capacity of 10 MMBtu/h or greater. The proposed rule also set emission limits for mercury from new and existing coal-fired boilers.

In this final rule, the emission limits for mercury and CO have been revised for existing coal-fired boilers with a heat input capacity greater than 10 MMBtu/h. The MACT emission limits for the coal subcategory have been revised based on the revised MACT floor approach (see Section V of this preamble). Existing boilers in the biomass and oil subcategories are not required to meet emission limits for CO in this final rule; these units must meet the management practice standards of implementing a boiler tune-up program.

In this final rule, the PM emission limits for new area source boilers have been revised based on the size category. For new boilers in the coal, biomass, and oil subcategories with a heat input capacity less than 10 MMBtu/h, GACT is a management practice of a tune-up. For new boilers between 10 and 30 MMBtu/h heat input, the PM limit has been revised to reflect the performance of GACT, which is a multiclone. The emission limits for mercury and CO have been revised for new coal-fired boilers with a heat input capacity greater than 10 MMBtu/h. New boilers in the biomass and oil subcategories are not required to meet emission limits for CO; these units must meet the management practice standards of a tune-up.

Table 2 of this preamble summarizes the revised emission limits for each pollutant for each subcategory.

TABLE 2—REVISED EMISSION LIMITS FOR SUBPART JJJJJJ

| Subcategory | Heat input (MMBtu/hr) | Pollutant | Proposed emission limit | Final emission limit |
|---|---|---|---|---|
| New coal-fired boiler | ≥30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.03 lb per MMBtu of heat input |
| | | Mercury | 0.000003 lb per MMBtu of heat input. | 0.0000048 lb per MMBtu of heat input |
| | | Carbon Monoxide | 310 ppm by volume on a dry basis corrected to 7 percent oxygen | 400 ppm by volume on a dry basis corrected to 3 percent oxygen |
| | ≥10 and <30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.42 lb per MMBtu of heat input |
| | | Mercury | 0.000003 lb per MMBtu of heat input. | 0.0000048 lb per MMBtu of heat input |
| | | Carbon Monoxide | 310 ppm by volume on a dry basis corrected to 7 percent oxygen | 400 ppm by volume on a dry basis corrected to 3 percent oxygen |
| New biomass-fired boiler | ≥30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.03 lb per MMBtu of heat input |
| | | Carbon Monoxide | 100 ppm by volume on a dry basis corrected to 7 percent oxygen. | Management Practice Standards (see Table 2 to subpart JJJJJJ) |
| | ≥10 and <30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.07 lb per MMBtu of heat input |
| | | Carbon Monoxide | 100 ppm by volume on a dry basis corrected to 7 percent oxygen. | Management Practice Standards (see Table 2 to subpart JJJJJJ) |
| New oil-fired boiler | ≥30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.03 lb per MMBtu of heat input |
| | | Carbon Monoxide | 1 ppm by volume on a dry basis corrected to 3 percent oxygen. | Management Practice Standards (see Table 2 to subpart JJJJJJ) |
| | ≥10 and <30 | Particulate Matter | 0.03 lb per MMBtu of heat input | 0.03 lb per MMBtu of heat input |
| | | Carbon Monoxide | 1 ppm by volume on a dry basis corrected to 3 percent oxygen. | Management Practice Standards (see Table 2 to subpart JJJJJJ) |
| Existing coal-Fired boiler | ≥10 | Mercury | 0.000003 lb per MMBtu of heat input. | 0.0000048 lb per MMBtu of heat input |
| | | Carbon Monoxide | 310 ppm by volume on a dry basis corrected to 7 percent oxygen | 400 ppm by volume on a dry basis corrected to 3 percent oxygen |
| Existing biomass-fired boiler. | | Carbon Monoxide | 160 ppm by volume on a dry basis corrected to 7 percent oxygen | Management Practice Standards (see Table 2 to subpart JJJJJJ) |
| Existing coal-fired boiler | | Carbon Monoxide | 2 ppm by volume on a dry basis corrected to 3 percent oxygen | Management Practice Standards (see Table 2 to subpart JJJJJJ) |

*F. Demonstrating Compliance*

We have revised the compliance dates for existing affected sources according to the applicable provisions for each affected source (e.g., work practice standards, emission limits, management practice standards, and/or an energy assessment). Under the proposed rule, owners and operators of existing sources would have had to comply with this final rule within 3 years following March 21, 2011. This final rule requires that if you own or operate an existing source subject to a work practice or management practice standard of a tune-up, you must comply with this final rule no later than March 21, 2012. If you own or operate an existing source subject to an emission limit or an energy assessment requirement, you must comply with this final rule no later than March 21, 2014. Under the proposed rule, the owner or operator of a new source would have been required to comply on the date of publication of the final rule or upon startup of the facility, which ever was later. Because this rule is subject to the Congressional Review Act, the owner or operator of a new source is required to comply on May 20, 2011 or upon startup of the facility, whichever is later.

Additionally, we have clarified the compliance requirements for commercial and industrial solid waste incineration units subject to 40 CFR part 60, subpart CCCC or subpart DDDD that cease combusting solid waste and become subject to Subpart JJJJJJ. Owners and operators of commercial and industrial solid waste incineration units must be in compliance with this subpart on the effective date of the waste to fuel switch (at least 12 months from the date that the owner or operator ceased

combusting solid waste), if the effective date is after the applicable compliance dates discussed above.

We have also revised the proposed continuous compliance requirements to be consistent with changes to the emission limits in this final rule, and are no longer requiring CO CEMS for biomass, oil, and coal-fired units. For new and existing coal units with a heat input capacity greater than 10 MMBtu/h, we are requiring stack testing every 3 years to demonstrate compliance with the CO emission limits. Because boilers in the biomass and oil subcategories are only required to meet the management practice standards in Table 2 of 40 CFR part 63, subpart JJJJJJ, no testing for CO emissions is required for these units.

*G. Affirmative Defense*

We have added provisions to this final rule to include an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. Consistent with *Sierra Club* v. *EPA,* EPA has established standards in this rule that apply at all times. However, in response to an action to enforce the standards set forth in 40 CFR 63.11201, you may assert an affirmative defense for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. (*See* 40 CFR 63.11226 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding). The included provisions specify the elements that are necessary to establish an affirmative defense for periods of malfunction, including evidence and notification requirements that must be prepared by the source.

*H. Technical/Editorial Corrections*

In this final action, we are making a number of technical corrections and clarifications to subpart JJJJJJ. These changes improve the clarity and procedures for implementing the emission limitations to affected sources. We are also clarifying several definitions to help affected sources determine their applicability. We have modified some of the regulatory language that we proposed based on public comments.

We made several changes to the initial compliance demonstration requirements. We revised 40 CFR 63.11211(a) to clarify that sources using a second fuel only for start up, shutdown, and/or transient flame stability are still considered to be sources using a single fuel. We deleted 40 CFR 63.11210(b) to remove the requirement that boilers with a heat input capacity above 100 MMBtu/h are required to demonstrate compliance by conducting a performance evaluation of their CO CEMS.

We made a change to the monitoring requirements in 40 CFR 63.11225 (40 CFR 63.11224 in the proposed rule). We deleted paragraph (e) to remove the requirement that boilers having a heat input capacity of 100 MMBtu/h and subject to a CO limit install a CO CEMS.

In response to comments asking for clarification, we have added definitions to 40 CFR 63.11237 for "Annual heat input basis," "Energy use system," "Hot water heater," "Minimum scrubber pressure drop," "Minimum voltage or amperage," "Qualified energy assessor," and "Solid fossil fuel." We have also revised several definitions in that section based on public comments. For example, we revised the definition of "Boiler" to describe what is meant by the term "controlled flame combustion" as used in that definition.

Several of the definitions in 40 CFR 64.11237 were revised to clarify the types of equipment to which different standards apply. For example, the definition of "Waste heat boiler" was revised to remove the criteria that 50 percent of total rated heat input capacity had to be from supplemental burners. We also revised the definition of "Natural gas" to include gas derived from naturally occurring mixtures found in geological formations as long as the principal constituent is methane, consistent with the definition provided in 40 CFR part 60 subpart Db. A definition of propane was also incorporated into the definition of natural gas.

## V. Significant Area Source Public Comments and Rationale for Changes to Proposed Rule

This section contains a brief summary of major comments and responses. EPA received many comments on this subpart covering numerous topics. EPA's responses to all comments, including those below, can be found in the comment response document for Area Source Industrial, Commercial, and Institutional Boilers in the docket.

*A. Legal and Applicability Issues*

Section 112(c)(6) of the CAA

*Comment:* Some commenters stated that EPA misinterpreted the statute in using MACT instead of GACT for area sources. These commenters argued that the statute allows for setting a standard under CAA section 112(d)(2) that can be satisfied using the alternative GACT procedure specified in CAA section 112(d)(5) to meet the 112(c)(6) requirements.

*Response:* We disagree with the comment that the CAA gives EPA discretion to promulgate GACT standards pursuant to section 112(d)(5) for area source categories required to be regulated under section 112(c)(6). Section 112(c)(6) of the CAA explicitly requires that "sources accounting for not less than 90 per centum of the aggregate emissions of each [pollutant specified in this provision] are subject to standards under subsection 112(d)(2) or (d)(4) * * *." (Emphasis added). The plain language of section 112(c)(6) requires that the Agency set standards under section 112(d)(2) or (d)(4). There is no ambiguity in this language and thus the legislative history cited by the commenter is irrelevant. As such, the Agency is appropriately setting standards for the sources at issue pursuant to section 112(d)(2).

The commenter argues that section 112(d)(5) trumps the very specific language in section 112(c)(6). We disagree. Congress unambiguously required the Agency to set standards for these persistent, bioaccumulative HAP under section 112(d)(2) or (d)(4). Had Congress wanted us to permit EPA to issue GACT standards for the 112(c)(6) HAP, it would have said that EPA could issue standards under section 112(d), as it did in section 112(k)(3)(B) of the Act, noting that area sources shall be subject to standards issued pursuant to "subsection (d) of this section." Congress could not have been more precise in section 112(c)(6), and we reject the commenter's interpretation.

EPA has consistently maintained that standards under section 112(d)(2) or (d)(4) are required for the pollutants listed in section 112(c)(6). In this case, we are setting a section 112(d)(2) MACT standard for mercury and CO (as a surrogate for POM) for coal-fired area source boilers, which are the 112(c)(6) pollutants that form the basis for the listing of the source category at issue here.

*Comment:* One commenter argued that EPA did not provide justification for its decision that mercury and POM must be regulated pursuant to CAA section 112(c)(6) at area source boilers to satisfy the requirements that 90 percent of nationwide emissions of these pollutants must be reduced. The commenter further stated that the proposed rule and supporting documentation provide no rational basis or adequate factual justification for the need to regulate area source POM or

mercury emissions to satisfy CAA section 112(c)(6). Specifically, the commenter stated that neither the proposed rule nor the MACT floor memo provide data that support the proposed determination that 90.3 percent of the 1990 emissions inventory for mercury is already subject to regulation. In contrast, another commenter said that, once a category is listed under CAA section 112(c)(6), the only procedure available to EPA for refraining from promulgating a MACT-based standard for the category is to remove the category from the CAA section 112(c) list through the use of CAA section 112(c)(9), regardless of whether the category is needed to meet the 90 percent requirement in CAA section 112(c)(6).

*Response:* The statute does not limit EPA's discretion as to how it fulfills its obligations under CAA section 112(c)(6). To the extent that the commenters seek to challenge whether EPA has selected appropriate categories to meet its obligations under CAA section 112(c)(6) or whether EPA has met the requirement in CAA section 112(c)(6) to regulate categories emitting at least 90 percent of the specified pollutants (in this case, mercury and POM), such challenges should not be reviewed in the context of a review of an individual NESHAP. Rather, if review is appropriate, it should be in the context of an EPA finding that it has fulfilled its obligations under CAA section 112(c)(6), and an accounting by the agency of how it reached the 90 percent threshold for each pollutant. Nevertheless, the docket for this rulemaking contains a spreadsheet that demonstrates our belief that we have met the 90 percent requirement for POM and for mercury with this final rule.

While we are promulgating GACT-based provisions at this time for mercury and POM from biomass-fired and oil-fired area source boilers, note that we have not removed or "delisted" oil-fired and biomass-fired area source boilers by this action. We are not promulgating MACT-based regulations at this time because they are unnecessary to meet the requirements of CAA section 112(c)(6).

*Comment:* Comments received suggested EOM was not appropriate for representing POM emissions. The commenters noted a drawback to using EOM as a surrogate for POM is the limited amount of data available to quantify emissions and the few EOM inventories or emission factors in existence. Commenters also stated that EOM includes other extractible organics in addition to the PAHs. The commenters suggest that the reasonable assumption is that any observed health effects come from the PAH fraction and since EOM includes compounds other than PAH, it should not be used as a surrogate for POM.

*Response:* This issue primarily affects whether biomass-fired and oil-fired boilers are needed to meet the CAA section 112(c)(6) requirements. EPA has considered commenter input and revised the final rule based on our re-examination of our section 112(c)(6) baseline inventory for POM. As we noted in the proposed rule, we reexamine the inventory associated with the original listing as we learn more about the source category in the rule development process (75 FR 31904). Based on a re-examination of the emission inventory in light of comments, we have determined that we only need to address the coal-fired portion of the area source segments of these categories under CAA section 112(c)(6) in order to meet the 90 percent threshold requirement of that provision for both mercury and POM.

As discussed in the preamble to the June 2010 proposed rule (75 FR 31896), we have determined that we must regulate mercury and POM from coal-fired area source boilers in order to meet the requirements in CAA section 112(c)(6), and we are establishing MACT-based limits for mercury and POM (using CO as a surrogate) for this subcategory. We are implementing work practice standards, as allowed by CAA section 112(h), for control of mercury and POM from new and existing area source boilers in the coal subcategory with a designed heat input capacity less than 10 MMBtu/h.

In the CAA section 112(c)(6) source listing, we used three indicators (7–PAH, 16–PAH, and extractable organic matter (EOM)) to represent POM emissions and compiled three separate baseline inventories for POM, one for each indicators. In light of the comment described above regarding EOM, we re-examined our three section 112(c)(6) baseline inventories for POM. For the reason stated below, we have decided to use only the baseline inventory for 16–PAH in determining the 90 percent threshold under section 112(c)(6).

We agree with the commenters who have identified data gaps in our knowledge of what source categories are emitting EOM. While we have data on 16–PAH emissions for 94 categories, we only have available data on EOM emissions for 18 source categories. The lack of available data on EOM emission creates a distorted picture of the relative contributions of source categories for which there are available EOM data. The lack of source categories making up the total EOM inventory makes the relative contribution of the few categories that do have data unrealistically inflated.[2] We therefore cannot say with confidence that by using the baseline inventory for EOM we are capturing 90 percent of the baseline POM emissions, as required by section 112(c)(6). Similarly, we have data on 7–PAH for 32 categories, considerably fewer than the 94 categories for which we have 16–PAH data. Because the 16–PAH inventory allows for the most accurate representation of the universe of categories that emit POM, we have decided to use that baseline inventory for determining the 90 percent threshold for POM under section 112(c)(6). Based on the baseline inventory for 16–PAH, regulating POM emissions from area source biomass and oil boilers are not needed to meet the CAA section 112(c)(6) obligations. Thus, POM emissions from area source boilers in the biomass and oil subcategories can be regulated under GACT, instead of MACT.

With respect to mercury and POM from area source boilers classified as biomass-fired or oil-fired, as well as with respect to other urban HAP besides POM, we have revised the final rule standards to reflect GACT for these two area source subcategories (*see* Section IV.B of this preamble). We are implementing management practice standards, as allowed by CAA section 112(d)(5), for control of POM from new and existing area source boilers in the biomass and oil subcategories. The management practice standard for new and existing area source boilers requires the implementation of a tune-up program.

As stated previously in the preamble to the June 2010 proposed rule, we determined that the control technologies currently used by facilities in the source category to reduce non-mercury metallic HAP and PM (multiclone, fabric filters, and ESP) are generally available and cost effective for new area source boilers. Additionally, these controls are commonly required by state and other federal regulations that apply to the area source boilers in the source category. Therefore, we are establishing numeric emission limits representing GACT for all new area source boilers with a heat

[2] When justifying its use in the 1998 inventory, we said that EPA would undertake an effort to develop a robust inventory for EOM sources to feed into the CAA section 112(c)(6) inventory. Had more data been gathered, perhaps EOM would have proved to be a more useful indicator of POM. However, the anticipated inventory was not developed.

input capacity greater than 10 MMBtu/h (using PM as a surrogate).

Emission Standards for HAP Other Than Mercury

*Comment:* One commenter stated that CAA section 112(c)(6) provides that EPA must "list categories and subcategories of sources assuring that sources accounting for not less than 90 percent of each [enumerated] pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section." The commenter also stated that the DC Circuit has held repeatedly that when EPA sets standards for a category or subcategory of sources under section 112(d)(2), EPA has a statutory duty to set emission standards for each HAP that the sources in that category or subcategory emit. The commenter concluded that when EPA sets standards for area source boilers under section 112(d)(2), as section 112(c)(6) requires it to do, EPA must set section 112(d)(2) emission standards for all the HAP that area source boilers emit.

The commenter said that EPA appears to believe that because area source boilers are needed only to reach the section 112(c)(6) requirement of 90 percent for mercury and POM and not for the other pollutants enumerated in section 112(c)(6), EPA's only obligation under section 112(c)(6) is to set section 112(d)(2) standards for mercury and POM. The commenter said that section 112(c)(6) expressly requires EPA to issue section 112(d)(2) standards for the "sources" in the categories listed under section 112(c)(6), not some subset of the pollutants that those sources emit, and that section 112(d)(2) standards must include emission standards for each HAP that a source category emits. The commenter continued by stating that nothing in the CAA exempts EPA from this requirement. The commenter concluded that, had Congress wished to give EPA discretion to set standards for only some of the pollutants emitted by a category listed under section 112(c)(6), it would have done so expressly.

*Response:* EPA disagrees with the comment that, even though EPA lists a category under section 112(c)(6) due to the emissions of one or more HAP specified in that section, EPA must issue emission standards for all HAP (including HAP not listed in section 112(c)(6)) that sources in that category emit. The commenter cited in support the opinion by the United States Court of Appeals for the DC Circuit in *National Lime Ass'n* v. *EPA,* 233 F.3d 625, 633–634 (DC Cir. 2000)). The part of the *National Lime* opinion referenced in the comment dealt with EPA's failure to set emission standards for certain HAP emitted by major sources of cement manufacturing because the Agency found no sources using control technologies for those HAP. In rejecting EPA's argument, the court stated that EPA has "a statutory obligation to set emission standards for each listed HAP." *Id.* at 634. The Court noted the list of HAP in section 112(b) and stated that section 112(d)(1) requires that EPA "promulgate regulations establishing emission standards for each category or subcategory of *major sources* * * * of hazardous air pollutants listed for regulation * * *" *Id.* (Emphasis added). For the reasons stated below, we do not believe that today's final rule is controlled by or otherwise conflicts with the *National Lime* decision.

*National Lime* did not involve section 112(c)(6). That provision is ambiguous as to whether standards for listed source categories must address all HAP or only the section 112(c)(6) HAP for which the source category was listed. Section 112(c)(6) requires that "sources accounting for not less than 90 per centum of the aggregate emissions of each such [specific] pollutant are subject to standards under subsection (d)(2) or (d)(4)." This language can reasonably be read to mean standards for the section 112(c)(6) HAP or standards for all HAP emitted by the source. Under either reading, the source would be subject to a section 112(d)(2) or (d)(4) standard.

The commenter insists that once a section 112(d)(2) standard comes into play, all HAP must be controlled (per *National Lime*). But this result is not compelled by the pertinent provision, section 112(c)(6). That provision is obviously intended to ensure controls for specific persistent, bioaccumulative HAP, and this purpose is served by a reading which compels regulation under section 112(d)(2) only of the HAP for which a source category is listed under section 112(c)(6), rather than for all HAP.

The facts here support the reasonableness of EPA's approach. Area source boilers are included in source categories listed under section 112(c)(6) for regulation under section 112(d)(2) solely due to its mercury and POM emissions. There is special statutory sensitivity to regulation of area source categories in section 112. For example, an area source category may be listed for regulation under section 112 if EPA makes an adverse effects finding pursuant to Section 112(c)(3) or if EPA determines that the area source category is needed to meet its section 112(c)(3) obligations to regulate urban HAP or its section 112(c)(6) obligations to regulate certain persistent bioaccumulative HAP. Moreover, to the extent EPA lists an area source category pursuant to section 112(c)(3) (whether that finding is based on adverse effects to human health or the environment or a finding that the source is needed to meet the 90 percent requirement in section 112(c)(3)), the statute gives EPA discretion to set GACT standards for such sources (42 U.S.C. 7412(d)(5)).

EPA does not interpret section 112 (c)(6) to create a means of automatically compelling regulation of all HAP emitted by area sources unrelated to the core object of section 112(c)(6), which is control of the specific persistent, bioaccumulative HAP, and thereby bypassing these otherwise applicable preconditions to setting section 112(d) standards for area sources. Nor does *National Lime* address the issue, since the case dealt exclusively with major sources (233 F. 3d at 633). Consequently, EPA disagrees with the comment that it is compelled to promulgate section 112(d)(2) MACT standards for all HAP emitted by area source boilers.

Beyond-the-Floor Option

We are promulgating the proposed standard requiring the performance of an energy assessment for existing area source facilities having an affected boiler with a designed heat input capacity of 10 MMBtu/h or greater. This final rule requires the performance of an energy assessment, by qualified personnel, on the boiler and its energy use systems to identify cost-effective energy conservation measures. As discussed in the June 2010 proposed rule, an energy assessment provides valuable information on improving energy efficiency. Owners and operators are encouraged, but not required, to use the results of the energy assessment to increase the energy-efficiency and cost-efficiency of their boiler system.

In the proposed rule, the energy assessment requirement was a beyond-the-floor option for the MACT-based mercury and CO emission standards because additional emission reductions would be realized as the results of these energy assessments, if implemented. In this final rule, the energy assessment requirement is both a beyond-the-floor control for the MACT-based standards for the coal subcategory and a GACT for the biomass and oil subcategory because energy assessments are generally available and have already been performed at numerous facilities.

The principal arguments against an energy assessment requirement are: (1) EPA lacks authority to impose requirements on portions of the source that are not designated as part of the

affected source, such as non-emitting energy using systems at a facility; (2) EPA has not quantified the reductions associated with the energy assessment requirement, therefore it cannot be "beyond the floor;" and (3) the bare requirement to perform an audit without being required to implement its findings is not a standard under CAA section 112(d).

With respect to the first argument, we have carefully limited the requirement to perform an energy assessment to specific portions of the source that directly affect emissions from the affected boiler, as indicated by the revised definition of an energy assessment in section 63.11237 of subpart JJJJJJ. The emissions that are being controlled come from the affected source. For coal-fired units, the process changes resulting from a change in an energy using system will reduce the volume of emissions at the affected source. For biomass-fired and oil-fired area sources, better management practices at energy using systems will reduce the emissions of HAP from the affected source by reducing fuel consumption and the HAP released through combustion of fuel. In either case, the requirement controls the emissions of the affected source.

With respect to the second argument, the energy assessment will generate emission reductions through the reduction in fuel use beyond those required by the floor. While the precise quantity of emission reductions will vary from source to source and cannot be precisely estimated, the requirement is clearly directionally sound and thus consistent with the requirement to examine beyond the floor controls. By definition, any emission reduction would be cost effective or else it would not be implemented.

Finally, with respect to the third argument, the requirement to perform the energy audit is, of course, a requirement that can be enforced and thus a standard. As noted, while we do not know the precise reductions that will occur at individual sources, the record indicates that energy assessments reduce fuel consumption and that parties will implement recommendations from an auditor that they believe are prudent.[3] Therefore, the requirement to perform an energy assessment can both be enforced and will result in emission reductions.

Section 112(h) of the CAA

*Comment:* Commenters stated that setting work practice standards in lieu of emission standards for area source boilers with a heat input capacity less than 10 MMBtu/h is unlawful and arbitrary. Commenters cited EPA's determination with respect to the technical and economic limitations on the enforcement of emission standards for boilers with heat input capacity less than 10 MMBtu/h, and stated that these limitations do not satisfy CAA section 112(h) conditions for setting work practice standards in lieu of emission standards. Some commenters argued that the technical limitations of measuring PM using Method 5, as discussed in the preamble to the proposed June 2010 rule, do not apply to mercury and CO. Other commenters remarked that the absence of sampling ports and stacks at area source boilers does not provide a basis for a technical or economic limitation, stating that sources are able to work around this issue. Multiple commenters said that the lack of measuring ports (which can affect retrofitting new boiler installations into existing buildings), other design requirements for efficient exhaust from smaller boilers, and the inapplicability of approved test methods would make measurement technically and economically impractical for both existing and new sources. Commenters specifically cited CAA section 112(h)(1) and (2), which allows the agency to prescribe work practice standards only if it is "not feasible to prescribe or enforce an emission standard * * * due to technological or economic limitations."

*Response:* EPA disagrees with commenters. As discussed in the preamble to the June 2010 proposed rule, CAA section 112(h) authorizes the Administrator to promulgate "a design, equipment, work practice, or operational standard, or combination thereof," consistent with the provisions of CAA sections 112(d) or (f), in those cases where, in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard. CAA section 112(h)(2)(B) further defines the term "not feasible" to mean when "the application of measurement technology to a particular class of sources is not practicable due to technological and economic limitations." We have elected to implement work practice standards for coal-fired boilers with a heat input capacity of less than 10 MMBtu/h because we have determined that the standard reference methods for measuring emissions of mercury, CO (as a surrogate for POM), and PM (as a surrogate for urban non-mercury metals) are not applicable for sampling small diameter (less than 12 inches) stacks. Furthermore, through the comment process, we have learned that common, very small boilers (less than 5 MMBtu/h) typically exhaust through vents and not stacks, and that the installation of ports into small diameter vents for smaller boilers would likely interfere with the functionality of exhaust systems for new and existing boilers. Because many existing area source boilers with a capacity below 10 MMBtu/h generally have stacks with diameters less than 12 inches, and because many area source boilers do not currently have sampling ports or a platform for accessing the exhaust stack, we have determined that the testing and monitoring costs that area source boiler facilities would incur to demonstrate compliance with the proposed emission limits would present an excessive burden for smaller sources. Thus, we are establishing work practice standards to limit the emissions of mercury and CO (as a surrogate for POM) for existing and new coal-fired area source boilers having a heat input capacity of less than 10 MMBTU/h.

De minimis Levels

*Comment:* Several commenters stated that EPA should establish a *de minimis* heat input level (less than 1 MMBtu/h heat input capacity) below which area sources are not subject to regulation or only subject to work practice standards. These commenters referenced water heaters and small comfort heating units that are not used in industrial, commercial, or institutional processes but instead used to provide hot water for personal use or seasonal comfort heating. Other commenters noted that State rules that require work practice requirements for boilers all have a lower limit on applicability of typically 1 to 5 MMBtu/h; these commenters stated that EPA has provided no basis for applying work practice standards to boilers of this size.

*Response:* EPA must establish standards for each category or subcategory of major sources and area sources of HAP listed pursuant to CAA section 112(c). EPA may distinguish among classes, types, and size in establishing such standards but the standards established must be applicable to new and existing sources of HAP within the category. However, we agree with the commenters that the categories of boiler covered by this rule are industrial boilers, commercial

[3] Case studies and success stories highlighting energy savings achieved by companies that have participated in *Save Energy Now* energy assessments and used Industrial Technologies Program software tools to improve energy efficiency can be found at *http://www1.eere.energy.gov/industry/saveenergynow/case_studies.html* and at the Department of Energy's Energy Assessment Centers Database *http://iac.rutgers.edu/database.*

boilers, and institutional boilers. In the proposed rule, we did not list hot water heaters as exempted as we did in the proposed Boiler MACT for major sources. As stated in the preamble to the proposed Boiler MACT, hot water heaters meet the definition of a boiler but are more appropriately described as residential-type boilers, not industrial, commercial, or institutional boilers because their output is intended for personal use rather than for use in an industrial, commercial, or institutional process. The primary reason for exempting hot water heaters in the Boiler MACT was that hot water heaters are not part of the listed source category. Because hot water heaters generally use natural gas and gas-fired boilers were not part of the area source category, we did not include a similar exemption in the proposed rule. To be consistent with the Boiler MACT, we have included in this final rule a similar exemption and definition for hot water heaters.

*B. CO Limits*

*Comment:* Multiple commenters argued that EPA's determination of using CO as a surrogate for POM is inappropriate. Several of these commenters reiterated that there is no reliable correlation between CO and POM. Some commenters stated that CO is not an appropriate surrogate for POM or organic HAP at lower CO emission levels. For instance, one commenter stated that while there is a linear correlation between decreasing CO and decreasing HAP at higher levels, once CO values fall under 100 ppm, further reduction of CO does not provide any substantial correlating reduction of HAP. Other commenters stated that CO is an inadequate surrogate for POM because there is no POM invariably present in CO; likewise, commenters stated that because CO and POM have different mechanisms of formation and reduction, CO cannot be considered as a reliable surrogate.

Several commenters suggested total hydrocarbon (THC) as a better surrogate, stating that THC levels are often more stable and less reactive to load swings than CO. Commenters noted that THC has been used as a surrogate for organic HAP emissions in other regulatory efforts, including the hazardous waste incinerator MACT.

*Response:* EPA acknowledges commenters' concerns. Based on new data received during the public comment period, we have re-examined our analysis and revised the final standards for CO. As previously discussed, this final rule only establishes CO emission limits for coal-fired boilers pursuant to CAA section 112(c)(6). We are implementing management practice standards, as allowed by CAA section 112(d)(5), for control of CO from new and existing area source boilers in the biomass and oil subcategories. Additionally, for the coal subcategory, we have revised the final CO emission limits to ensure a more accurate correlation between POM and CO levels. EPA is aware of one European study [4] that finds the correlation between CO and POM (or organic HAP, in general) is weaker at lower CO concentrations (less than 100 ppmv) but we did not have the opportunity to examine the data relied on by the study and no data supporting this supposition were submitted as part of the public comments. We have revised the final standards (400 ppm) based on 99.9 percent UPL as discussed in Section IV.C of this preamble. EPA believes that CO is a reliable surrogate for POM at this emission level. EPA considered using THC as a surrogate for POM, however, we did not have available THC data for area sources.

*Comment:* Several commenters expressed concern with respect to the proposed CO limits. Some commenters stated that the proposed CO limits are unachievable for some units, including liquid-fired boilers. Commenters further stated that meeting the CO limits would be more burdensome for area sources than major sources. Specifically, many commenters argued that the CO limits are unfeasible from a measurement, operability, and cost standpoint, particularly when considered simultaneously with other limits ($NO_X$, VOC). Some commenters expressed concern that prioritizing CO reduction may promote boiler inefficiency and result in higher emissions of $NO_X$.

Other commenters suggested that the CO emission limits should be determined using long-term CEMS data to account for natural variability in CO emissions. Commenters also offered alternatives for control of POM. One commenter suggested that EPA consider cleaner fuels or end of stack technologies for control, such as fabric filters and scrubbers that capture POM and POM-precursors.

*Response:* As discussed above, this final rule establishes MACT-based emission limits for CO only for new and existing coal-fired boilers. In this final rule, area source boilers in the biomass and oil-fired subcategories are not required to meet CO emission limits; these boilers are instead required to meet the management practice standard which consists of a tune-up. The MACT-based CO emission limits are still required for coal-fired area source boilers in order to meet our obligation under CAA section 112(c)(6). Based on the available CO data and the revised UPL calculation methodology, the final CO emission limits for coal-fired area source boilers are higher than the proposed limits which should provide more assurance that the limit can be achieved at all times. EPA notes that the available dataset did not include sufficient long-term CEMS data for area sources to be used to set a limit. Therefore, we have established the CO standards based on the data provided using the revised UPL methodology to account for variability over the operating cycle of typical industrial, commercial, and institutional boilers. We also considered other appropriate control options for sources in each subcategory, including switching to clean fuels and end of stack technologies. We considered whether fuel switching could be technically achieved by boilers in the subcategory considering the existing design of boilers and the availability of various types of fuel. We determined that fuel switching was not an appropriate control technology based on the overall effect of fuel switching on HAP emissions and the technical and design considerations discussed previously in the preamble to the proposed June 2010 rule (75 FR 31896). This determination is discussed in the memorandum "Development of Fuel Switching Costs and Emission Reductions for Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Area Source" located in the docket. Additionally, EPA did not identify add-on control technologies available for control of CO in use at area source boilers.

C. MACT Floor Analysis

Pollutant-by-Pollutant Approach

*Comment:* Several commenters argued that the pollutant-by-pollutant approach used by EPA is not appropriate. Commenters rejected the pollutant-by-pollutant approach on the basis that both PM and CO emission limits are not achievable even for the best performing sources. These commenters argued that because the proposed area source MACT standards rely on a different set of best performing sources for each separate HAP standard, no single source is in the

[4] European Wood-Heating Technology Survey: An Overview of Combustion Principles and the Energy and Emissions Performance Characteristics of Commercially Available Systems in Austria, Germany, Denmark, Norway, and Sweden; Final Report; Prepared for the New York State Energy Research and Development Authority; NYSERDA Report 10–01; April 2010.

population of units for both the PM and CO emission limits, and therefore, the approach does not reflect the performance of the best performing boilers. Rather, commenters asserted that the proposed limits were unrealistic, unnecessarily stringent, and unachievable. Commenters further stated that the provisions of CAA sections 112(d)(1), (2), and (3) of the CAA require that standards must be based on actual sources, and cannot be the product of pollutant-by-pollutant "cherry-picking." Commenters stated that EPA does not have the authority to "distinguish" units and sources by individual pollutant. Other commenters stated that EPA must set limits for each HAP that the sources in the subcategory emit, and not solely mercury or POM. These commenters stated that to ignore the emitted HAP violates the CAA and the court order.

*Response:* EPA is mindful that MACT floors must reflect achieved performance. EPA is also mindful that that costs cannot be considered by EPA in ascertaining the level of the MACT floor. *See,* e.g., *Brick MACT,* 479 F. 3d at 880–81, 882–83; *NRDC* v. *EPA,* 489 F. 3d 1364, 1376 (DC Cir. 2007) ("Plywood MACT"); *see* also *Cement Kiln Recycling Coalition* v. *EPA,* 255 F. 3d 855, 861–62 (DC Cir. 2001) ("achievability" requirement of CAA section 112(d)(2) cannot override the requirement that floors be calculated on the basis of what best performers actually achieved).

EPA has carefully developed data for each standard, assessing both technological controls and HAP inputs in doing so. The MACT floor variability methodology is discussed in a later response.

Among all boilers at area sources, only new and existing coal-fired ones will need to meet MACT-based limits. Nevertheless, it is true that at least some coal-fired area source boilers will need to install controls to meet these standards, and that these controls have significant costs. This is part of the expected MACT process where, by definition, the averaged performance of the very best performers sets the minimum level of the standard. The Agency believes that it has followed the statute and applicable case law in developing its floor methodology. Although industry commenters maintain these sources cannot meet the standards, which are predicated on their own performance without adding controls, this contention lacks a basis in the record. For mercury, 6 of the 7 boilers for which EPA has emissions data are meeting the MACT floor standards for mercury. For CO, 13 of the 16 boilers in the MACT pool meet the promulgated standard. In those instances where commenters provided actual data on these plants' performance, EPA took the information into account in developing the final standards. Indeed, EPA adjusted all of the standards based on actual data presented. We have emissions data on a limited number of area source units. The available information does indicate that at least one unit meets both the final PM and CO emission limits.

Dataset for the MACT Floor Analysis

*Comment:* Commenters stated numerous objections to the dataset used for the MACT floor analysis. Some commenters stated that it is inappropriate to apply limits from data submitted as part of the major source industrial boiler MACT ICR to area sources. Commenters objected to EPA's assertion that boilers at area sources are similar in size and operation to major source boilers; one commenter noted that EPA did not use test data from area source facilities to set major source floors.

Other commenters stated that the emission limits are significantly flawed because they are based on inadequate data and not representative of the units in the source category. These commenters stated that the data collected is insufficient because it represents the performance of less than 1 percent of almost 183,000 existing area source boilers, particularly given that EPA based the analysis on the top 12 percent of units for which data were available. Commenters further stated that there was insufficient data available to establish appropriate boiler-type subcategories.

Some commenters expressed that EPA must include emissions data collected by state and local permitting authorities in establishing the MACT floor; these commenters stated that these data are more objective than the newer industry testing and are also necessary to fill in "gaps" in the existing data. Other commenters requested that certain data should be excluded from the MACT floor analysis. For instance, some commenters stated that non-detect data should be excluded or that the analysis should be adjusted to account for the capabilities of the test methods. These commenters stated that the non-detect data results in an unreasonably low MACT floor; some commenters stated that the proposed limits are in some cases below the detection capability of the required test method. Commenters also stated that EPA has not justified using three times the detection level in its analysis. These commenters stated that this method biases the results towards higher HAP emissions, results in a hypothetical standard that is unrealistic and not determined as required by statute.

*Response:* EPA acknowledges commenters' concerns. As mentioned elsewhere in this preamble, EPA is required to establish MACT floor levels using existing emissions information. For all data sets, the final emission limits are based on the available data and EPA's assessment of variability. Since proposal we have received updated data on certain boilers and used that data to revise our emission estimates from the best performing sources. We re-evaluated the information available for the area source category and revised the proposed MACT-based CO emission limits such that they only apply to boilers in the coal subcategory. As discussed above, based on information received during the public comment period, we determined that regulating POM emissions from area source biomass and oil boilers is not needed to meet our CAA section 112(c)(6) obligations; we only need to regulate coal-fired area source boilers under section 112(d)2) to meet the 90 percent requirement set forth in CAA section 112(c)(6) for POM. The emissions limits for CO for coal-fired boilers were based on the available information from the ICR and state operating permits, as well as that received in comments.

EPA disagrees with commenters who stated that we excluded emissions data collected by state and local permitting authorities in establishing the MACT floor. The available state permits obtained for coal-fired area source boilers limiting CO emissions were for 11 units located in Ohio (3 units), and Illinois (8 units). We also obtained CO emission data from five coal-fired area source boilers as part of the information collection effort for the major source NESHAP. Even though the latter data were gathered in the course of collecting data on major sources, the emission data on these five boilers is from emission sources in the area source coal-fired boiler subcategory.

With respect to non-detect data, EPA considered and accounted for non-detect data when conducting the MACT analysis for mercury for existing and new coal-fired boilers in this final rule. EPA developed a methodology to account for the imprecision introduced by incorporating non-detect data into the MACT floor calculation. At very low emission levels where emissions tests result in non-detect values, the inherent imprecision in the pollutant measurement method has a large influence on the reliability of the data

underlying the MACT floor emission limit. Because of sample and emission matrix effects, laboratory techniques, sample size, and other factors, method detection levels normally vary from test to test for any specific test method and pollutant measurement. The confidence level that a value, measured at the detection level is greater than zero, is about 99 percent. The expected measurement imprecision for an emissions value occurring at or near the method detection level is about 40 to 50 percent. Pollutant measurement imprecision decreases to a consistent level of 10 to 15 percent for values measured at a level about three times the method detection level.[5]

One approach that we believe can be applied to account for measurement variability in this situation starts with defining a method detection level that is representative of the data used in the data pool. The first step in this approach would be to identify the highest test-specific method detection level reported in a data set that is also equal to or less than the average emission calculated for the data set. This approach has the advantage of relying on the data collected to develop the MACT floor emission limit, while to some degree, minimizing the effect of a test(s) with an inordinately high method detection level (e.g., the sample volume was too small, the laboratory technique was insufficiently sensitive or the procedure for determining the detection level was other than that specified).

The second step is to determine the value equal to three times the representative method detection level and compare it to the calculated MACT floor emission limit. If three times the representative method detection level were less than the calculated MACT floor emission limit, we would conclude that measurement variability is adequately addressed, and we would not adjust the calculated MACT floor emission limit. If, on the other hand, the value equal to three times the representative method detection level were greater than the calculated MACT floor emission limit, we would conclude that the calculated MACT floor emission limit does not account entirely for measurement variability. Therefore, we revised the approach we used for the proposal and, for the final rule, we used the value equal to 3 times the method detection level in place of the calculated MACT floor emission limit to ensure that the MACT floor emission limit for mercury accounts for measurement variability and imprecision.

Variability

*Comment:* Numerous commenters stated that the floor methodology used by EPA is unlawful. Some commenters criticized EPA's application of the UPL to all the test results for all sources in the top twelve percent. These commenters stated that while EPA can consider variability in estimating an individual source's performance over time, it cannot account for differences in performance between sources. Specifically, these commenters stated that EPA may only account for differences in performance between sources except as CAA section 112(d)(3) provides, by averaging the emission levels achieved by the sources in the top 12 percent. Commenters stated that the UPL is not equivalent to the "average" emission level. For instance, some commenters stated that the methodology for the mercury and CO emission limits for new coal fired units does not reflect the emission levels achieved by the single best performing source; these commenters stated that the proposed method results in higher emission levels for new sources than the average level of the best 12 percent.

Commenters further stated that EPA erred by relying on the 99 percent UPL only to reflect variability. Some commenters stated that EPA must collect and consider data on additional variability, such as that related to variable fuel quality or longer term variability, to supplement its analysis. These commenters stated that the short-term test data are not representative of long-term operation of a unit nor are they likely to reflect the "worst reasonably foreseeable circumstances" a unit may experience. Other commenters stated that EPA should use the upper tolerance limit (UTL) in lieu of the UPL; these commenters claimed that the UTL is more appropriate for situations where the available data does not represent the entire population.

*Response:* EPA disagrees with commenters and believes that the final emission limits appropriately account for variability. The Court has recognized that EPA may consider variability in estimating the degree of emission reduction achieved by the best-performing sources and in setting MACT floors that the best performing sources can expect to meet "every day and under all operating conditions". *See Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (DC Cir 2004). Furthermore, CAA section 112(d)(3) includes a provision stating that the MACT floor for existing sources cannot be less stringent than "the average emission limitation achieved by the best-performing 12 percent of the existing sources (for which the Administrator has emissions information)." We see no statutory prohibition in considering inter-source variability of the best performing sources (which is all our floor calculation does, by considering the pooled variability of the best performing sources). Section 112(d)(3) of the CAA does not specify any single method of ascertaining an average. Considering the average variability among the group of best performing sources is well within the language of the provision (and was upheld in *Chemical Manufacturers Association* v. *EPA; see* 870 F. 2d at 228). The commenters' argument that "average" can only mean average of emission levels achieved in performance tests of an individual unit is inconsistent with the holding in *Mossville,* 370 F. 3d at 1242, that EPA must account for variability in developing MACT floors and that individual performance tests do not by themselves account for such variability. Therefore, we believe that it is reasonable and necessary to account for inter-source variability of the best performing sources by taking the pooled average of the best performing sources' variability. This is an aspect of identifying the average performance of those sources.

Furthermore, EPA is confident that the UPL is an appropriate statistical tool to use in determining variability when there is a limited sampling of the source category. EPA has considered comments regarding suggested alternatives to the UPL statistic, such as the upper tolerance limit (UTL). Whereas a confidence interval covers a population parameter with a stated confidence, that is, a certain proportion of the time, a tolerance interval covers a fixed proportion of the population with a stated confidence. That is, confidence limits are limits within which we expect a given population parameter, such as the mean, to lie; statistical tolerance limits are limits within which we expect a stated proportion of the population to lie. Given this definition, the 99 percent UTL represents the value which we can expect 99 percent of the measurements to fall below 99 percent of the time in repeated sampling. In other words, if we were to obtain another set of emission observations from the floor sources, we can be 99 percent confident that 99 percent of these measurements will fall below a specified level. Since you must calculate the sample percentile, and the sample sizes for the area source boiler

[5] American Society of Mechanical Engineers, *Reference Method Accuracy and Precision (ReMAP): Phase 1, Precision of Manual Stack Emission Measurements,* CRTD Vol. 60, February 2001.

floor data are small, the 99th percentile is underestimated. Therefore, EPA notes that the UTL should only be used where one can calculate a sample percentile, e.g., where there is a sample size of at least 100. On the other hand, a prediction interval for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what future values will be, based upon present or past background samples taken. The UPL represents the value which we can expect the mean of 3 future observations (3-run average) to fall below, based upon the results of the independent sample of size n from the same population. Given the above considerations, EPA notes that only the UPL adequately gets at the notion of average emissions for a small sample size.

EPA has revised its default selection of data distributions consistent with its guidance document "Data Quality Assessment: Statistical Methods for Practitioners EPA QA/G–9S". This document indicates that most environmental data is lognormally distributed, so EPA has modified its assumptions when the results of the skewness and kurtosis tests result in a tie, or when there is not enough data to complete the skewness and kurtosis tests. With respect to the methods used to compute the UPL for a dataset that is determined to be lognormally distributed, EPA also considered the commenters suggested revisions to the calculations in order to avoid skewing the UPL by calculating the UPL of an arithmetic mean instead of the UPL of a geometric mean. To adjust the calculation EPA considered a scale bias correction approach as well as a new UPL equation based on a Bhaumik and Gibbons 2004 paper, which calculates "An Upper Prediction Limit for the Arithmetic Mean of a Lognormal Random Variable [6]". Given data availability, EPA selected the Bhaumik and Gibbons 2004 approach which addresses commenters concerns with the proposed computations.

Additionally, EPA has determined that 99 percent UPL is appropriate for fuel based HAP, and a 99.9 percent UPL is appropriate for CO. For fuel-based HAP the 99 percent confidence level is consistent with other recent rulemakings (75 FR 54975). Further, as commenters have noted elsewhere, the sample sizes were limited and EPA determined that a level of 99 percent is a good compromise and represents emission levels that are protective of human health and the environment. Given that the subcategories had limited data to establish the floor calculations, EPA determined it was inappropriate to use a confidence level lower than 99 percent. Further, for fuel based HAP mercury, EPA has implemented an additional fuel variability analysis. Additionally, there are well established control measures currently used on units in the source category (fabric filters for PM and mercury) that serve to mitigate, to some degree, the variability in emissions that can be expected. Given these additional considerations for fuel-based HAP, but recognizing the emission limits must be met at all times yet are based on short term stack test data, EPA selected the 99 percent confidence level. For CO, EPA considered both quantitative and qualitative comments received during the public comment period on how CO emissions vary with load, fuel mixes and other routine operating conditions. After considering these comments EPA determined that a 99.9 percent confidence level for CO would better account for some of these fluctuations.

Finally, EPA notes that where appropriate, we have accounted for variable fuel quality. EPA first took fuel into consideration, among other boiler design factors when it divided the source category into subcategories. EPA is aware that differences between given types of units, and fuel, can affect technical feasibility of applying emission control techniques. As noted in the preamble to the June 2010 proposed rule, EPA attempted to assess the impact of fuel variability for development of the mercury standard. However, no fuel analysis data from boilers in the top 12 percent were available for assessing the impact of fuel variability on mercury emissions. EPA realizes that mercury is a fuel dependent HAP, and that the amount of mercury emitted from the boiler depends on the amount of mercury contained in the fuel. For this final rule, we have implemented a fuel variability factor into the mercury emission limit by determining a factor relating the highest mercury content to the average mercury content in coal that may be used at sources comprising the best 12 percent of sources. We also note that fuel usage can be reduced by improving the combustion efficiency of the boiler. Therefore, in the development of the final standards, we are establishing requirements for larger existing boilers (greater than 10 MMBtu/h heat input capacity) to conduct an energy assessment, and smaller boilers (both existing and new boilers with a heat input capacity less than 10 MMBtu/h) to meet a work practice or management practice requirements of a tune-up, in order to improve combustion efficiency.

*D. Beyond the Floor Analysis*

*Comment:* Several commenters objected to EPA's beyond-the-floor determination for new area source boilers. Many of these commenters stated that the beyond the floor approach must consider fuel switching as an option. Other commenters objected to EPA's beyond-the-floor determination for existing boilers, specifically stating that EPA should require existing facilities to either comply with emission limits for larger units, or require fuel switching to the cleanest fuel in their class (fuel type). Commenters noted that while EPA identified substantial emissions reductions for mercury and POM from switching coal-fired boilers to natural gas, EPA failed to rationalize why fuel-switching is not a technically feasible or economically achievable option. Commenters debated EPA's stated concerns regarding fuel availability and curtailment, arguing that there is sufficient capacity to meet the expected increased demand for natural gas. Furthermore, these commenters stated that the potential increases in metallic HAP emissions from fuel-switching were minor and should be considered in light of overall reductions for POM.

*Response:* EPA has considered this comment and concluded that fuel switching is not an appropriate option for the beyond the floor level of control. EPA originally considered whether fuel switching would be an appropriate control option for sources in each subcategory under the proposed rule, including the feasibility of fuel switching to other fuels used in the subcategory and to fuels from other subcategories. This consideration included determining whether switching fuels would achieve lower HAP emissions. We also gave consideration to whether fuel switching could be technically achieved by boilers in the subcategory considering the existing design of boilers and the availability of various types of fuel. After considering these factors, we determined that fuel switching was not an appropriate control technology for purposes of determining the MACT floor level or beyond the floor level of control for any subcategory. This decision is based on the overall effect of

[6] Bhaumik, D. K. and R. D. Gibbons. 2004. An Upper Prediction Limit for the Arithmetic Mean of a Lognormal Random Variable. May 1, 2004. Technometrics 46(2): 239–248. doi:10.1198/004017004000000284

fuel switching on HAP emissions, technical and design considerations discussed previously in the preamble to the proposed June 2010 rule (75 FR 31896), and concerns about fuel availability. This determination is discussed in the memorandum "Development of Fuel Switching Costs and Emission Reductions for Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Area Source" located in the docket.

Energy Assessments

*Comment:* Several commenters disagreed with EPA's determination to require energy assessments as a beyond the floor option. Commenters specifically stated that EPA cannot require an energy assessment because an assessment is not an emission standard and there is no proven relationship between HAP emissions and the assessment. Other commenters argued that the proposed requirements for an energy assessment were not stringent enough; these commenters stated that an energy assessment cannot impose standards more stringent than the MACT floor. For instance, one commenter argued that if EPA did not require implementation of the energy assessment findings, no reductions in fuel use or HAP would result. The commenter further asserted that even an implemented energy assessment would not reduce HAP emissions consistent with the requirements of CAA section 112(d)(2). One commenter specifically stated that by only considering energy audits, EPA did not consider the full range of potential emission measures.

Other commenters argued that EPA does not have the authority to require an energy assessment, and that the proposed requirements were "too broad" or "too intrusive." Commenters were concerned that the energy assessment would include not only the affected source, but also the entire facility, which EPA does not have the authority to regulate.

*Response:* EPA disagrees with commenters that state that EPA does not have the authority to require an energy assessment. An energy assessment is an appropriate beyond-the-floor control technology because it is one of the measures identified in CAA section 112(d)(2). CAA section 112(d)(2) states that "Emission standards promulgated * * * and applicable to new or existing sources * * * is achievable * * * through application of measures, processes, methods, systems or techniques including, but not limited to measures which—

(A) Reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications, * * *

(D) Are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h), or

(E) Are a combination of the above."

The purpose of an energy assessment is to identify energy conservation measures (such as, process changes or other modifications to the facility) that can be implemented to reduce the facility energy demand which would result in reduced fuel use. Reduced fuel use will result in a corresponding reduction in HAP, and non-HAP, emissions. Thus, an energy assessment, in combination with the MACT emission limits will result in the maximum degree of reduction in emissions as required by CAA section 112(d)(2).

It is not EPA's intent to require an energy assessment for the entire facility; the energy assessment is only applied to existing boilers and their energy use systems located at area sources. EPA acknowledges that the proposed definition for "energy assessment" is unclear, and we have revised this final rule to clarify the definition with respect to the requirements of Table 3 of subpart JJJJJJ (*see* 40 CFR 63.11237). In order to account for variability among boiler systems and energy use systems and to ensure that affected sources can adequately comply with the requirements, we have distinguished the requirements for the energy assessment based on the heat input use of the affected source. We have also added a definition for "energy use systems" to clarify the components for each boiler system and energy use system which must be considered during the energy assessment, including elements such as combustion management, thermal energy recovery, energy resource selection, and the steam end-use management of each affected boiler. These revisions clarify that an energy assessment is only required for those portions of the facility using the energy generated from the affected boiler system.

Additionally, a facility may elect, but is not required, to implement the cost-effective energy conservation measures identified in the energy assessment. Because we lack information on whether implementation of the conservation measures will prove cost-effective or economically feasible for facilities, we are allowing the owner or operator to determine the implementation of energy conservation measures identified in the energy assessment. EPA notes that the cost of an energy assessment is minimal, in most cases, compared to the cost for testing and monitoring to demonstrate compliance with an emission limit. Furthermore, the costs of any energy conservation improvement for the owner or operator will be offset, at least in part, by the cost savings in lower fuel costs. Therefore, after considering the structure of the requirement, the incentives it presents, and the likely behavior of sources, it is our judgment that sources will find it cost-effective to implement the conservation measures identified in the energy assessment, and we have elected to promulgate requirements for an energy assessment for all existing boilers with a heat input capacity greater than 10 MMBtu/h as a beyond the floor option or GACT.

EPA disagrees with commenters that state that the option for an energy assessment included in the June 2010 proposed rule is not stringent enough. An energy assessment refers to a process which involves a thorough examination of potential savings from energy efficiency improvements, pollution prevention, and productivity improvement. It leads to the reduction of pollutants through process changes and other efficiency modifications. Improving energy efficiency reduces negative impacts on the environment as well as operating and maintenance costs; improvements in energy efficiency result in decreased fuel use which results in a corresponding decrease in emissions (both HAP and non-HAP) from the boiler. The revised definitions of "energy assessment" and "energy use systems," as discussed above, have been expanded to include the specific components that must be considered for an energy assessment. These changes elucidate the in-depth nature of the energy assessment, which requires identifying all energy conservation measures appropriate for a facility given its operating parameters.

EPA proposed the energy assessment as a beyond the floor option for existing area source boilers having a heat input capacity of greater than 10 MMBtu/h, rather than focusing on smaller boilers. We also examined other emission measures currently in place. EPA did not have sufficient information to determine if requiring an energy assessment for area boilers with a heat input capacity of less than 10 MMBtu/h is economically feasible. For boilers with a heat input capacity less than 10 MMBtu/h, the data that we have suggests that area source boilers typically conduct boiler tune-ups. We also examined work practices listed in

state regulations for area source boilers with a heat input capacity less than 10 MMBtu/h. These regulations included tune-ups (10 states), operator training (one state), periodic inspections (two states), and operation in accordance with manufacturer specifications (one state).

When energy assessments have been undertaken in the past, they typically result in 10 to 15 percent reduction in fuel use, according to the Department of Energy who has conducted energy assessment at selected manufacturing facilities.[7] While the efficiency gains may be somewhat less when the assessment is mandated for a source rather than voluntary, the absence of a requirement to implement the particular findings of the assessment should still result in measures being implemented that are cost-effective for the source and in emission reductions over and above what is otherwise required by MACT and other GACT measures. Therefore, we elected to promulgate requirements for an energy assessment for all existing boilers with a heat input capacity greater than 10 MMBtu/h, and require area source boilers in the biomass and oil subcategories with a heat input capacity of greater than 10 MMBtu/h to meet the management practice standard of a tune-up. These requirements represent the generally available and cost-effective pollution reduction measures that are already required or in place.

*E. GACT Standards*

*Comment:* Commenters stated that the GACT standards should consist of work practice standards, rather than numeric emission limits. One commenter specifically stated that in order to reduce the burden on small facilities operating boilers, EPA should establish work practice standards for CO instead of emission limits, referencing requirements from the state of New Jersey. Other commenters stated that the emission limits and testing procedures proposed for new boilers impose onerous capital and annual costs on potential project owners, which typically include schools, small businesses, hospitals, and other institutions in rural areas. Some commenters stated that the CO emission limits were not achievable for small boilers over a range of operating periods, and that EPA should consider work practice standards in order to account for load variability.

*Response:* CAA section 112(d)(5) allows the Administrator, with respect to area sources, to promulgate standards which provide for the use of generally available control technologies or management practices to reduce emissions of HAP. Therefore, with respect to mercury and POM from area source boilers classified as biomass-fired or oil-fired, as well as with respect to other urban HAP besides POM, we have developed standards that reflect GACT for these two area source categories.

While the June 2010 proposed rule (75 FR 31896) set numeric MACT standards for CO (as a surrogate pollutant for the individual urban organic HAP) and mercury, and numeric GACT emission limits for PM (as a surrogate for the individual urban metal HAP), EPA has revised the standards for area source boilers classified in the biomass and oil subcategories. Rather than require a numeric MACT emission limit for POM, new and existing area source boilers in the biomass or oil subcategories must meet the requirements of GACT, which are management practice standards as described in Table 2 of 40 CFR part 63, subpart JJJJJJ.

However, for the purposes of regulating PM from new area source boilers, EPA has determined that the GACT standards should consist of numeric emission limits. PM is used as a surrogate for urban metals, which we are required to regulate pursuant to CAA section 112(c)(6). The data that we have available suggests that the control technologies currently used by facilities in the source category for reduction of non-mercury metallic HAP and PM are multiclones, which are generally used at area sources using solid fuel. We previously determined during the development of the June 2010 proposed rule that these controls are generally available and cost effective for new area source boilers. Additionally, we noted that new area source boilers with heat input capacity of 30 MMBtu/h or greater are subject to the NSPS for boilers (either subpart Db or Dc of 40 CFR part 60), which regulate emissions of PM and require performance testing. Furthermore, new coal-fired area source boilers with heat input capacity of 10 MMBtu/h or greater will likely require a PM control device to comply with the proposed mercury MACT standard and required performance testing. Therefore, a numerical limit for PM consistent with the devices required to meet mercury MACT should be generally achievable.

EPA has also revised the PM emission limits for area source boilers with a heat input capacity between 10 and 30 MMBtu/h; these limits have been revised to reflect the performance of GACT, which are multiclones. The PM GACT limits were calculated as the average of the data from units using GACT technology. EPA has determined that the promulgated numeric emission limits for PM are appropriate GACT standards for new area source boilers with a heat input capacity greater than 10 MMBtu/h. For new boilers with a heat input capacity less than 10 MMBtu/h, GACT is a management practice of a tune-up because, as previously discussed, there are technical and economic limitations of conducting PM testing on boilers with small diameter stacks.

Tune-Ups

*Comment:* Several commenters expressed concern regarding proposed work practice standards for existing area source boilers, including the requirement of a tune-up for control of POM and mercury. Commenters stated that tune-ups aimed at reducing CO may increase $NO_X$ emissions, reduce combustion efficiency, and/or increase fuel use. Commenters noted that many typical tune-up requirements, including states' requirements, are aimed at minimization of $NO_X$, and not CO. These commenters stated that the proposed tune-up requirements could violate the state tune-up requirements due to increases of $NO_X$. Multiple commenters requested that EPA specify that tune-ups consider optimizing efficiency and limiting increases of $NO_X$, and not only require minimizing CO.

Other commenters requested that EPA allow the use of portable instruments to measure CO for the tune-up requirements. Several commenters requested that EPA clarify that, for the tune-up procedures, gases do not have to be measured using EPA Reference Methods. These commenters indicated that requiring EPA Methods would increase the cost burden for small facilities.

*Response:* EPA disagrees with commenters and is requiring tune-ups as a work practice standard for coal-fired area source boilers with a heat input capacity less than 10 MMBtu/h and as a management practice standard for all biomass-fired and oil-fired area source boilers. EPA acknowledges that that a tune-up designed to specifically decrease CO emissions from an area source boiler would potentially increase emissions of $NO_X$. However, it was not EPA's intent to require that area source

[7] Case studies and success stories highlighting energy savings achieved by companies that have participated in energy assessments can be found at *http://www1.eere.energy.gov/industry/saveenergynow/case_studies.html* and at the Department of Energy's Energy Assessment Centers Database *http://iac.rutgers.edu/database.*

boilers be specifically tuned for the reduction of CO emissions, but rather to require good combustion practices (GCP) by ensuring that area source boilers are tuned to manufacturer's specifications. As discussed in the preamble to the June 2010 proposed rule, boilers may be, at best, 85 percent efficient, and untuned boilers may have combustion efficiencies of 60 percent or lower. Furthermore, as the combustion efficiency decreases, fuel usage increases to maintain energy output resulting in increased emissions. A tune-up performed to the manufacturer's specifications would ensure the highest energy efficiency and reduce fuel usage, which will ultimately reduce HAP emissions. As commenters noted, the tune-up requirements specified by area source boiler manufacturers are generally aimed at reducing $NO_X$ and would not increase emissions of $NO_X$. The tune-up provisions incorporated in this final rule for area source boilers require that the owner or operator measure the concentration in the effluent stream of CO in ppm, by volume, dry basis (ppmvd), before and after adjustments are made to the boiler. EPA does not specify the instrument that must be used for measuring these concentrations, and allows owners and operators to choose the method of measurement. Therefore, EPA agrees with commenters that portable instruments are permissible for this purpose.

*F. Subcategories*

*Comment:* Several commenters raised concerns regarding the subcategories defined by EPA in the development of the proposed rule. Multiple commenters argued that the proposed subcategories are unlawful and arbitrary because they are not based on different classes, types, or sizes. At least one commenter specifically stated that the proposed subcategorization defied the explicit recommendation of the Small Entity Representatives (SERs) to the Small Business Advocacy Review (SBAR) Panel, which recommended that "EPA should subcategorize based on fuel type, boiler type, duty cycle, and location." Many of these commenters suggested subcategories based on limited use, type of biomass (wood, bark, agricultural residue, moisture level) and/or coal (bituminous, anthracite), boiler design (stoker, fluidized bed, or suspension), heat input capacity smaller than 1 MMBtu/h, and combustion of secondary materials. Other commenters recommended that the same subcategories applied to major sources should be used for area sources.

*Response:* EPA disagrees with commenters. Section 112(d)(1) of the CAA states "the Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory" in establishing emission standards. Thus, we have discretion in determining appropriate subcategories based on classes, types, and sizes of sources. We used this discretion in developing subcategories for the boiler area source category. Through subcategorization, we are able to define subsets of similar emission sources within a source category if differences in emissions characteristics, technical feasibility of applying emission control techniques, or opportunities for pollution prevention exist within the source category. The design, operating, and emissions information that EPA reviewed during the area source rulemaking indicates the need to subcategorize based on boiler design which is based on the fuel type. EPA continues to believe that this subcategorization is appropriate. As noted in the preamble to the June 2010 proposed rule, boiler systems are designed for specific fuel types (e.g., coal, biomass, oil or a mixture/combination) and will encounter problems if a fuel or mixture with characteristics other than those originally specified is fired. EPA has noted that emissions from boilers burning coal, biomass, and oil will also differ, and that HAP formation, including emissions of metals and mercury, is dependent upon the composition of the fuel. Organic HAP, on the other hand, are formed from incomplete combustion, which are a function of time, turbulence, and temperature, and are influenced by the design of the boiler and dependent in part on the type of fuel being burned. Because these different types of boilers have different emission characteristics which may influence the feasibility and effectiveness of emission control, we believe that subcategorizing them by fuel type is appropriate.

Additionally, EPA notes that we lack sufficient emissions data for area source boilers to develop limits for additional subcategories. We have elected to establish different subcategories for the major and area source rulemakings, as major source boilers have a different scale of operation and often different combustor designs. There is also more detailed emissions data available for the major source category, which favors the development of more specific subcategories. Because we lack the same level of detail for the area source category, EPA has determined that it would be inappropriate to establish the same subcategories for major and area source boilers.

We believe that area source boilers are generally designed to burn a standard fuel type and less capable of switching fuel type as some major source boilers. However, as was done for the major source NESHAP, we have redefined how to determine the appropriate subcategory. Instead of considering whether the boiler is designed to combust at least 10 percent coal as the first step (as proposed), the first step in determining the appropriate subcategory is to consider the percentage of biomass that is combusted in the boiler.ies are determine.

In addition, as discussed in the comments below, we have established a small units subcategory for each type of fuel (area source boilers with a heat input capacity of less than 10 MMBtu/h), and see no further need for smaller subcategories. We have also adjusted the definition for each fuel subcategory to account for the combustion of secondary materials. The definitions have been clarified to specify that the fuel subcategories are based on the fuel that the boiler is designed to combust, rather than the actual fuel that the boiler is combusting.

Finally, as discussed earlier in this section, we have revised the MACT and GACT limits for the coal, oil, and biomass subcategories in this final rule. Existing oil and biomass-fired boilers are no longer required to meet emission limits, and are only required to meet management practice standards under this final rule. Furthermore, coal-fired boilers with a heat input capacity of less than 10 MMBtu/h are only required to meet work practice standards. While more stringent limits under this final rule may have required subcategories based on the size of the unit, EPA has determined that the subcategories chosen are reasonable based on the applicable requirements of this final rule.

Combustion of Secondary Fuels

*Comment:* Multiple commenters sought clarity for the combustion of secondary materials and/or alternative fuels within the proposed subcategories for area source boilers. Several of these commenters requested clarification of the defined fuels for the biomass, coal, and oil-fired subcategories, as well as additional clarification regarding gas-fired boilers. Some commenters stated that EPA's determination that the boilers subject to this rule do not combust any non-hazardous secondary materials is erroneous, and that to not

consider standards for units burning secondary materials would be unlawful.

Many commenters recommended that EPA classify boilers based on predominant use of a particular fuel; several commenters recommended redefining the subcategories to allow minimal burning of other fuels or for further clarification. For instance, some commenters expressed concern regarding "combination boilers" (boilers that co-fire coal in an amount greater than 10 percent heat input basis with at least 10 percent biomass), which do not cleanly fit into either the coal-fired boiler subcategory or the biomass-fired boiler subcategory. Other commenters argued that the definition of gas-fired boilers should allow for units burning less than 10 percent liquid fuels. Many of the commenters suggested alternative definitions for the proposed subcategories or provided alternative thresholds.

Alternatively, there were some commenters who expressed concern regarding the use of alternative fuels. Commenters specifically stated that allowing 10 percent alternative fuel use, or use of multiple alternatives from year to year, would create significant enforcement issues for states without detailed requirements for tracking, recordkeeping, and reporting.

*Response:* EPA has considered these comments and revised the subcategories based on a revised MACT floor approach. As discussed in Section IV.A of this preamble, we have redefined the coal, biomass and oil subcategories for area source boilers to clarify the fuel inputs that define each subcategory. While the subcategories under the proposed rule accounted for secondary materials such as biomass, liquid or gaseous fuels combusted in combination with traditional fuels, we wished to clarify each subcategory in order to account for the combustion of an array of secondary fuels. Area source boilers combusting coal, biomass or oil may also combust secondary materials as part of their fuel mix. It was not our intent to exclude boilers combusting these non-hazardous secondary materials that do not meet the definition of "solid waste" from the coal, biomass or oil-fired subcategories. Therefore, we have revised the definition for each subcategory to account for the combustion of these non-hazardous secondary materials.

For instance, the proposed rule limited the coal subcategory to boilers combusting coal or coal in combination with biomass, liquid, or gaseous fuels. We have redefined the coal subcategory to include boilers that burn any solid fossil fuel and no more than 15 percent biomass on an annual heat input basis. "Solid fossil fuels" has been defined to include, but not limited to, coal, petroleum coke, coal refuse, and tire derived fuel (TDF). Similarly, we have revised the biomass subcategory to account for boilers that may burn biomass and secondary materials. The biomass subcategory includes boilers combusting at least 15 percent of biomass. This definition differentiates these primarily biomass-fired boilers from the coal subcategory. Additionally, the oil subcategory has been revised to include boilers that burn any liquid fuel but are not included in either the coal or biomass subcategories.

Based on new data submitted during the public comment period, EPA has determined that area source boilers may combust secondary materials. Data submitted indicates that as much as 15 percent of secondary materials, or alternative traditional fuel, may be mixed without causing problems with boiler operations. We wished to differentiate boilers combusting greater than 15 percent of biomass from the remaining subcategories, as these fuels will have higher rates of organic HAP due to the higher moisture content of biomass compared to fossil fuel. The revised definitions for the coal, biomass and oil subcategories clarify this by establishing the fuel type and the input ratio of each fuel type combusted. Therefore, the revised definitions more accurately reflect EPA's intent to include and account for boilers combusting secondary materials in the coal, biomass, and oil subcategories and the effect of biomass on the combustion process.

*Comment:* A number of commenters requested that EPA provide exemptions for specific unit types, including limited use boilers, recovery boilers, hot water heaters, boilers firing ultra low sulfur #2 fuel oil, and boilers with a heat input capacity of less than 1 MMBtu/h. Other commenters stated that EPA is not justified in providing an exemption for gas-fired boilers.

*Response:* As noted in Section VII of the proposed June 2010 rule, in the **Federal Register** notice "Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements," (63 FR 17838, 17849), Table 2 (1998), EPA identified "Industrial Coal Combustion," "Industrial Oil Combustion," "Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" as source categories "subject to regulation" for purposes of CAA section 112(c)(6). Notably, gas-fired units are not included in the source category listing for area source boilers. Without such a listing, EPA cannot address gas-fired boilers in this regulation. We have also included in this final rule an exemption for hot water heaters because these units are, as defined in this final rule, considered residential boilers. In addition, recovery boilers would be exempt because they are regulated under another section 112 MACT standard (*See* 40 CRF part 63, subpart MM).

Conversely, EPA is required to set standards for other unit types, including limited use boilers and boilers firing ultra low sulfur fuel oil. These boilers are included in the source category listing for CAA section 112(d)(2) and emit the pollutants identified in CAA section 112(c)(3). As discussed above, EPA has set appropriate MACT and GACT limits to boilers based on fuel type and size, including area source boilers with a heat input capacity of less than 10 MMBtu/h. EPA also notes that waste heat boilers have been excluded from the definition of boiler.

*G. Startup, Shutdown, and Malfunction*

*Comment:* Several commenters stated that a separate standard must be developed for periods of startup and shutdown. Commenters stated that requiring emission limits during SSM directly conflicts with the requirement that MACT be achievable and is technically feasible; therefore EPA could not require emission limits during periods of SSM. Some commenters requested a separate standard for CO for startup; at least one commenter specifically stated that many area source boilers must operate under conditions driven by safety considerations, operational concerns, and warranty requirements that would likely generate unavoidable increases in CO emissions during startup and shutdown. The commenter therefore concluded that requiring a CO emission limit during startup and shutdown would not only be technically unachievable, but would promote unsafe and improper operation. Several commenters suggested that work practice standards are more appropriate than emission limits, citing a lack of relevant data for periods of SSM. Other commenters specifically objected to EPA's decision to base the SSM requirements on data from the proposed major source NESHAP for industrial, commercial, and institutional boilers and stated that the data from the proposed major source rule cannot be applied to area sources.

*Response:* EPA has considered these comments and has revised this final rule to incorporate a work practice standard

for periods of startup and shutdown. As part of the development of the proposed rule, we reviewed the cost information for CO CEMS provided by commenters on the NESHAP for major source boilers and determined that requiring CO CEMS for units with heat input capacities greater or equal to 100 MMBtu/hr was reasonable. However, EPA has revised this final rule to only require emission limits for mercury and CO for coal-fired boilers. Furthermore, we are only requiring sources to perform a work practice standard, following the manufacturer's recommended procedures, to demonstrate compliance with the emission limits for area source coal-fired boilers during periods of startup and shutdown. Based on the available dataset for facilities in the affected area source category, EPA determined that there are currently no existing coal-fired boilers with a heat input capacity greater than 100 MMBtu/h located at area sources. Coal-fired boilers with a heat input capacity of greater than 50 MMBtu/h are generally major sources of HAP. Therefore, requiring CEMS for boilers of this size is unnecessary for the defined source category.

In lieu of CEMS, we also considered whether requirements for performance testing would be feasible for area source boilers during periods of startup and shutdown. Upon review of these requirements, EPA determined that it is not feasible to require stack testing—in particular, to complete the multiple required test runs—during periods of startup and shutdown due to physical limitations and the short duration of startup and shutdown periods. Therefore, a separate standard must be developed for these periods.

In regards to malfunctions, EPA had previously determined in the development of the proposed rule that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. As discussed in Section III.E of this preamble, EPA has added to this final rule an affirmative defense for civil penalties for exceedances of numerical emission limits that are caused by malfunctions.

Therefore, as allowed under CAA section 112(h), we are requiring a work practice standard for all coal-fired area source boilers during periods of startup and shutdown. The work practice standard requires following the boiler manufacturer's specifications for periods of startup and shutdown.

*H. Compliance Requirements*

Rationale for Demonstrating Compliance

*Comment:* Several commenters expressed concern that, given the large numbers of boilers that would be affected by the proposed rule and the limited capacity of existing vendors, contractors, and engineers, a 3-year time period would not be sufficient to allow completion of all of the required modifications.

*Response:* EPA has re-evaluated the compliance dates for this final rule following the revised MACT and GACT standards. We have revised the initial compliance dates for existing affected sources according to the applicable provisions for each affected source (e.g., work practice or management practice standards, emission limits, and/or an energy assessment), as discussed in Section VI.E of this preamble. EPA has determined that existing sources subject to a work practice standard of a tune-up must comply with this final rule no later than one year after publication of this final rule. We have determined that one year is adequate time for affected sources to meet the work practice or management practice standard, which includes a tune-up based on the manufacturer's recommendations. Existing sources subject to an emission limit or an energy assessment requirement are required to comply with this final rule no later than 3 years after publication of the final rule. Section 112(i)(3)(B) allows EPA, on a case-by-case basis to grant an extension permitting an existing source up to one additional year to comply with standards if such additional period is necessary for the installation of controls. The EPA feels that this provision is sufficient for those sources where the 3-year deadline would not provide adequate time to retrofit as necessary to comply with the requirements of the standard.

*Comment:* Commenters objected to proposed requirements to use CEMS and in some circumstances COMS. Commenters stated that these requirements are extremely burdensome on area sources considering the testing requirements and costs, and that the requirements for CO CEMS for units less than 100 MMBtu/h are too onerous. Commenters noted that many units at this size in the industrial and institutional sector do not operate frequently; therefore the cost of installing CO CEMS was not justified for units with such limited operation. Other commenters argued that requiring boilers to test for CO poses a significant regulatory burden. Several commenters stated that the proposed testing frequency was burdensome.

*Response:* EPA has considered these comments, and we have revised the proposed continuous compliance requirements to not require a CO CEMS for area source boilers. Per the revised MACT and GACT determinations, this final rule only requires emission limits for mercury and CO for coal-fired units. Therefore, for new and existing coal units with a heat input capacity greater than 10 MMBtu/h, we are requiring stack testing every 3 years to demonstrate compliance with the CO emission limits. In the development of the proposed rule, we reviewed the cost information for CO CEMS provided by commenters on the NESHAP for major source boilers and determined that requiring CO CEMS for units with heat input capacities greater or equal to 100 MMBtu/h was reasonable. However, based on a review of the available dataset for facilities in the affected area source category, we have determined that there are currently no existing coal-fired boilers with a heat input capacity greater than 100 MMBtu/h located at area sources. Therefore, requiring CEMS for coal-fired boilers of this size is unnecessary for the defined source category. Additionally, boilers in the biomass and oil subcategories with a heat input capacity greater than 10 MMBtu/h are not required to meet emission limits for CO in this final rule; these boilers are subject to the management practice standards in Table 2 of 40 CFR part 63, subpart JJJJJJ, and therefore, no CO testing is required for these units.

*I. Cost/Economic Impacts*

*Comment:* Multiple commenters stated that the economic impacts of the proposed rule were significantly underestimated. Many commenters stated that the CO limits would require costly controls, and specifically, that the cost of particulate control for biomass boilers was severely underestimated. Other commenters stated that EPA made erroneous assumptions in performing the cost calculations. For instance, one commenter stated that EPA does not have enough data to support the assumption that fabric filters alone will be sufficient for area source coal-fired boilers to meet the proposed mercury limit.

*Response:* In light of changes to this final rule, EPA believes that these concerns are no longer an issue. We have revised the costs estimates for this final rule to reflect EPA's determination of the final MACT standards for coal-fired boilers and GACT standards for biomass and oil-fired boilers. For

instance, EPA is only requiring particulate emission limits for new boilers with a heat input capacity of greater than 10 MMBtu/h; smaller boilers must only meet the management practice standard of a tune-up. These changes have significantly decreased the costs presented in the proposed June 2010 rule. Additionally, commenters provided additional cost information during the public comment period; EPA has incorporated this information into the analysis for this final rule. Based on this re-analysis, EPA has determined that fabric filter controls are generally available and cost effective for new area source boilers. As noted previously, new area source boilers with a heat input capacity of 30 MMBtu/h or greater are subject to the NSPS for boilers (either subpart Db or Dc of 40 CFR part 60), which regulate emissions of PM and require performance testing. Furthermore, new coal-fired area source boilers will likely require a PM control device to comply with the proposed mercury MACT standard and required performance testing. We determined in the context of the major source rulemaking, and from further analysis of new data submitted during the public comment period, that fabric filters are the most effective technology employed by industrial, commercial, and institutional boilers for controlling mercury and particulate emissions. Therefore, EPA has determined it is appropriate and cost-effective to estimate the cost of compliance based on fabric filters for new area source boilers.

*Comment:* Some commenters stated that this final rule would have substantial impacts on rural communities. Commenters noted that many rural communities rely upon or significantly benefit from the use of biomass boilers for energy at manufacturing facilities, schools and hospitals. These commenters stated that the proposed rule will negatively impact both boiler owners and fuel suppliers in these communities. Similarly, other commenters stated that this final rule would have a significant adverse impact on the use of biomass renewable energy throughout the economy.

*Response:* In light of the changes made to the final regarding biomass-fired area source boilers, we believe these concerns are no longer an issue. In the final rule, existing biomass area source boilers are only subject to the management practice of a tune-up and only existing biomass-fired area source boilers with a heat input capacity of 10 MMBtu/h or greater are required to have an energy assessment performed. There are no testing or monitoring requirements in this final rule for existing biomass-fired area source boilers. For a typical existing biomass-fired boilers, this change resulted in reducing the annualized cost of compliance from about $420,000 to about $2,200.

New biomass-fired area source boilers with a heat input capacity of 10 MMBtu/h or greater are only subject to a PM emission limit which requires a PM test be conducted once every 3 years.

*J. Title V Permitting Requirements*

In response to comments received and after further evaluation of the record, EPA has decided to exempt all area sources subject to this subpart from title V permitting. In evaluating the record, we have determined that observations and data we have relied upon in other rulemakings for distinguishing between sources that became synthetic area sources due to controls and other synthetic and natural area sources did not necessarily apply to this source category. Therefore, we lack sufficient information at this juncture to distinguish the sources which have applied controls to boilers in order to become area sources from other synthetic and natural area sources. As a result, the rationale for exempting most area sources subject to this rule as explained in the proposal preamble (*see* pages 31910 to 31913) is also now relevant for sources which we proposed to permit. Thus, no area sources subject to this subpart are required to obtain a title V permit as a result of being subject to this subpart.

A source subject to this subpart may be subject to title V permitting for another reason or reasons, e.g., being located at a major source. If more than one requirement triggers a source's obligation to apply for a title V permit, the 12-month timeframe for submitting a title V application is triggered by the requirement which first causes the source to be subject to title V. See 40 CFR 70.3(a) and (b) or 71.3(a) and (b).

## VI. Relationship of This Action to CAA Section 112(c)(6)

CAA section 112(c)(6) requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). EPA has identified "Industrial Coal Combustion," "Industrial Oil Combustion," Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" as source categories that emit two of the seven CAA section 112(c)(6) pollutants: POM and mercury. (The POM emitted is composed of 16 polyaromatic hydrocarbons (PAH).) In the **Federal Register** notice, *Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements,* 63 FR 17838, 17849, Table 2 (April 10, 1998), EPA identified "Industrial Coal Combustion," "Industrial Oil Combustion," Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" as source categories "subject to regulation" for purposes of CAA section 112(c)(6) with respect to the CAA section 112(c)(6) pollutants that these units emit.

Specifically, as by-products of combustion, the formation of POM is effectively reduced by the combustion and post-combustion practices required to comply with the CAA section 112 standards. Any POM that does form during combustion is further controlled by the various post-combustion controls. The add-on PM control systems (fabric filter) used to reduce mercury and/or PM emissions further reduce emissions of these organic pollutants, as is evidenced by performance data. Specifically, the emission tests obtained at currently operating major source boilers show that the MACT regulations for coal-fired area source boilers will reduce Hg emissions by about 86 percent. It is, therefore, reasonable to conclude that POM emissions from coal-fired area source boilers will be substantially controlled.

In lieu of establishing numerical emissions limits for pollutants such as POM, we regulate surrogate substances. While we have not identified specific numerical limits for POM, we believe CO serves as an effective surrogate for this HAP, because CO, like POM, is formed as a product of incomplete combustion.

Consequently, we have concluded that the emissions limits for CO function as a surrogate for control of POM, such that it is not necessary to establish numerical emissions limits for POM with respect to coal-fired area source boilers to satisfy CAA section 112(c)(6).

To further address POM and mercury emissions, this rule also includes an energy assessment provision that encourages modifications to the facility to reduce energy demand that lead to these emissions.

## VII. Summary of the Impacts of This Final Rule

### *A. What are the air impacts?*

Table 3 of this preamble illustrates, for each subcategory, the estimated emissions reductions achieved by this rule (i.e., the difference in emissions between an area source boiler controlled to the MACT/GACT level of control and boilers at the current baseline) for new and existing sources. Nationwide emissions of total HAP (HCl, hydrogen fluoride, non-mercury metals, mercury, and VOC (for organic HAP) will be reduced by about 667 tpy for existing units and 74 tpy for new units. Emissions of mercury will be reduced by about 88 pounds per year for existing units and by about 9 pounds per year for new units. Emissions of filterable PM will be reduced by about 2,300 tpy for existing units and 280 tpy for new units. Emissions of non-mercury metals (i.e., antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium) will be reduced by about 280 tpy for existing units and will be reduced by 40 tpy for new units. Additionally, EPA has estimated that conducting an biennial tune-up will likely reduce emissions of organic HAP as a result of improved combustion and reduced fuel use. POM reductions are represented by 7–PAH, a group of polycyclic aromatic hydrocarbons. EPA estimates that the work practices, management practices, and CO emission limits may reduce emissions of 7–PAH by 8 tpy for existing units and by 1 tpy for new units. A discussion of the methodology used to estimate baseline emissions and emissions reductions is presented in "Estimation of Impacts for Industrial, Commercial, and Institutional Boilers Area Source NESHAP" in the docket.

TABLE 3—SUMMARY OF HAP EMISSIONS REDUCTIONS FOR EXISTING AND NEW SOURCES (TPY)

| Source | Subcategory | PM | Non mercury metals [a] | Mercury | POM [b] |
|---|---|---|---|---|---|
| Existing Units | Coal | 1,092 | 4 | 0.003 | 0.2 |
| | Biomass | 815 | 11 | 0.003 | 5 |
| | Oil | 349 | 269 | 0.04 | 3 |
| New Units | Coal | 7 | 0.03 | 0.0001 | 0.02 |
| | Biomass | 121 | 2 | 0.0002 | 0.5 |
| | Oil | 149 | 36 | 0.004 | 0.5 |

[a] Includes antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium.
[b] POM is represented by total emissions of polycyclic aromatic hydrocarbons (7–PAH). It is assumed that compliance with work practice standard and management practice will reduce fuel usage by 1 percent, which may reduce emissions of 7–PAH by an equivalent amount.

### *B. What are the cost impacts?*

To estimate the national cost impacts of this rule for existing sources, EPA developed several model boilers and determined the cost of control for these model boilers. EPA assigned a model boiler to each existing unit based on the fuel, size, and current controls. The analysis considered all air pollution control equipment currently in operation at existing boilers. Model costs were then assigned to all existing units that could not otherwise meet the proposed standards. The resulting total national cost impact of this rule for existing units is $487 million dollars in total annualized costs. The total annualized costs (new and existing) for installing controls, conducting biennial tune-ups and an energy assessment, and implementing testing and monitoring requirements is $535 million. Table 4 of this preamble shows the total annualized cost impacts for each subcategory.

TABLE 4—SUMMARY OF ANNUAL COSTS FOR NEW AND EXISTING SOURCES

| Source | Subcategory | Estimated/projected No. of affected units | Total annualized cost (TAC) ($10 $^{6}$/yr) [a] |
|---|---|---|---|
| Existing Units | Coal | 3,710 | 37 |
| | Biomass | 10,958 | 24 |
| | Oil | 168,003 | 374 |
| Facility Energy Assessment | All | ..... | 52 |
| New Units [b] | Coal | 155 | 0.4 |
| | Biomass | 200 | 2.6 |
| | Oil | 6,424 | 45 |

[a] TAC does not include fuel savings from improving combustion efficiency.
[b] Impacts for new units assume the number of units online in the first 3 years of this rule (2010 to 2013).

Using Department of Energy projections on fuel expenditures, as well as the history of installation dates of area source boilers in the dataset, the number of additional boilers that could be potentially constructed was estimated. The resulting total national cost impact of this proposed rule on new sources by the third year, 2013, is $48 million dollars in total annualized costs. When accounting for a 1 percent fuel savings resulting from improvements to combustion efficiency, the total national cost impact on new sources is −$3.6 million.

A discussion of the methodology used to estimate cost impacts is presented in the memorandum, "Estimation of Impacts for Industrial, Commercial, and Institutional Boilers Area Source NESHAP" in the Docket.

### *C. What are the economic impacts?*

The economic impact analysis (EIA) that is included in the RIA shows that the expected prices for industrial sectors could be 0.01 percent higher and

domestic production may fall by less than 0.01 percent. Because of higher domestic prices, imports may rise by less than 0.01 percent. Energy prices will not be affected.

Social costs are estimated to be also $0.49 billion in 2008 dollars. This is estimated to made up of a $0.24 billion loss in domestic consumer surplus, a $0.25 billion loss in domestic producer surplus, a $0.004 billion increase in rest of the world surplus, and a $0.003 billion net loss associated with new source costs and fuel savings not modeled in a way that can be used to attribute it to consumers and producers.

EPA performed a screening analysis for impacts on small entities by comparing compliance costs to sales/revenues (e.g., sales and revenue tests). EPA's analysis found the tests were typically higher for small entities included in the screening analysis. EPA has prepared an Initial Regulatory Flexibility Analysis (IRFA) that discusses alternative regulatory or policy options that minimize this final rule's small entity impacts. It includes key information about key results from the Small Business Advocacy Review (SBAR) panel. The IRFA is discussed in section 5.2 of the report "Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heater" located in the docket. EPA has also prepared A Final Regulatory Flexibility Analysis (FRFA) that is found in section 5 of the RIA.

In addition to estimating this rule's social costs and benefits, EPA has estimated the employment impacts of the final rule. We expect that the rule's direct impact on employment will be small. We have not quantified the rule's indirect or induced impacts. For further explanation and discussion of our analysis, see Chapter 4 of the RIA.

*D. What are the benefits?*

The benefit categories associated with the emission reduction anticipated for this rule can be broadly categorized as those benefits attributable to reduced exposure to hazardous air pollutants (HAPs) and those attributable to exposure to other pollutants. Because we were unable to monetize the benefits associated with reducing HAPs, all monetized benefits reflect improvements in ambient $PM_{2.5}$ and ozone concentrations. This results in an underestimate of the total monetized benefits. We estimated the total monetized benefits of this final regulatory action to be $210 million to $520 million (2008$, 3 percent discount rate) in the implementation year (2014). The monetized benefits at a 7 percent discount rate are $190 million to $470 million (2008$). Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.[8] A summary of the monetized benefits estimates at discount rates of 3 percent and 7 percent are provided in Table 6 of this preamble. A summary of the avoided health benefits are provided in Table 7 of this preamble.

TABLE 6—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE FINAL BOILER AREA SOURCE RULE

[Millions of 2008$] [1]

| Pollutant | Emissions reductions (tons) | Total monetized benefits (at 3% discount rate) | Total monetized benefits (at 7% discount rate) |
|---|---|---|---|
| Direct $PM_{2.5}$ | 678 | $79 to $190 | $72 to $180 |
| $SO_2$ | 3,197 | 130 to 320 | 120 to 290 |
| Total | | 210 to 520 | 190 to 470 |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures so numbers may not sum across rows. All fine particles are assumed to have equivalent health effects. Benefits from reducing HAP are not included. These estimates do not include energy disbenefits valued at less than $1 million. These benefits reflect existing boilers and 6,779 new boilers anticipated to come online by 2014.

TABLE 7—SUMMARY OF THE AVOIDED HEALTH INCIDENCES FOR THE FINAL BOILER MACT

| | Avoided health incidences |
|---|---|
| Avoided Premature Mortality | 24 to 61 |
| Avoided Morbidity: | |
| Chronic Bronchitis | 17 |
| Acute Myocardial Infarction | 40 |
| Hospital Admissions, Respiratory | 6 |
| Hospital Admissions, Cardiovascular | 13 |
| Emergency Room Visits, Respiratory | 21 |
| Acute Bronchitis | 38 |
| Work Loss Days | 3,200 |
| Asthma Exacerbation | 420 |
| Minor Restricted Activity Days | 19,000 |
| Lower Respiratory Symptoms | 460 |
| Upper Respiratory Symptoms | 350 |

**Note:** All estimates are for the implementation year (2014), and are rounded to two significant figures and whole numbers. All fine particles are assumed to have equivalent health effects. Benefits from reducing HAP are not included. These benefits reflect existing boilers and 6,779 new boilers anticipated to come online by 2014.

[8] Roman *et al.,* 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268—2274.

These quantified benefits estimates represent the human health benefits associated with reducing exposure to $PM_{2.5}$. The PM reductions are the result of emission limits on PM as well as emission limits on other pollutants, including HAP. To estimate the human health benefits, we used the environmental Benefits Mapping and Analysis Program (BenMAP) model to quantify the changes in $PM_{2.5}$-related health impacts and monetized benefits based on changes in air quality. This approach is consistent with the recently proposed Transport Rule RIA.[9]

For this final rule, we have expanded and updated the analysis since the proposal in several important ways. Using the Comprehensive Air Quality Model with extensions (CAMx) model, we are able to provide boiler sector-specific air quality impacts attributable to the emission reductions anticipated from this final rule. We believe that this modeling provides estimates that are more appropriate for characterizing the health impacts and monetized benefits from boilers than the generic benefit-per-ton estimates used for the proposal analysis.

To generate the boiler sector-specific benefit-per-ton estimates, we used CAMx to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and BenMAP to estimate the changes in human health associated with that change in air quality. Finally, the monetized health benefits were divided by the emission reductions to create the boiler sector-specific benefit-per-ton estimates. These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. Directly emitted $PM_{2.5}$ and $SO_2$ are the dominant $PM_{2.5}$ precursors affected by this rule. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. For example, $SO_2$ has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not directly transform into $PM_{2.5}$, and because sulfate particles formed from $SO_2$ emissions can transport many miles, including over areas with low populations. Direct $PM_{2.5}$ emissions convert directly into ambient $PM_{2.5}$, thus, to the extent that emissions occur in population areas, exposures to direct $PM_{2.5}$ will tend to be higher, and monetized health benefits will be higher than for $SO_2$ emissions.

Furthermore, CAMx modeling allows us to model the reduced mercury deposition that would occur as a result of the estimated reductions of mercury emissions. Although we are unable to model mercury methylation and human consumption of mercury-contaminated fish, the mercury deposition maps provide an improved qualitative characterization of the mercury benefits associated with this final rulemaking.

For context, it is important to note that the magnitude of the PM benefits is largely driven by the concentration response function for premature mortality. Experts have advised EPA to consider a variety of assumptions, including estimates based on both empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this rule, we cite two key empirical studies, one based on the American Cancer Society cohort study[10] and the extended Six Cities cohort study.[11] In the RIA for this rule, which is available in the docket, we also include benefits estimates derived from expert judgments and other assumptions.

EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature and recent scientific advice, we have determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this recent advice, we are replacing the previous threshold sensitivity analysis with a new LML assessment. While an LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related benefits in this rule would accrue to populations exposed to higher levels of $PM_{2.5}$. Using the Pope, *et al.,* (2002) study, 79 percent of the population is exposed at or above the LML of 7.5 μg/m$^3$. Using the Laden, *et al.,* (2006) study, 34 percent of the population is exposed above the LML of 10 μg/m$^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because as we estimate PM-related mortality among populations exposed to levels of $PM_{2.5}$ that are successively lower, our confidence in the results diminishes. However, our analysis shows that the great majority of the impacts occur at higher exposures.

It should be emphasized that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including reducing other air pollutants, ecosystem effects, and visibility impairment. The benefits from reducing other pollutants have not been monetized in this analysis, including reducing 1,100 tons of CO, 340 tons of HCl, 8 tons of HF, 90 pounds of mercury, and 320 tons of other metals each year. Specifically, we were unable to estimate the benefits associated with HAPs that would be reduced as a result of this rule due to data, resource, and methodology limitations. Challenges in quantifying the HAP benefits include a lack of exposure-response functions, uncertainties in emissions inventories and background levels, the difficulty of extrapolating risk estimates to low doses, and the challenges of tracking health progress for diseases with long latency periods. Although we do not have sufficient information or modeling available to provide monetized estimates for this rulemaking, we include a qualitative assessment of the health effects of these air pollutants in the RIA for this rule, which is available in the docket.

In addition, the monetized benefits estimates provided in Table 6 do not reflect the disbenefits associated with increased electricity usage from operation of the control devices. We estimate that the increases in emissions of $CO_2$ would have disbenefits valued at less than $1 million at a 3 percent discount rate (average). $CO_2$-related disbenefits were calculated using the social cost of carbon, which is discussed further in the RIA. However, these disbenefits do not change the rounded total monetized benefits. In the RIA, we also provide the monetized $CO_2$ disbenefits using discount rates of 5 percent (average), 2.5 percent (average), and 3 percent (95th percentile).

[9] U.S. Environmental Protection Agency, 2010. RIA for the Proposed Federal Transport Rule. Prepared by Office of Air and Radiation. June. Available on the Internet at *http://www.epa.gov/ttn/ecas/regdata/RIAs/proposaltrria_final.pdf.*

[10] Pope *et al,* 2002. "Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution." *Journal of the American Medical Association.* 287:1132–1141.

[11] Laden *et al.,* 2006. "Reduction in Fine Particulate Air Pollution and Mortality." *American Journal of Respiratory and Critical Care Medicine.* 173:667–672.

This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA or 2008 Ozone NAAQS RIA. However, the benefits analyses in these RIAs provide an indication of the sensitivity of our results to various assumptions, including the use of alternative concentration-response functions and the fraction of the population exposed to low $PM_{2.5}$ levels.

For more information on the benefits analysis, please refer to the RIA for this final rule that is available in the docket.

*E. What are the water and solid waste impacts?*

EPA estimated that no additional water usage would result from the MACT floor level of control or GACT requirement. The fabric filter, multiclone, or combustion control devices used to meet the standards of this rule do not require any water to operate, nor do they generate any wastewater.

EPA estimated the additional solid waste that would result from this rule to be 1,800 tpy for existing sources due to the dust and fly ash captured by mercury and PM control devices. The cost of handling the additional solid waste generated from existing sources is $75,700 per year. For new sources installed by 2013, the EPA estimated the additional solid waste that would result from this rule to be 540 tpy for new sources due to the dust and fly ash captured by mercury and PM control devices. The cost of handling the additional solid waste generated from new sources is $22,900 per year. These costs are also accounted for in the control costs estimates.

A discussion of the methodology used to estimate impacts is presented in "Estimation of Impacts for Industrial, Commercial, and Institutional Boilers Area Source NESHAP" in the Docket.

*F. What are the energy impacts?*

EPA expects an increase of approximately 25 million kWh in national annual energy usage from existing sources as a result of this rule. The increase results from the electricity required to operate control devices installed to meet this rule, such as fabric filters. Additionally, for new sources installed by 2013, EPA expects an increase of approximately 8 million kWh in national annual energy usage in order to operate the control devices.

The Department of Energy has conducted energy assessments at selected manufacturing facilities and reports that facilities can reduce fuel/energy use by 10 to 15 percent by using best practices to increase their energy efficiency. Additionally, the EPA expects work practice standards, such as boiler tune-ups, and combustion controls such as new replacement burners, will improve the efficiency of boilers. EPA estimates existing area source facilities can save 20 trillion Btu of fuel each year. For new sources online by 2013, the EPA estimates 2.3 trillion BTU per year of fuel can be conserved. This fuel savings estimate includes only those fuel savings resulting from liquid and coal fuels and it is based on the assumption that the work practice standards will achieve 1 percent improvement in efficiency.

## VIII. Statutory and Executive Order Review

*A. Executive Order 12866 and 13563: Regulatory Planning and Review*

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Accordingly, EPA submitted this action to OMB for review under EO 12866 and any changes in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the Regulatory Impact Analysis (RIA) report. For more information on the costs and benefits for this rule, see the following table.

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER AREA SOURCE RULE IN 2014

[Millions of 2008$] [1]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| **Final MACT/GACT Approach: Selected** | | |
| Total Monetized Benefits [2] | $210 to $520 | $190 to $470 |
| Total Social Costs [3] | $490 | $490 |
| Net Benefits | −$280 to $30 | −$300 to −$20 |
| Non-monetized Benefits | 1,100 tons of carbon monoxide<br>340 tons of HCl<br>8 tons of HF<br>90 pounds of mercury<br>320 tons of other metals<br><1 gram of dioxins/furans (TEQ)<br>Health effects from $SO_2$ exposure<br>Ecosystem effects<br>Visibility impairment | |
| **Proposed MACT Approach: Alternative** | | |
| Total Monetized Benefits [2] | $200 to $490 | $180 to $440 |
| Total Social Costs [3] | $850 | $850 |
| Net Benefits | −$650 to −$360 | −$670 to −$410 |
| Non-monetized Benefits | 1,100 tons of carbon monoxide<br>340 tons of HCl<br>8 tons of HF<br>90 pounds of mercury<br>320 tons of other metals | |

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER AREA SOURCE RULE IN 2014—Continued

[Millions of 2008$] [1]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| | <1 gram of dioxins/furans (TEQ) | |
| | Health effects from $SO_2$ exposure | |
| | Ecosystem effects | |
| | Visibility impairment | |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $SO_2$. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope *et al.* (2002) to Laden *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at less than $1 million.

[3] The methodology used to estimate social costs for one year in the multimarket model using surplus changes results in the same social costs for both discount rates.

*B. Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to 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 ICR document prepared by EPA has been assigned EPA ICR number 2253.01. The recordkeeping and reporting requirements in this rule are based on the information collection requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to CAA section 114 (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and EPA's implementing regulations at 40 CFR part 2, subpart B.

This NESHAP would require applicable one-time notifications according to the NESHAP General Provisions. Facility owners or operators are required to include compliance certifications for the work practices and management practices in their Notifications of Compliance Status. Recordkeeping is required to demonstrate compliance with emission limits, work practices, management practices, monitoring, and applicability provisions. New affected facilities are required to comply with the requirements for startup, shutdown, and malfunction reports and to submit a compliance report if a deviation occurred during the semiannual reporting period.

When a malfunction occurs, sources must report them according to the applicable reporting requirements of this Subpart JJJJJJ. An affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions is available to a source if it can demonstrate that certain criteria and requirements are satisfied. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation) and where the source took necessary actions to minimize emissions. In addition, the source must meet certain notification and reporting requirements. For example, the source must prepare a written root cause analysis and submit a written report to the Administrator documenting that it has met the conditions and requirements for assertion of the affirmative defense.

To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, EPA provides an administrative adjustment to this ICR that shows what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. EPA's estimate for the required notification, reports and records, including the root cause analysis, totals $3,141 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused an exceedance of an emission limit. The estimate also includes time to produce and retain the record and reports for submission to EPA. EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

The annual monitoring, reporting, and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) is estimated to be $407 million. This includes 2.7 million labor hours per year at a cost of $254 million and total non-labor capital costs of $153 million per year. This estimate includes initial and triennial performance tests, conducting and documenting an energy assessment, conducting and documenting a tune-up, semiannual excess emission reports, maintenance inspections, developing a monitoring plan, notifications, and recordkeeping. Monitoring, testing, tune-up and energy assessment costs were also included in the cost estimates presented in the control cost impacts estimates in Section VII.B of this preamble. The total burden for the federal government (averaged over the first 3 years after the effective date of the standard) is estimated to be 286,000 hours per year at a total labor cost of $13 million per year. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR part 63 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, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996*

Pursuant to section 603 of the RFA, EPA prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule and convened a Small Business Advocacy Review Panel to obtain advice and recommendations of representatives of the regulated small entities. A detailed discussion of the Panel's advice and recommendations is found in the final Panel Report (Docket ID No. EPA–HQ–OAR–2002–0058–0797). A summary of the Panel's recommendations is also presented in the preamble to the proposed rule at 75 FR 32044–32045 (June 4, 2010). In the proposed rule, EPA included provisions consistent with four of the Panel's recommendations. As required by section 604 of the RFA, we also prepared a final regulatory flexibility analysis (FRFA) the final rule.

The rule is intended to reduce emissions of HAP as required under section 112 of the CAA. Section II.A of this preamble describes the reasons that EPA is finalizing this action.

Many significant issues were raised during the public comment period, and EPA's responses to those comments are presented in section V of this preamble or in the response to comments document contained in the docket. Significant changes to the rule that resulted from the public comments are described in section IV of the final rule's preamble.

The primary comments on the IRFA were provided by SBA, with the remainder of the comments generally supporting SBA's comments. Those comments applicable to the proposal regarding area source boilers included the following: EPA should have adopted additional subcategories, including the following: Unit design type (*e.g.* fluidized bed, stoker, fuel cell, suspension burner), duty cycle, geographic location, boiler size, burner type (with and without low-$NO_X$ burners), and hours of use (limited use); EPA should have minimized facility monitoring and reporting requirements; EPA should not have proposed the energy audit requirement; and EPA's proposed emissions standards are too stringent.

In response to the comments on the IRFA and other public comments, EPA made the following changes to the final rule. EPA is promulgating management practice standards requiring the implementation of a boiler tune-up program for area source boilers in the biomass and oil subcategories instead of the proposed CO emission limits. This change will significantly reduce the monitoring and testing costs for existing and new biomass-fired and oil-fired area source boilers. EPA also decreased monitoring and testing costs for coal-fired area source boilers by eliminating the CO CEMS requirement for boilers greater than 100 MMBtu/h. The final rule also includes work practice standards or management practice standards, instead of emission limits, for new area source boilers less than 10 MMBtu/h. Finally, EPA is finalizing emission limits that are less stringent than the proposed limits. The emission limit changes are largely due to the changes in data corrections and incorporation of new data into the floor calculations. Additional details on the changes discussed in this paragraph are included in sections IV and V of the final rule's preamble.

Table 5 of this preamble summarizes the EPA estimates of the number of area source facilities expected to be affected by the area source rule. EPA does not have sufficient information to estimate the number of small entities expected to be covered by the area source rule.

As discussed in section 5.1 of the RIA for this rule, using these cost data and the Census estimates of average establishment receipts, a substantial number of SUSB NAICS/enterprise categories have ratios over 3%. The following types of representative small area source public facilities would have cost-to-revenue ratios exceeding 1 percent but below 3 percent: Other public facilities (ratio >1.7 percent) and churches (ratio = 1.5 percent).

TABLE 5—ESTIMATED AFFECTED FACILITIES USING 13 STATE BOILER INSPECTOR INVENTORY: AREA SOURCES

| SIC | Total number of affected facilities in SIC Code |
|---|---|
| 01 | 0 |
| 02 | 247 |
| 07 | 0 |
| 09 | 0 |
| 14 | 83 |
| 16 | 0 |
| 17 | 247 |
| 20 | 5,733 |
| 23 | 83 |
| 24 | 2,676 |
| 26 | 0 |
| 40 | 329 |
| 41 | 0 |
| 42 | 83 |
| 43 | 0 |
| 44 | 0 |
| 45 | 0 |
| 47 | 0 |
| 48 | 741 |
| 50 | 165 |
| 51 | 247 |
| 52 | 0 |
| 53 | 494 |
| 54 | 0 |
| 55 | 801 |
| 56 | 0 |
| 57 | 0 |
| 58 | 905 |
| 59 | 288 |
| 60 | 329 |
| 64 | 0 |
| 65 | 2,878 |
| 70 | 4,893 |
| 72 | 2,138 |
| 73 | 165 |
| 75 | 1,606 |
| 76 | 0 |
| 79 | 1,151 |
| 80 | 15,293 |
| 81 | 0 |
| 82 | 33,303 |
| 83 | 0 |
| 84 | 165 |
| 86 | 3,330 |
| 87 | 666 |
| 91 to 98 | 5,098 |
| Unknown | 576 |

The information collection activities in this ICR include initial and triennial stack tests, fuel analyses, operating parameter monitoring, continuous oxygen monitoring for all coal-fired area source boilers greater than 10 MMBtu/h, certified energy assessments for area source facilities having a boiler greater than 10 MMBtu/h, biennial tune-ups, preparation of a startup, shutdown, malfunction plan (SSMP), preparation of a site-specific monitoring plan and a site-specific fuel monitoring plan, one-time and periodic reports, and the maintenance of records. Based on 13 states' inventories of boilers, there are an estimated 92,000 existing facilities with affected boilers. It is estimated that 53 percent are located in the private sector and the remaining 47 percent are located in the public sector. Of these, only about 0.3 percent of the area source facilities are subject to emission limits and the testing and monitoring requirements in the final rule. A table included in the FRFA summarizes the types and number of each type of small entities expected to be affected by the area source rule.

The Agency expects that persons with knowledge of .pdf software, spreadsheet and relational database programs will be

necessary in order to prepare the report or record. Based on experience with previous emission stack testing, we expect most facilities to contract out preparation of the reports associated with emission stack testing, including creation of the Electronic Reporting Tool submittal which will minimize the need for in depth knowledge of databases or spreadsheet software at the source. We also expect affected sources will need to work with web-based applicability tools and flowcharts to determine the requirements applicable to them, knowledge of the heat input capacity and fuel use of the combustion units at each facility will be necessary in order to develop the reports and determine initial applicability to the rule. Affected facilities will also need skills associated with vendor selection in order to identify service providers that can help them complete their compliance requirements, as necessary.

While EPA did make significant changes based on public comment, EPA is maintaining, but clarifying, the energy assessment requirement. Some changes to the energy assessment requirement that will reduce costs for small entities include a the following provisions: The energy assessment for facilities with affected boilers using less than 0.3 trillion Btu per year heat input will be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a one-day energy assessment; and the energy assessment for facilities with affected boilers using 0.3 to 1.0 trillion Btu per year will be 3 days in length maximum. The boiler system and any energy use system accounting for at least 33 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a 3-day energy assessment. In addition, the final rule allows facilities to use a previously completed energy assessment to satisfy the energy assessment requirement.

As required by section 212 of SBREFA, EPA also is preparing a Small Entity Compliance Guide to help small entities comply with this rule. Small entities will be able to obtain a copy of the Small Entity Compliance guide at the following Web site: *http://www.epa.gov/ttn/atw/boiler/boilerpg.html.*

### *D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, we 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 1 year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires us 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 this final rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with this final rule an explanation why that alternative was not adopted. Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must develop a small government agency plan under section 203 of the UMRA. 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 regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule contains 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 1 year. Accordingly, we have prepared a written statement entitled "Unfunded Mandates Reform Act Analysis for the Boiler Area Source NESHAP" under section 202 of the UMRA which is summarized below.

#### 1. Statutory Authority

As discussed in Section I of this preamble, the statutory authority for this rulemaking is CAA section 112. Title III of the CAA was enacted to reduce nationwide air toxic emissions. Section 112(b) of the CAA lists the 188 chemicals, compounds, or groups of chemicals deemed by Congress to be HAP. These toxic air pollutants are to be regulated by NESHAP.

Section 112(d) of the CAA requires us to establish NESHAP for both major and area sources of HAP that are listed for regulation under CAA section 112(c). CAA section 112(k)(3)(B) calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. CAA section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources based on GACT used by those sources to reduce emissions of HAP. Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. We also consider the standards applicable to major sources in the analogous source category and, as appropriate, the control technologies and management practices at area and major sources in similar categories, to determine if the standards, technologies, and/or practices are transferable and generally available to area sources. In determining GACT for a particular area source category, we consider the costs and economic impacts of available control technologies and management practices on that category.

While GACT may be a basis for standards for most types of HAP emitted from area source, CAA section 112(c)(6) requires that source categories accounting for emissions of the HAP listed in CAA section 112(c)(6) be subject to standards under CAA section 112(d)(2) for the listed pollutants. Thus, CAA section 112(c)(6) requires that emissions of each listed HAP for the listed categories be subject to MACT regulation. The CAA section 112(c)(6) list of source categories includes industrial boilers and institutional/commercial boilers. Within these two source categories, coal combustion, oil combustion, and wood combustion have been on the CAA section 112(c)(6) list because of emissions of mercury and POM. We currently believe that regulation of coal-fired boilers will ensure that we fulfill our obligation under CAA section 112(c)(6) with respect to mercury and POM reductions. Consequently, we deem it reasonable to regulate the coal-fired boilers under MACT, rather than the biomass and oil-fired boilers, to obtain additional mercury and POM reductions towards achieving the CAA section 112(c)(6)

obligation. We are regulating biomass-fired and oil-fired boilers under GACT.

This NESHAP will apply to all existing and new industrial boilers, institutional boilers, and commercial boilers located at area sources. In compliance with section 205(a) of the UMRA, we identified and considered a reasonable number of regulatory alternatives. Additional information on the costs and environmental impacts of these regulatory alternatives is presented in the docket.

The emission limits for existing area source boilers are only applicable to area source boilers that have a designed heat input capacity of 10 MMBtu/h or greater. The regulatory alternative upon which the standards are based represents the MACT floor for the listed CAA section 112(c)(6) pollutants (mercury and POM) for coal-fired units and GACT for the other urban HAP which formed the basis for the listing of these two area source categories. The standards will require new coal-fired boilers to meet MACT-based emission limits for mercury and CO (as a surrogate for POM) and GACT-based emission limits for PM (as a surrogate for urban metals). New biomass and oil-fired boilers will be required to meet GACT for CO, which are tune-ups, and GACT-based emission limits for PM. Existing large coal-fired boilers will be required to meet MACT-based emission limits for mercury and CO for coal-fired units, and existing large biomass and oil-fired boilers will be subject to GACT, which is a tune-up. As allowed under CAA section 112(h), a work practice standard requiring the implementation of a tune-up program is being established for existing and new area source boilers with a designed heat input capacity of less than 10 MMBtu/h. An additional "beyond-the-floor" standard is being established for existing area source facilities having an affected boiler with a heat input capacity of 10 MMBtu/h or greater that requires the performance of an energy assessment on the boiler and the facility to identify cost-effective energy conservation measures.

2. Social Costs and Benefits

The regulatory impact analysis prepared for this final rule including the Agency's assessment of costs and benefits, is detailed in the "Regulatory Impact Analysis: National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters" in the docket. Based on estimated compliance costs associated with this final rule and the predicted change in prices and production in the affected industries, the estimated social costs of this final rule are $0.49 billion (2008 dollars).

It is estimated that 3 years after implementation of this final rule, HAP will be reduced by hundreds of tons, including reductions in metallic HAP including mercury, hydrochloric acid, hydrogen fluoride, and several other organic HAP from area source boilers. Studies have determined a relationship between exposure to these HAP and the onset of cancer; however, the Agency is unable to provide a monetized estimate of the HAP benefits at this time. In addition, there are reductions in $PM_{2.5}$ and in $SO_2$ that will occur, including 678 tons of $PM_{2.5}$ and 3,197 tons of $SO_2$. These reductions occur within 3 years after the implementation of the regulation and are expected to continue throughout the life of the affected sources. The major health effect associated with reducing $PM_{2.5}$ and $PM_{2.5}$ precursors (such as $SO_2$) is a reduction in premature mortality. Other health effects associated with $PM_{2.5}$ emission reductions include avoiding cases of chronic bronchitis, heart attacks, asthma attacks, and work-lost days (*i.e.,* days when employees are unable to work). While we are unable to monetize the benefits associated with the HAP emissions reductions, we are able to monetize the benefits associated with the $PM_{2.5}$ and $SO_2$ emissions reductions. For $SO_{2.5}$ and $PM_{2.5}$, we estimated the benefits associated with health effects of PM but were unable to quantify all categories of benefits (particularly those associated with ecosystem and visibility effects). Our estimates of the monetized benefits in 2013 associated with the implementation of this final rule range from $0.21 billion (2008 dollars) to $0.52 billion (2008 dollars) when using a 3 percent discount rate (or from $0.19 billion (2008 dollars) to $0.47 billion (2008 dollars) when using a 7 percent discount rate. The general approach used to value benefits is discussed in more detail in Section VII.D of this preamble. For more detailed information on the benefits estimated for the rulemaking, refer to the RIA in the docket.

3. Future and Disproportionate Costs

The Unfunded Mandates Reform Act requires that we estimate, where accurate estimation is reasonably feasible, future compliance costs imposed by this final rule and any disproportionate budgetary effects. Our estimates of the future compliance costs of this final rule are discussed in Section VII.C of this preamble.

We do not believe that there will be any disproportionate budgetary effects of this final rule on any particular areas of the country, state or local governments, types of communities (e.g., urban, rural), or particular industry segments. See the results of the "Economic Impact Analysis of the Proposed Industrial Boilers and Process Heaters NESHAP," the results of which are discussed in Section VII.C of this preamble.

4. Effects on the National Economy

The Unfunded Mandates Reform Act requires that we estimate the effect of the proposed rule on the national economy. To the extent feasible, we must estimate the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of the U.S. goods and services, if we determine that accurate estimates are reasonably feasible and that such effect is relevant and material.

The nationwide economic impact of this final rule is presented in the Economic Impact Analysis chapter (Section 4) of the RIA in the docket. This analysis provides estimates of the effect of this final rule on some of the categories mentioned above. The results of the economic impact analysis are summarized in Section VII.C of this preamble. The results show that there will be a small impact on prices and output (less than 0.01 percent). In addition, there should be little impact on energy markets (in this case, coal, natural gas, petroleum products, and electricity). Hence, the potential impacts on the categories mentioned above should be small.

5. Consultation With Government Officials

The Unfunded Mandates Reform Act requires that we describe the extent of the Agency's prior consultation with affected state, local, and tribal officials, summarize the officials' comments or concerns, and summarize our response to those comments or concerns. In addition, section 203 of the UMRA requires that we develop a plan for informing and advising small governments that may be significantly or uniquely impacted by a proposal. Consistent with the intergovernmental consultation provisions of section 204 of the UMRA, EPA has initiated consultations with governmental entities affected by this rule. EPA invited the following 10 national organizations representing state and local elected officials to a meeting held on March 24, 2010 in Washington, DC: (1) National Governors Association; (2)

National Conference of State Legislatures, (3) Council of State Governments, (4) National League of Cities, (5) U.S. Conference of Mayors, (6) National Association of Counties, (7) International City/County Management Association, (8) National Association of Towns and Townships, (9) County Executives of America, and (10) Environmental Council of States. These 10 organizations of elected state and local officials have been identified by EPA as the "Big 10" organizations appropriate to contact for purpose of consultation with elected officials. The purposes of the consultation were to provide general background on the proposal, answer questions, and solicit input from state/local governments. During the meeting, officials expressed uncertainty with regard to how boilers owned/operated by state and local entities would be impacted, as well as with regard to the potential burden associated with implementing this final rule on state and local entities. To that end, officials requested and EPA provided (1) model boiler costs, (2) inventory of area source boilers (coal, oil, biomass only) for the 13 states for which we have an inventory, and (3) information on potential size of boilers used for various facility types and sizes. EPA has not received additional questions or requests from state or local officials.

Consistent with section 205, EPA identified and considered a reasonable number of regulatory alternatives. Because an initial screening analysis for impact on small entities indicated a likely significant impact for substantial numbers, EPA convened a SBAR Panel to obtain advice and recommendation of representatives of the small entities that potentially would be subject to the requirements of this final rule. As part of that process, EPA considered several options. Those options included establishing emission limits, establishing work practice standards, and establishing work practice standards and requiring an energy assessment. The regulatory alternative selected is a combination of the options considered and includes provisions regarding each of the SBAR Panel's recommendations for area source boilers. The recommendations regard the use of subcategories, work practice standards, and compliance costs (see section IX.C of this preamble for more detail on the RFA).

EPA determined subcategories based on boiler type to be appropriate because different types of units have different emission characteristics which may affect the feasibility and effectiveness of emission control. Thus, this final rule identifies three subcategories of area source boilers: (1) Boilers designed for coal firing, (2) boilers designed for biomass firing, and (3) boilers designed for oil firing.

The emission limits for existing and new area source boilers are only applicable to area source boilers that have a designed heat input capacity of 10 MMBtu/h or greater. A work practice standard (for mercury from coal-fired boilers and for POM from all boilers) or management practice (for all other HAP, including mercury from biomass-fired and oil-fired boilers) requiring the implementation of a tune-up program is being established for existing area source boilers with a designed heat input capacity of less than 10 MMBtu/h. The regulatory alternative upon which the standards are based represents the MACT floor for mercury and POM (CO is used as a surrogate for POM) for coal-fired boilers, and GACT for the other urban HAP (PM is used as a surrogate for urban HAP metals and CO is used as a surrogate for urban organic pollutants) for new coal, biomass, and oil-fired boilers. An additional "beyond-the-floor" standard is being established for existing area source facilities having an affected boiler with a heat input capacity of 10 MMBtu/h or greater that requires the performance of an energy assessment on the boiler and the facility to identify cost-effective energy conservation measures.

The use of surrogate pollutants will result in reduced compliance costs because testing is only required for the surrogate pollutants (*i.e.,* CO and PM) versus for the HAP (i.e., POM and metals). The work practice standard/management practice also will result in reduced compliance costs with respect to monitoring/testing for the smaller existing area source boilers. EPA's exemption of area source facilities from title V permit requirements also will reduce burden on area source boiler facilities.

This rule is not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. While some small governments may have boilers that will be affected by this final rule, EPA's analysis shows that other public facilities that are located at area source facilities owned by small entities will not have cost-to-revenue ratios exceeding 10 percent. Hospitals' and schools' revenue tests fall below 1 percent. Because this final rule's requirements apply equally to boilers owned and/or operated by governments and to boilers owned and/or operated by private entities, there will be no requirements that uniquely apply to such governments or impose any disproportionate impacts on them.

*E. Executive Order 13132: Federalism*

Under Executive Order 13132, EPA may not issue an action that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed action.

EPA has concluded that this action may have federalism implications, because it may impose substantial direct compliance costs on state or local governments, and the federal government will not provide the funds necessary to pay those costs. Accordingly, EPA provides the following federalism summary impact statement as required by section 6(b) of Executive Order 13132.

Based on the estimates in EPA's RIA for today's action, the regulatory option may have federalism implications because the action may impose approximately $276 million in annual direct compliance costs on an estimated 57,000 state or local governments. Boiler inventories for the health services, educational services, and government-owned buildings sectors from 13 States were used to estimate the nationwide number of potentially impacted state or local governments. Because the inventories for these sectors include privately owned and federal government owned facilities, the estimate may include many facilities that are not state or local government owned. Table 8 of this preamble presents estimates of the number of potentially impacted state and local governments and their potential annual compliance costs for each of the three sectors. In addition to an estimate of the total number of potentially impacted facilities, estimates for facilities with small boilers and for facilities with large boilers are presented. Small boilers (boilers with heat input capacity of less than 10 MMBtu/h) will be subject to a work practice standard or management practice that requires a boiler tune-up every 2 years. Large coal-fired boilers (boilers with heat input capacity of 10 MMBtu/h or greater) will be subject to emission limits for mercury and CO. Large biomass and oil-fired boilers will be subject to a biennial boiler tune-up requirement for CO. All facilities with

large boilers will be required to conduct a one-time energy assessment.

TABLE 8—STATE AND LOCAL GOVERNMENTS POTENTIALLY IMPACTED BY THE STANDARDS FOR BOILERS AT AREA SOURCE FACILITIES

| Sector | Number of potentially impacted facilities | | | Annual compliance costs to meet standards ($) |
|---|---|---|---|---|
| | Total | Small | Large | |
| Health Services | 17,206 | 15,293 | 1,913 | $84 million. |
| Educational Services | 34,052 | 33,303 | 749 | 159 million. |
| Government-Owned Buildings | 5,796 | 5,098 | 698 | 33 million. |
| Total | 57,054 | 53,694 | 3,360 | 276 million. |

EPA consulted with state and local officials in the process of developing the action to permit them to have meaningful and timely input into its development. EPA met with 10 national organizations representing state and local elected officials to provide general background on the proposed rule, answer questions, and solicit input from state/local governments. The UMRA discussion in Section IX.D of this preamble includes a description of the consultation. As required by section 8(a) of Executive Order 13132, EPA included a certification from its Federalism Official stating that EPA had met the Executive Order's requirements in a meaningful and timely manner, when it sent the draft of this final action to OMB for review pursuant to Executive Order 12866. A copy of this certification has been included in the public version of the official record for this final action.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule imposes requirements on owners and operators of specified area sources and not tribal governments. We do not know of any industrial, commercial, or institutional boilers owned or operated by Indian tribal governments. However, if there are any, the effect of this final rule on communities of tribal governments would not be unique or disproportionate to the effect on other communities. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. In addition, this action is not subject to Executive Order 13045 because this final rule is based solely on technology performance.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (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. We estimate no significant changes for the energy sector for price, production, or imports. For more information on the estimated energy effects, please refer to Section VI of this preamble. The analysis is available in the public docket.

*I. National Technology Transfer and Advancement Act*

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

This final rule involves technical standards. EPA cites the following standards in this final rule: EPA Methods 1, 2, 2F, 2G, 3A, 3B, 4, 5, 5D, 10, 10A, 10B, 17, 19, 29 of 40 CFR part 60; 101A of 40 CFR part 61; and voluntary consensus standards: American Society of Mechanical Engineers (ASME) PTC 19 (manual methods only), American Society for Testing and Materials (ASTM) D6522–00, ASTM D6784–02, ASTM D2234/D2234M–10, ASTM D6323–98, ASTM D2013–04, ASTM D5198–92, ASTM D5865–04, ASTM E711–87, ASTM D3173–03, ASTM E871–82, and ASTM D6722–01.

Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified as alternatives for EPA Methods 2F, 2G, 5D, and 19. The search and review results are in the docket for this rule.

The search for emissions measurement procedures identified 16 other voluntary consensus standards. EPA determined that these 16 standards identified for measuring emissions of the HAP or surrogates subject to emission standards in this rule were impractical alternatives to EPA test methods for the purposes of this rule. Therefore, EPA did not adopt these standards for this purpose. The reasons for the determinations for the 16 methods can be found in the docket to this rule.

Table 4 to subpart JJJJJJ of this rule lists the testing methods included in the regulation. Under 40 CFR 63.7(f) and 63.8(f) of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures.

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

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

This action establishes national emission standards for industrial, commercial, and institutional boilers that are area sources. The industrial boiler source category includes boilers used in manufacturing, processing, mining, refining, or any other industry. The commercial boiler source category includes boilers used in commercial establishments such as stores/malls, laundries, apartments, restaurants, theatres, and hotels/motels. The institutional boiler source category includes boilers used in medical centers (*e.g.,* hospitals, clinics, nursing homes), educational and religious facilities (*e.g.,* schools, universities, places of worship), and municipal buildings (*e.g.,* courthouses, arts centers, prisons). There are approximately 92,000 facilities affected by this final rule, most of which are small entities. By the defined nature of the category, many of these sources are located in close proximity to residential areas, commercial centers, and other locations where large numbers of people live and work.

Due to the large number of these sources, their nation-wide dispersal, and the absence of site specific coordinates, EPA is unable to examine the distributions of exposures and health risks attributable to these sources among different socio-demographic groups for this rule, or to relate the locations of expected emission reductions to the locations of current poor air quality. However, this final rule is anticipated to have substantial emissions reductions of toxic air pollutants (*see* Table 2 of this preamble), some of which are potential carcinogens, neurotoxins, and respiratory irritants. This final rule will also result in reductions in criteria pollutants such as CO, PM, $SO_2$, as well as ozone precursors.

Because of the close proximity of these source categories to people, the substantial emission reductions of air toxics resulting from the implementation of this rule is anticipated to have health benefits for all persons living or going near these types of sources. (Please refer to the RIA for this rulemaking, which is available in the docket.) For example, there will be reductions of mercury emissions which will reduce potential exposures due to the atmospheric deposition of mercury for populations such as subsistence fisherman. In addition, there will be reductions in other air toxics which can cause adverse health effects such as ozone precursors that contribute to "smog." EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority, low-income, or tribal populations.

EPA defines "Environmental Justice" to include meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and polices. To promote meaningful involvement, EPA has developed an EJ communication strategy to ensure that interested communities have access to this rule, are aware of its content, and have an opportunity to comment. In addition, state and federal permitting requirements will provide state and local governments and communities the opportunity to provide their comments on the permit conditions associated with permitting these sources.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating this final rule must submit a rule report, which includes a copy of this final 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 this final 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 a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective May 20, 2011.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: February 21, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended 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 63.14 is amended by:
■ a. Revising paragraphs (b)(27), (b)(35), (b)(39) through (44), (b)(47) through (52), (b)(57), (b)(61), (b)(64), and (i)(1).
■ b. Removing and reserving paragraphs (b)(45), (b)(46), (b)(55), (b)(56), (b)(58) through (60), and (b)(62).
■ c. Adding paragraphs (b)(66) through (68).
■ d. Adding paragraphs (p) and (q).

**§ 63.14 Incorporation by reference.**

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(b) * * *

(27) ASTM D6522–00, Standard Test Method for Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas Fired Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters Using Portable Analyzers, IBR approved for § 63.9307(c)(2).

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(35) ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008, IBR approved for table 1 to subpart DDDDD of this part, table 2 to subpart DDDDD of this part, table 5 to subpart DDDDD, table 12 to subpart DDDDD of this part, and table 4 to subpart JJJJJJ of this part.

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(39) ASTM Method D388–05, Standard Classification of Coals by Rank, approved September 15, 2005, IBR approved for § 63.7575 and § 63.11237.

(40) ASTM D396–10 Standard Specification for Fuel Oils, approved October 1, 2010, IBR approved for § 63.7575.

(41) ASTM Method D1835–05, Standard Specification for Liquefied Petroleum (LP) Gases, approved April 1, 2005, IBR approved for § 63.7575 and § 63.11237.

(42) ASTM D2013/D2013M–09 Standard Practice for Preparing Coal Samples for Analysis, approved November 1, 2009, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(43) ASTM D2234/D2234M–10 Standard Practice for Collection of a Gross Sample of Coal, approved January 1, 2010, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(44) ASTM D3173–03 (Reapproved 2008) Standard Test Method for Moisture in the Analysis Sample of Coal and Coke, approved February 1, 2008, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

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(47) ASTM D5198–09 Standard Practice for Nitric Acid Digestion of Solid Waste, approved February 1, 2009, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(48) ASTM D5865–10a Standard Test Method for Gross Calorific Value of Coal and Coke, approved May 1, 2010, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(49) ASTM D6323–98 (Reapproved 2003), Standard Guide for Laboratory Subsampling of Media Related to Waste Management Activities, approved August 10, 2003, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(50) ASTM E711–87 (Reapproved 2004) Standard Test Method for Gross Calorific Value of Refuse-Derived Fuel by the Bomb Calorimeter, approved August 28, 1987, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(51) ASTM E776–87 (Reapproved 2009) Standard Test Method for Forms of Chlorine in Refuse-Derived Fuel, approved July 1, 2009, IBR approved for table 6 to subpart DDDDD of this part.

(52) ASTM E871–82 (Reapproved 2006) Standard Test Method for Moisture Analysis of Particulate Wood Fuels, approved November 1, 2006, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

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(57) ASTM D6721–01 (Reapproved 2006) Standard Test Method for Determination of Chlorine in Coal by Oxidative Hydrolysis Microcoulometry, approved April 1, 2006, IBR approved for table 6 to subpart DDDDD of this part.

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(61) ASTM D6722–01 (Reapproved 2006) Standard Test Method for Total Mercury in Coal and Coal Combustion Residues by the Direct Combustion Analysis, approved April 1, 2006, IBR approved for Table 6 to subpart DDDDD and Table 5 to subpart JJJJJJ of this part.

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(64) ASTM D6522–00 (Reapproved 2005), Standard Test Method for Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas Fired Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters Using Portable Analyzers, approved October 1, 2005, IBR approved for table 4 to subpart ZZZZ of this part, table 5 to subpart DDDDD of this part, and table 4 to subpart JJJJJJ of this part.

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(66) ASTM D4084–07 Standard Test Method for Analysis of Hydrogen Sulfide in Gaseous Fuels (Lead Acetate Reaction Rate Method), approved June 1, 2007, IBR approved for table 6 to subpart DDDDD of this part.

(67) ASTM D5954–98 (Reapproved 2006), Test Method for Mercury Sampling and Measurement in Natural Gas by Atomic Absorption Spectroscopy, approved December 1, 2006, IBR approved for table 6 to subpart DDDDD of this part.

(68) ASTM D6350–98 (Reapproved 2003) Standard Test Method for Mercury Sampling and Analysis in Natural Gas by Atomic Fluorescence Spectroscopy, approved May 10, 2003, IBR approved for table 6 to subpart DDDDD of this part.

(i) * * *

(1) ANSI/ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]," IBR approved for §§ 63.309(k)(1)(iii), 63.865(b), 63.3166(a)(3), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), 63.11148(e)(3)(iii), 63.11155(e)(3), 63.11162(f)(3)(iii) and (f)(4), 63.11163(g)(1)(iii) and (g)(2), 63.11410(j)(1)(iii), 63.11551(a)(2)(i)(C), table 5 to subpart DDDDD of this part, table 1 to subpart ZZZZZ of this part, and table 4 to subpart JJJJJJ of this part.

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(p) The following material is available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov.*

(1) National Emission Standards for Hazardous Air Pollutants (NESHAP) for Integrated Iron and Steel Plants—Background Information for Proposed Standards, Final Report, EPA–453/R–01–005, January 2001, IBR approved for § 63.7491(g).

(2) Office Of Air Quality Planning And Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, IBR approved for § 63.7525(j)(2) and § 63.11224(f)(2).

(3) SW–846–3020A, Acid Digestion of Aqueous Samples And Extracts For Total Metals For Analysis By GFAA Spectroscopy, Revision 1, July 1992, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(4) SW–846–3050B, Acid Digestion of Sediments, Sludges, And Soils, Revision 2, December 1996, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(5) SW–846–7470A, Mercury In Liquid Waste (Manual Cold-Vapor Technique), Revision 1, September 1994, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(6) SW–846–7471B, Mercury In Solid Or Semisolid Waste (Manual Cold-Vapor Technique), Revision 2, February 2007, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(7) SW–846–9250, Chloride (Colorimetric, Automated Ferricyanide AAI), Revision 0, September 1986, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part.

(q) The following material is available for purchase from the International

Standards Organization (ISO), 1, ch. de la Voie-Creuse, Case postale 56, CH–1211 Geneva 20, Switzerland, +41 22 749 01 11, *http://www.iso.org/iso/home.htm.*

(1) ISO 6978–1:2003(E), Natural Gas—Determination of Mercury—Part 1: Sampling of Mercury by Chemisorption on Iodine, First edition, October 15, 2003, IBR approved for table 6 to subpart DDDDD of this part.

(2) ISO 6978–2:2003(E), Natural gas—Determination of Mercury—Part 2: Sampling of Mercury by Amalgamation on Gold/Platinum Alloy, First edition, October 15, 2003, IBR approved for table 6 to subpart DDDDD of this part.

■ 3. Part 63 is amended by adding subpart JJJJJJ to read as follows:

## Subpart JJJJJJ—National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers Area Sources

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## Subpart JJJJJJ—National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers Area Sources

### What This Subpart Covers

#### § 63.11193 Am I subject to this subpart?

You are subject to this subpart if you own or operate an industrial, commercial, or institutional boiler as defined in § 63.11237 that is located at, or is part of, an area source of hazardous air pollutants (HAP), as defined in § 63.2, except as specified in § 63.11195.

#### § 63.11194 What is the affected source of this subpart?

(a) This subpart applies to each new, reconstructed, or existing affected source as defined in paragraphs (a)(1) and (2) of this section.

(1) The affected source is the collection of all existing industrial, commercial, and institutional boilers within a subcategory (coal, biomass, oil), as listed in § 63.11200 and defined in § 63.11237, located at an area source.

(2) The affected source of this subpart is each new or reconstructed industrial, commercial, or institutional boiler within a subcategory, as listed in § 63.11200 and as defined in § 63.11237, located at an area source.

(b) An affected source is an existing source if you commenced construction or reconstruction of the affected source on or before June 4, 2010.

(c) An affected source is a new source if you commenced construction or reconstruction of the affected source after June 4, 2010 and you meet the applicability criteria at the time you commence construction.

(d) A boiler is a new affected source if you commenced fuel switching from natural gas to solid fossil fuel, biomass, or liquid fuel after June 4, 2010.

(e) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or part 71 as a result of this subpart. You may, however, be required to obtain a title V permit due to another reason or reasons. *See* 40 CFR 70.3(a) and (b) or 71.3(a) and (b). Notwithstanding the exemption from title V permitting for area sources under this subpart, you must continue to comply with the provisions of this subpart.

#### § 63.11195 Are any boilers not subject to this subpart?

The types of boilers listed in paragraphs (a) through (g) of this section are not subject to this subpart and to any requirements in this subpart.

(a) Any boiler specifically listed as, or included in the definition of, an affected source in another standard(s) under this part.

(b) Any boiler specifically listed as an affected source in another standard(s) established under section 129 of the Clean Air Act.

(c) A boiler required to have a permit under section 3005 of the Solid Waste Disposal Act or covered by subpart EEE of this part (e.g., hazardous waste boilers).

(d) A boiler that is used specifically for research and development. This exemption does not include boilers that solely or primarily provide steam (or heat) to a process or for heating at a research and development facility. This exemption does not prohibit the use of the steam (or heat) generated from the boiler during research and development, however, the boiler must be concurrently and primarily engaged in research and development for the exemption to apply.

(e) A gas-fired boiler as defined in this subpart.

(f) A hot water heater as defined in this subpart.

(g) Any boiler that is used as a control device to comply with another subpart of this part, provided that at least 50 percent of the heat input to the boiler is provided by the gas stream that is regulated under another subpart.

#### § 63.11196 What are my compliance dates?

(a) If you own or operate an existing affected boiler, you must achieve

compliance with the applicable provisions in this subpart as specified in paragraphs (a)(1) through (3) of this section.

(1) If the existing affected boiler is subject to a work practice or management practice standard of a tune-up, you must achieve compliance with the work practice or management standard no later than March 21, 2012.

(2) If the existing affected boiler is subject to emission limits, you must achieve compliance with the emission limits no later than March 21, 2014.

(3) If the existing affected boiler is subject to the energy assessment requirement, you must achieve compliance with the energy assessment requirement no later than March 21, 2014.

(b) If you start up a new affected source on or before May 20, 2011, you must achieve compliance with the provisions of this subpart no later than May 20, 2011.

(c) If you start up a new affected source after May 20, 2011, you must achieve compliance with the provisions of this subpart upon startup of your affected source.

(d) If you own or operate an industrial, commercial, or institutional boiler and would be subject to this subpart except for the exemption in § 63.11195(b) for commercial and industrial solid waste incineration units covered by 40 CFR part 60, subpart CCCC or subpart DDDD, and you cease combusting solid waste, you must be in compliance with this subpart on the effective date of the waste to fuel switch.

## Emission Limits, Work Practice Standards, Emission Reduction Measures, and Management Practices

### § 63.11200 What are the subcategories of boilers?

The subcategories of boilers are coal, biomass, and oil. Each subcategory is defined in § 63.11237.

### § 63.11201 What standards must I meet?

(a) You must comply with each emission limit specified in Table 1 to this subpart that applies to your boiler.

(b) You must comply with each work practice standard, emission reduction measure, and management practice specified in Table 2 to this subpart that applies to your boiler. An energy assessment completed on or after January 1, 2008 that meets the requirements in Table 2 to this subpart satisfies the energy assessment portion of this requirement.

(c) You must comply with each operating limit specified in Table 3 to this subpart that applies to your boiler.

(d) These standards apply at all times.

## General Compliance Requirements

### § 63.11205 What are my general requirements for complying with this subpart?

(a) At all times you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require you to make any further efforts to reduce emissions if levels required by this standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator that may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(b) You can demonstrate compliance with any applicable mercury emission limit using fuel analysis if the emission rate calculated according to § 63.11211(c) is less than the applicable emission limit. Otherwise, you must demonstrate compliance using stack testing.

(c) If you demonstrate compliance with any applicable emission limit through performance stack testing and subsequent compliance with operating limits (including the use of continuous parameter monitoring system), with a CEMS, or with a COMS, you must develop a site-specific monitoring plan according to the requirements in paragraphs (c)(1) through (3) of this section for the use of any CEMS, COMS, or continuous parameter monitoring system. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 63.8(f).

(1) For each continuous monitoring system required in this section (including CEMS, COMS, or continuous parameter monitoring system), you must develop, and submit to the delegated authority for approval upon request, a site-specific monitoring plan that addresses paragraphs (c)(1)(i) through (vi) of this section. You must submit this site-specific monitoring plan, if requested, at least 60 days before your initial performance evaluation of your CMS. This requirement to develop and submit a site specific monitoring plan does not apply to affected sources with existing monitoring plans that apply to CEMS and COMS prepared under Appendix B to part 60 of this chapter and which meet the requirements of § 63.11224.

(i) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device);

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction systems; and

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(iv) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1)(ii), (c)(3), and (c)(4)(ii);

(v) Ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d); and

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 63.10(c) (as applicable in Table 8 to this subpart), (e)(1), and (e)(2)(i).

(2) You must conduct a performance evaluation of each CMS in accordance with your site-specific monitoring plan.

(3) You must operate and maintain the CMS in continuous operation according to the site-specific monitoring plan.

## Initial Compliance Requirements

### § 63.11210 What are my initial compliance requirements and by what date must I conduct them?

(a) You must demonstrate initial compliance with each emission limit specified in Table 1 to this subpart that applies to you by either conducting performance (stack) tests, as applicable, according to § 63.11212 and Table 4 to this subpart or, for mercury, conducting fuel analyses, as applicable, according to § 63.11213 and Table 5 to this subpart.

(b) For existing affected boilers that have applicable emission limits, you must demonstrate initial compliance no later than 180 days after the compliance date that is specified in § 63.11196 and according to the applicable provisions in § 63.7(a)(2).

(c) For existing affected boilers that have applicable work practice standards, management practices, or emission reduction measures, you must demonstrate initial compliance no later than the compliance date that is specified in § 63.11196 and according to the applicable provisions in § 63.7(a)(2).

(d) For new or reconstructed affected sources, you must demonstrate initial

compliance no later than 180 calendar days after March 21, 2011 or within 180 calendar days after startup of the source, whichever is later, according to § 63.7(a)(2)(ix).

(e) For affected boilers that ceased burning solid waste consistent with § 63.11196(d), you must demonstrate compliance within 60 days of the effective date of the waste-to-fuel switch. If you have not conducted your compliance demonstration for this subpart within the previous 12 months, you must complete all compliance demonstrations before you commence or recommence combustion of solid waste.

**§ 63.11211 How do I demonstrate initial compliance with the emission limits?**

(a) For affected boilers that demonstrate compliance with any of the emission limits of this subpart through performance (stack) testing, your initial compliance requirements include conducting performance tests according to § 63.11212 and Table 4 to this subpart, conducting a fuel analysis for each type of fuel burned in your boiler according to § 63.11213 and Table 5 to this subpart, establishing operating limits according to § 63.11222, Table 6 to this subpart and paragraph (b) of this section, as applicable, and conducting continuous monitoring system (CMS) performance evaluations according to § 63.11224. For affected boilers that burn a single type of fuel, you are exempted from the compliance requirements of conducting a fuel analysis for each type of fuel burned in your boiler. For purposes of this subpart, boilers that use a supplemental fuel only for startup, unit shutdown, and transient flame stability purposes still qualify as affected boilers that burn a single type of fuel, and the supplemental fuel is not subject to the fuel analysis requirements under § 63.11213 and Table 5 to this subpart.

(b) You must establish parameter operating limits according to paragraphs (b)(1) through (4) of this section.

(1) For a wet scrubber, you must establish the minimum liquid flowrate and pressure drop as defined in § 63.11237, as your operating limits during the three-run performance stack test. If you use a wet scrubber and you conduct separate performance stack tests for particulate matter and mercury emissions, you must establish one set of minimum scrubber liquid flowrate and pressure drop operating limits. If you conduct multiple performance stack tests, you must set the minimum liquid flowrate and pressure drop operating limits at the highest minimum values established during the performance stack tests.

(2) For an electrostatic precipitator operated with a wet scrubber, you must establish the minimum voltage and secondary amperage (or total electric power input), as defined in § 63.11237, as your operating limits during the three-run performance stack test. (These operating limits do not apply to electrostatic precipitators that are operated as dry controls without a wet scrubber.)

(3) For activated carbon injection, you must establish the minimum activated carbon injection rate, as defined in § 63.11237, as your operating limit during the three-run performance stack test.

(4) The operating limit for boilers with fabric filters that demonstrate continuous compliance through bag leak detection systems is that a bag leak detection system be installed according to the requirements in § 63.11224, and that each fabric filter must be operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period.

(c) If you elect to demonstrate compliance with an applicable mercury emission limit through fuel analysis, you must conduct fuel analyses according to § 63.11213 and Table 5 to this subpart and follow the procedures in paragraphs (c)(1) through (3) of this section.

(1) If you burn more than one fuel type, you must determine the fuel type, or mixture, you could burn in your boiler that would result in the maximum emission rates of mercury.

(2) You must determine the 90th percentile confidence level fuel mercury concentration of the composite samples analyzed for each fuel type using Equation 1 of this section.

$$P_{90} = \text{mean} + (SD * t) \quad \text{(Eq. 1)}$$

Where:

$P_{90}$ = 90th percentile confidence level mercury concentration, in pounds per million Btu.

mean = Arithmetic average of the fuel mercury concentration in the fuel samples analyzed according to § 63.11213, in units of pounds per million Btu.

SD = Standard deviation of the mercury concentration in the fuel samples analyzed according to § 63.11213, in units of pounds per million Btu.

t = t distribution critical value for 90th percentile (0.1) probability for the appropriate degrees of freedom (number of samples minus one) as obtained from a Distribution Critical Value Table.

(3) To demonstrate compliance with the applicable mercury emission limit, the emission rate that you calculate for your boiler using Equation 1 of this section must be less than the applicable mercury emission limit.

**§ 63.11212 What stack tests and procedures must I use for the performance tests?**

(a) You must conduct all performance tests according to § 63.7(c), (d), (f), and (h). You must also develop a site-specific test plan according to the requirements in § 63.7(c).

(b) You must conduct each stack test according to the requirements in Table 4 to this subpart.

(c) You must conduct performance stack tests at the representative operating load conditions while burning the type of fuel or mixture of fuels that have the highest emissions potential for each regulated pollutant, and you must demonstrate initial compliance and establish your operating limits based on these performance stack tests. For subcategories with more than one emission limit, these requirements could result in the need to conduct more than one performance stack test. Following each performance stack test and until the next performance stack test, you must comply with the operating limit for operating load conditions specified in Table 3 to this subpart.

(d) You must conduct a minimum of three separate test runs for each performance stack test required in this section, as specified in § 63.7(e)(3) and in accordance with the provisions in Table 4 to this subpart.

(e) To determine compliance with the emission limits, you must use the F–Factor methodology and equations in sections 12.2 and 12.3 of EPA Method 19 of appendix A–7 to part 60 of this chapter to convert the measured particulate matter concentrations and the measured mercury concentrations that result from the initial performance test to pounds per million Btu heat input emission rates.

**§ 63.11213 What fuel analyses and procedures must I use for the performance tests?**

(a) You must conduct fuel analyses according to the procedures in paragraphs (b) and (c) of this section and Table 5 to this subpart, as applicable. You are not required to conduct fuel analyses for fuels used for only startup, unit shutdown, and transient flame stability purposes. You are required to conduct fuel analyses only for fuels and units that are subject to emission limits for mercury in Table 1 of this subpart.

(b) At a minimum, you must obtain three composite fuel samples for each fuel type according to the procedures in Table 5 to this subpart. Each composite sample must consist of a minimum of three samples collected at approximately equal intervals during a test run period.

(c) Determine the concentration of mercury in the fuel in units of pounds per million Btu of each composite sample for each fuel type according to the procedures in Table 5 to this subpart.

**§ 63.11214 How do I demonstrate initial compliance with the work practice standard, emission reduction measures, and management practice?**

(a) If you own or operate an existing or new coal-fired boiler with a heat input capacity of less than 10 million Btu per hour, you must conduct a performance tune-up according to § 63.11223(b) and you must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted a tune-up of the boiler.

(b) If you own or operate an existing or new biomass-fired boiler or an existing or new oil-fired boiler, you must conduct a performance tune-up according to § 63.11223(b) and you must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted a tune-up of the boiler.

(c) If you own or operate an existing affected boiler with a heat input capacity of 10 million Btu per hour or greater, you must submit a signed certification in the Notification of Compliance Status report that an energy assessment of the boiler and its energy use systems was completed and submit, upon request, the energy assessment report.

(d) If you own or operate a boiler subject to emission limits in Table 1 of this subpart, you must minimize the boiler's startup and shutdown periods following the manufacturer's recommended procedures, if available. If manufacturer's recommended procedures are not available, you must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available. You must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted startups and shutdowns according to the manufacturer's recommended procedures or procedures specified for a boiler of similar design if manufacturer's recommended procedures are not available.

## Continuous Compliance Requirements

**§ 63.11220 When must I conduct subsequent performance tests?**

(a) If your boiler has a heat input capacity of 10 million Btu per hour or greater, you must conduct all applicable performance (stack) tests according to § 63.11212 on an triennial basis, unless you follow the requirements listed in paragraphs (b) through (d) of this section. Triennial performance tests must be completed no more than 37 months after the previous performance test, unless you follow the requirements listed in paragraphs (b) through (d) of this section.

(b) You can conduct performance stack tests less often for particulate matter or mercury if your performance stack tests for the pollutant for at least 3 consecutive years show that your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions. In this case, you do not have to conduct a performance stack test for that pollutant for the next 2 years. You must conduct a performance stack test during the third year and no more than 37 months after the previous performance stack test.

(c) If your boiler continues to meet the emission limit for particulate matter or mercury, you may choose to conduct performance stack tests for the pollutant every third year if your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions, but each such performance stack test must be conducted no more than 37 months after the previous performance test.

(d) If you have an applicable CO emission limit, you must conduct triennial performance tests for CO according to § 63.11212. Each triennial performance test must be conducted between no more than 37 months after the previous performance test.

(e) If you demonstrate compliance with the mercury emission limit based on fuel analysis, you must conduct a fuel analysis according to § 63.11213 for each type of fuel burned monthly. If you plan to burn a new type of fuel or fuel mixture, you must conduct a fuel analysis before burning the new type of fuel or mixture in your boiler. You must recalculate the mercury emission rate using Equation 1 of § 63.11211. The recalculated mercury emission rate must be less than the applicable emission limit.

**§ 63.11221 How do I monitor and collect data to demonstrate continuous compliance?**

(a) You must monitor and collect data according to this section.

(b) You must operate the monitoring system and collect data at all required intervals at all times the affected source is operating except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods (see section 63.8(c)(7) of this part), and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(c) You may not use data recorded during monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(d) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments,

failure to collect required data is a deviation of the monitoring requirements.

**§ 63.11222 How do I demonstrate continuous compliance with the emission limits?**

(a) You must demonstrate continuous compliance with each emission limit and operating limit in Tables 1 and 3 to this subpart that applies to you according to the methods specified in Table 7 to this subpart and to paragraphs (a)(1) through (4) of this section.

(1) Following the date on which the initial compliance demonstration is completed or is required to be completed under §§ 63.7 and 63.11196, whichever date comes first, you must continuously monitor the operating parameters. Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(2) If you have an applicable mercury or PM emission limit, you must keep records of the type and amount of all fuels burned in each boiler during the reporting period to demonstrate that all fuel types and mixtures of fuels burned would result in lower emissions of mercury than the applicable emission limit (if you demonstrate compliance through fuel analysis), or result in lower fuel input of mercury than the maximum values calculated during the last performance stack test (if you demonstrate compliance through performance stack testing).

(3) If you have an applicable mercury emission limit and you plan to burn a new type of fuel, you must determine the mercury concentration for any new fuel type in units of pounds per million Btu, using the procedures in Equation 1 of § 63.11211 based on supplier data or your own fuel analysis, and meet the requirements in paragraphs (a)(3)(i) or (ii) of this section.

(i) The recalculated mercury emission rate must be less than the applicable emission limit.

(ii) If the mercury concentration is higher than mercury fuel input during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.11212 to demonstrate that the mercury emissions do not exceed the emission limit.

(4) If your unit is controlled with a fabric filter, and you demonstrate continuous compliance using a bag leak detection system, you must initiate corrective action within 1 hour of a bag leak detection system alarm and operate and maintain the fabric filter system such that the alarm does not sound more than 5 percent of the operating time during a 6-month period. You must also keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of the operating time during each 6-month period that the alarm sounds. In calculating this operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm is counted as a minimum of 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action.

(b) You must report each instance in which you did not meet each emission limit and operating limit in Tables 1 and 3 to this subpart that apply to you. These instances are deviations from the emission limits in this subpart. These deviations must be reported according to the requirements in § 63.11225.

**§ 63.11223 How do I demonstrate continuous compliance with the work practice and management practice standards?**

(a) For affected sources subject to the work practice standard or the management practices of a tune-up, you must conduct a biennial performance tune-up according to paragraphs (b) of this section and keep records as required in § 63.11225(c) to demonstrate continuous compliance. Each biennial tune-up must be conducted no more than 25 months after the previous tune-up.

(b) You must conduct a tune-up of the boiler biennially to demonstrate continuous compliance as specified in paragraphs (b)(1) through (7) of this section.

(1) As applicable, inspect the burner, and clean or replace any components of the burner as necessary (you may delay the burner inspection until the next scheduled unit shutdown, but you must inspect each burner at least once every 36 months).

(2) Inspect the flame pattern, as applicable, and adjust the burner as necessary to optimize the flame pattern. The adjustment should be consistent with the manufacturer's specifications, if available.

(3) Inspect the system controlling the air-to-fuel ratio, as applicable, and ensure that it is correctly calibrated and functioning properly.

(4) Optimize total emissions of carbon monoxide. This optimization should be consistent with the manufacturer's specifications, if available.

(5) Measure the concentrations in the effluent stream of carbon monoxide in parts per million, by volume, and oxygen in volume percent, before and after the adjustments are made (measurements may be either on a dry or wet basis, as long as it is the same basis before and after the adjustments are made).

(6) Maintain onsite and submit, if requested by the Administrator, biennial report containing the information in paragraphs (b)(6)(i) through (iii) of this section.

(i) The concentrations of CO in the effluent stream in parts per million, by volume, and oxygen in volume percent, measured before and after the tune-up of the boiler.

(ii) A description of any corrective actions taken as a part of the tune-up of the boiler.

(iii) The type and amount of fuel used over the 12 months prior to the biennial tune-up of the boiler.

(7) If the unit is not operating on the required date for a tune-up, the tune-up must be conducted within one week of startup.

(c) If you own or operate an existing or new coal-fired boiler with a heat input capacity of 10 million Btu per hour or greater, you must minimize the boiler's time spent during startup and shutdown following the manufacturer's recommended procedures and you must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted startups and shutdowns according to the manufacturer's recommended procedures.

**§ 63.11224 What are my monitoring, installation, operation, and maintenance requirements?**

(a) If your boiler is subject to a carbon monoxide emission limit in Table 1 to this subpart, you must install, operate, and maintain a continuous oxygen monitor according to the procedures in paragraphs (a)(1) through (6) of this section by the compliance date specified in § 63.11196. The oxygen level shall be monitored at the outlet of the boiler.

(1) Each monitor must be installed, operated, and maintained according to the applicable procedures under Performance Specification 3 at 40 CFR part 60, appendix B, and according to the site-specific monitoring plan developed according to paragraph (c) of this section.

(2) You must conduct a performance evaluation of each CEMS according to the requirements in § 63.8(e) and according to Performance Specification 3 at 40 CFR part 60, appendix B.

(3) Each CEMS must complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(4) The CEMS data must be reduced as specified in § 63.8(g)(2).

(5) You must calculate and record the 12-hour block average concentrations.

(6) For purposes of calculating data averages, you must use all the data collected during all periods in assessing compliance, excluding data collected during periods when the monitoring system malfunctions or is out of control, during associated repairs, and during required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments). Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions. Any period for which the monitoring system malfunctions or is out of control and data are not available for a required calculation constitutes a deviation from the monitoring requirements. Periods when data are unavailable because of required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments) do not constitute monitoring deviations.

(b) If you are using a control device to comply with the emission limits specified in Table 1 to this subpart, you must maintain each operating limit in Table 3 to this subpart that applies to your boiler as specified in Table 7 to this subpart. If you use a control device not covered in Table 3 to this subpart, or you wish to establish and monitor an alternative operating limit and alternative monitoring parameters, you must apply to the United States Environmental Protection Agency (EPA) Administrator for approval of alternative monitoring under § 63.8(f).

(c) If you demonstrate compliance with any applicable emission limit through stack testing and subsequent compliance with operating limits, you must develop a site-specific monitoring plan according to the requirements in paragraphs (c)(1) through (4) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 63.8(f).

(1) For each continuous monitoring system (CMS) required in this section, you must develop, and submit to the EPA Administrator for approval upon request, a site-specific monitoring plan that addresses paragraphs (b)(1)(i) through (iii) of this section. You must submit this site-specific monitoring plan (if requested) at least 60 days before your initial performance evaluation of your CMS.

(i) Installation of the CMS sampling probe or other interface at a measurement location relative to each affected unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device).

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction systems.

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(2) In your site-specific monitoring plan, you must also address paragraphs (b)(2)(i) through (iii) of this section.

(i) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1), (3), and (4)(ii).

(ii) Ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d).

(iii) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 63.10(c), (e)(1), and (e)(2)(i).

(3) You must conduct a performance evaluation of each CMS in accordance with your site-specific monitoring plan.

(4) You must operate and maintain the CMS in continuous operation according to the site-specific monitoring plan.

(d) If you have an operating limit that requires the use of a CMS, you must install, operate, and maintain each continuous parameter monitoring system according to the procedures in paragraphs (d)(1) through (5) of this section.

(1) The continuous parameter monitoring system must complete a minimum of one cycle of operation for each successive 15-minute period. You must have a minimum of four successive cycles of operation to have a valid hour of data.

(2) Except for monitoring malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), you must conduct all monitoring in continuous operation at all times that the unit is operating. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(3) For purposes of calculating data averages, you must not use data recorded during monitoring malfunctions, associated repairs, out of control periods, or required quality assurance or control activities. You must use all the data collected during all other periods in assessing compliance. Any period for which the monitoring system is out-of-control and data are not available for a required calculation constitutes a deviation from the monitoring requirements.

(4) Determine the 12-hour block average of all recorded readings, except as provided in paragraph (d)(3) of this section.

(5) Record the results of each inspection, calibration, and validation check.

(e) If you have an applicable opacity operating limit under this rule, you must install, operate, certify and maintain each continuous opacity monitoring system (COMS) according to the procedures in paragraphs (e)(1) through (7) of this section by the compliance date specified in § 63.11196.

(1) Each COMS must be installed, operated, and maintained according to Performance Specification 1 of 40 CFR part 60, appendix B.

(2) You must conduct a performance evaluation of each COMS according to the requirements in § 63.8 and according to Performance Specification 1 of 40 CFR part 60, appendix B.

(3) As specified in § 63.8(c)(4)(i), each COMS must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) The COMS data must be reduced as specified in § 63.8(g)(2).

(5) You must include in your site-specific monitoring plan procedures and acceptance criteria for operating and maintaining each COMS according to the requirements in § 63.8(d). At a minimum, the monitoring plan must include a daily calibration drift assessment, a quarterly performance audit, and an annual zero alignment audit of each COMS.

(6) You must operate and maintain each COMS according to the requirements in the monitoring plan

and the requirements of § 63.8(e). Identify periods the COMS is out of control including any periods that the COMS fails to pass a daily calibration drift assessment, a quarterly performance audit, or an annual zero alignment audit.

(7) You must determine and record all the 1-hour block averages collected for periods during which the COMS is not out of control.

(f) If you use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate the bag leak detection system as specified in paragraphs (f)(1) through (8) of this section.

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter.

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations and in accordance with EPA–454/R–98–015 (incorporated by reference, see § 63.14).

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings.

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(6) The bag leak detection system must be equipped with an audible or visual alarm system that will activate automatically when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is easily heard or seen by plant operating personnel.

(7) For positive pressure fabric filter systems that do not duct all compartments of cells to a common stack, a bag leak detection system must be installed in each baghouse compartment or cell.

(8) Where multiple bag leak detectors are required, the system's instrumentation and alarm may be shared among detectors.

**§ 63.11225 What are my notification, reporting, and recordkeeping requirements?**

(a) You must submit the notifications specified in paragraphs (a)(1) through (a)(5) of this section to the delegated authority.

(1) You must submit all of the notifications in §§ 63.7(b): 63.8(e) and (f); 63.9(b) through (e); and 63.9(g) and (h) that apply to you by the dates specified in those sections.

(2) As specified in § 63.9(b)(2), you must submit the Initial Notification no later than 120 calendar days after May 20, 2011 or within 120 days after the source becomes subject to the standard.

(3) If you are required to conduct a performance stack test you must submit a Notification of Intent to conduct a performance test at least 60 days before the performance stack test is scheduled to begin.

(4) You must submit the Notification of Compliance Status in accordance with § 63.9(h) no later than 120 days after the applicable compliance date specified in § 63.11196 unless you must conduct a performance stack test. If you must conduct a performance stack test, you must submit the Notification of Compliance Status within 60 days of completing the performance stack test. In addition to the information required in § 63.9(h)(2), your notification must include the following certification(s) of compliance, as applicable, and signed by a responsible official:

(i) "This facility complies with the requirements in § 63.11214 to conduct an initial tune-up of the boiler."

(ii) "This facility has had an energy assessment performed according to § 63.11214(c)."

(iii) For an owner or operator that installs bag leak detection systems: "This facility has prepared a bag leak detection system monitoring plan in accordance with § 63.11224 and will operate each bag leak detection system according to the plan."

(iv) For units that do not qualify for a statutory exemption as provided in section 129(g)(1) of the Clean Air Act: "No secondary materials that are solid waste were combusted in any affected unit."

(5) If you are using data from a previously conducted emission test to serve as documentation of conformance with the emission standards and operating limits of this subpart consistent with § 63.7(e)(2)(iv), you must submit the test data in lieu of the initial performance test results with the Notification of Compliance Status required under paragraph (a)(4) of this section.

(b) You must prepare, by March 1 of each year, and submit to the delegated authority upon request, an annual compliance certification report for the previous calendar year containing the information specified in paragraphs (b)(1) through (4) of this section. You must submit the report by March 15 if you had any instance described by paragraph (b)(3) of this section. For boilers that are subject only to a requirement to conduct a biennial tune-up according to § 63.11223(a) and not subject to emission limits or operating limits, you may prepare only a biennial compliance report as specified in paragraphs (b)(1) through (4) of this section, instead of a semi-annual compliance report.

(1) Company name and address.

(2) Statement by a responsible official, with the official's name, title, phone number, e-mail address, and signature, certifying the truth, accuracy and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart.

(3) If the source experiences any deviations from the applicable requirements during the reporting period, include a description of deviations, the time periods during which the deviations occurred, and the corrective actions taken.

(4) The total fuel use by each affected boiler subject to an emission limit, for each calendar month within the reporting period, including, but not limited to, a description of the fuel, whether the fuel has received a non-waste determination by you or EPA through a petition process to be a non-waste under § 241.3(c), whether the fuel(s) were processed from discarded non-hazardous secondary materials within the meaning of § 241.3, and the total fuel usage amount with units of measure.

(c) You must maintain the records specified in paragraphs (c)(1) through (5) of this section.

(1) As required in § 63.10(b)(2)(xiv), you must keep a copy of each notification and report that you submitted to comply with this subpart and all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted.

(2) You must keep records to document conformance with the work practices, emission reduction measures, and management practices required by § 63.11214 as specified in paragraphs (c)(2)(i) and (ii) of this section.

(i) Records must identify each boiler, the date of tune-up, the procedures followed for tune-up, and the manufacturer's specifications to which the boiler was tuned.

(ii) Records documenting the fuel type(s) used monthly by each boiler, including, but not limited to, a description of the fuel, including whether the fuel has received a non-waste determination by you or EPA, and the total fuel usage amount with units

of measure. If you combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1), you must keep a record which documents how the secondary material meets each of the legitimacy criteria. If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a record that documents how the fuel satisfies the requirements of the petition process.

(3) For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation that were done to demonstrate compliance with the mercury emission limits. Supporting documentation should include results of any fuel analyses. You can use the results from one fuel analysis for multiple boilers provided they are all burning the same fuel type.

(4) Records of the occurrence and duration of each malfunction of the boiler, or of the associated air pollution control and monitoring equipment.

(5) Records of actions taken during periods of malfunction to minimize emissions in accordance with the general duty to minimize emissions in § 63.11205(a), including corrective actions to restore the malfunctioning boiler, air pollution control, or monitoring equipment to its normal or usual manner of operation.

(6) You must keep the records of all inspection and monitoring data required by §§ 63.11221 and 63.11222, and the information identified in paragraphs (c)(6)(i) through (vi) of this section for each required inspection or monitoring.

(i) The date, place, and time of the monitoring event.

(ii) Person conducting the monitoring.

(iii) Technique or method used.

(iv) Operating conditions during the activity.

(v) Results, including the date, time, and duration of the period from the time the monitoring indicated a problem to the time that monitoring indicated proper operation.

(vi) Maintenance or corrective action taken (if applicable).

(7) If you use a bag leak detection system, you must keep the records specified in paragraphs (c)(7)(i) through (iii) of this section.

(i) Records of the bag leak detection system output.

(ii) Records of bag leak detection system adjustments, including the date and time of the adjustment, the initial bag leak detection system settings, and the final bag leak detection system settings.

(iii) The date and time of all bag leak detection system alarms, and for each valid alarm, the time you initiated corrective action, the corrective action taken, and the date on which corrective action was completed.

(d) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1). As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each recorded action. You must keep each record onsite for at least 2 years after the date of each recorded action according to § 63.10(b)(1). You may keep the records off site for the remaining 3 years.

(e) As of January 1, 2012 and within 60 days after the date of completing each performance test, as defined in § 63.2, conducted to demonstrate compliance with this subpart, you must submit relative accuracy test audit (i.e., reference method) data and performance test (i.e., compliance test) data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (*see http://www.epa.gov/ttn/chief/ert/ert tool.html/*) or other compatible electronic spreadsheet. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

(f) If you intend to commence or recommence combustion of solid waste, you must provide 30 days prior notice of the date upon which you will commence or recommence combustion of solid waste. The notification must identify:

(1) The name of the owner or operator of the affected source, the location of the source, the boiler(s) that will commence burning solid waste, and the date of the notice.

(2) The currently applicable subcategory under this subpart.

(3) The date on which you became subject to the currently applicable emission limits.

(4) The date upon which you will commence combusting solid waste.

(g) If you intend to switch fuels, and this fuel switch may result in the applicability of a different subcategory or a switch out of subpart JJJJJJ due to a switch to 100 percent natural gas, you must provide 30 days prior notice of the date upon which you will switch fuels. The notification must identify:

(1) The name of the owner or operator of the affected source, the location of the source, the boiler(s) that will switch fuels, and the date of the notice.

(2) The currently applicable subcategory under this subpart.

(3) The date on which you became subject to the currently applicable standards.

(4) The date upon which you will commence the fuel switch.

**§ 63.11226 How can I assert an affirmative defense if I exceed an emission limit during a malfunction?**

In response to an action to enforce the standards set forth in paragraph § 63.11201 you may assert an affirmative defense to a claim for civil penalties for exceedances of numerical emission limits that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess

emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Notification.* The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 63.11201 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

## Other Requirements and Information

### § 63.11235 What parts of the General Provisions apply to me?

Table 8 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you.

### § 63.11236 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by EPA or a delegated authority such as your state, local, or tribal agency. If the EPA Administrator has delegated authority to your state, local, or tribal agency, then that agency has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if implementation and enforcement of this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraphs (c) of this section are retained by the EPA Administrator and are not transferred to the state, local, or tribal agency.

(c) The authorities that cannot be delegated to state, local, or tribal agencies are specified in paragraphs (c)(1) through (5) of this section.

(1) Approval of an alternative non-opacity emission standard and work practice standards in § 63.11223(a).

(2) Approval of alternative opacity emission standard under § 63.6(h)(9).

(3) Approval of major change to test methods under § 63.7(e)(2)(ii) and (f). A "major change to test method" is defined in § 63.90.

(4) Approval of a major change to monitoring under § 63.8(f). A "major change to monitoring" is defined in § 63.90.

(5) Approval of major change to recordkeeping and reporting under § 63.10(f). A "major change to recordkeeping/reporting" is defined in § 63.90.

### § 63.11237 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2 (the General Provisions), and in this section as follows:

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

*Annual heat input basis* means the heat input for the 12 months preceding the compliance demonstration.

*Bag leak detection system* means a group of instruments that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.,* baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on electrodynamic, triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

*Biomass* means any biomass-based solid fuel that is not a solid waste. This includes, but is not limited to, wood residue and wood products (e.g., trees, tree stumps, tree limbs, bark, lumber, sawdust, sander dust, chips, scraps, slabs, millings, and shavings); animal manure, including litter and other bedding materials; vegetative agricultural and silvicultural materials, such as logging residues (slash), nut and grain hulls and chaff (*e.g.,* almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds. This definition of biomass is not intended to suggest that these materials are or are not solid waste.

*Biomass subcategory* includes any boiler that burns at least 15 percent biomass on an annual heat input basis.

*Boiler* means an enclosed device using controlled flame combustion in which water is heated to recover thermal energy in the form of steam or hot water. Controlled flame combustion refers to a steady-state, or near steady-state, process wherein fuel and/or oxidizer feed rates are controlled. Waste heat boilers are excluded from this definition.

*Boiler system* means the boiler and associated components, such as, the feedwater system, the combustion air system, the boiler fuel system (including burners), blowdown system, combustion control system, steam system, and condensate return system.

*Coal* means all solid fuels classifiable as anthracite, bituminous, sub-bituminous, or lignite by the American Society for Testing and Materials in ASTM D388 (incorporated by reference, see § 63.14), coal refuse, and petroleum coke. For the purposes of this subpart, this definition of "coal" includes synthetic fuels derived from coal including, but not limited to, solvent-refined coal, coal-oil mixtures, and coal-water mixtures. Coal derived gases are excluded from this definition.

*Coal subcategory* includes any boiler that burns any solid fossil fuel and no more than 15 percent biomass on an annual heat input basis.

*Commercial boiler* means a boiler used in commercial establishments such as hotels, restaurants, and laundries to provide electricity, steam, and/or hot water.

*Deviation* (1) Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(i) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limit, operating limit, or work practice standard;

(ii) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit; or

(2) A deviation is not always a violation. The determination of whether a deviation constitutes a violation of the standard is up to the discretion of the entity responsible for enforcement of the standards.

*Dry scrubber* means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers are included in this definition. A dry scrubber is a dry control system.

*Electrostatic precipitator (ESP)* means an add-on air pollution control device used to capture particulate matter by charging the particles using an electrostatic field, collecting the particles using a grounded collecting surface, and transporting the particles into a hopper. An electrostatic precipitator is a dry control system, except when it is operated with a wet scrubber.

*Energy assessment* means the following only as this term is used in Table 3 to this subpart:

(1) Energy assessment for facilities with affected boilers using less than 0.3 trillion Btu (TBtu) per year heat input will be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the affected boiler(s) energy output will be evaluated to identify energy savings opportunities, within the limit of performing a one day energy assessment.

(2) Energy assessment for facilities with affected boilers and process heaters using 0.3 to 1 TBtu/year will be three days in length maximum. The boiler system(s) and any energy use system(s) accounting for at least 33 percent of the affected boiler(s) energy output will be evaluated to identify energy savings opportunities, within the limit of performing a 3-day energy assessment.

(3) Energy assessment for facilities with affected boilers and process heaters using greater than 1.0 TBtu/year, the boiler system(s) and any energy use system(s) accounting for at least 20 percent of the affected boiler(s) energy output will be evaluated to identify energy savings opportunities.

*Energy use system* includes, but not limited to, process heating; compressed air systems; machine drive (motors, pumps, fans); process cooling; facility heating, ventilation, and air-conditioning (HVAC) systems; hot heater systems;, building envelop; and lighting.

*Equivalent* means the following only as this term is used in Table 5 to this subpart:

(1) An equivalent sample collection procedure means a published voluntary consensus standard or practice (VCS) or

EPA method that includes collection of a minimum of three composite fuel samples, with each composite consisting of a minimum of three increments collected at approximately equal intervals over the test period.

(2) An equivalent sample compositing procedure means a published VCS or EPA method to systematically mix and obtain a representative subsample (part) of the composite sample.

(3) An equivalent sample preparation procedure means a published VCS or EPA method that: Clearly states that the standard, practice or method is appropriate for the pollutant and the fuel matrix; or is cited as an appropriate sample preparation standard, practice or method for the pollutant in the chosen VCS or EPA determinative or analytical method.

(4) An equivalent procedure for determining heat content means a published VCS or EPA method to obtain gross calorific (or higher heating) value.

(5) An equivalent procedure for determining fuel moisture content means a published VCS or EPA method to obtain moisture content. If the sample analysis plan calls for determining mercury using an aliquot of the dried sample, then the drying temperature must be modified to prevent vaporizing this metal. On the other hand, if metals analysis is done on an "as received" basis, a separate aliquot can be dried to determine moisture content and the mercury concentration mathematically adjusted to a dry basis.

(6) An equivalent mercury determinative or analytical procedure means a published VCS or EPA method that clearly states that the standard, practice, or method is appropriate for mercury and the fuel matrix and has a published detection limit equal or lower than the methods listed in Table 5 to this subpart for the same purpose.

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse. A fabric filter is a dry control system.

*Federally enforceable* means all limitations and conditions that are enforceable by the EPA Administrator, including the requirements of 40 CFR part 60 and 40 CFR part 61, requirements within any applicable state implementation plan, and any permit requirements established under §§ 52.21 or under 51.18 and § 51.24.

*Fuel type* means each category of fuels that share a common name or classification. Examples include, but are not limited to, bituminous coal, sub-bituminous coal, lignite, anthracite, biomass, distillate oil, residual oil. Individual fuel types received from different suppliers are not considered new fuel types.

*Gaseous fuels* includes, but is not limited to, natural gas, process gas, landfill gas, coal derived gas, refinery gas, hydrogen, and biogas.

*Gas-fired boiler* includes any boiler that burns gaseous fuels not combined with any solid fuels, burns liquid fuel only during periods of gas curtailment, gas supply emergencies, or periodic testing on liquid fuel. Periodic testing of liquid fuel shall not exceed a combined total of 48 hours during any calendar year.

*Heat input* means heat derived from combustion of fuel in a boiler and does not include the heat input from preheated combustion air, recirculated flue gases, or returned condensate.

*Hot water heater* means a closed vessel with a capacity of no more than 120 U.S. gallons in which water is heated by combustion of gaseous or liquid fuel and is withdrawn for use external to the vessel at pressures not exceeding 160 psig, including the apparatus by which the heat is generated and all controls and devices necessary to prevent water temperatures from exceeding 210 degrees Fahrenheit (99 degrees Celsius).

*Industrial boiler* means a boiler used in manufacturing, processing, mining, and refining or any other industry to provide steam, hot water, and/or electricity.

*Institutional boiler* means a boiler used in institutional establishments such as medical centers, research centers, and institutions of higher education to provide electricity, steam, and/or hot water.

*Liquid fuel* means, but not limited to, petroleum, distillate oil, residual oil, any form of liquid fuel derived from petroleum, used oil, liquid biofuels, and biodiesel.

*Minimum activated carbon injection rate* means load fraction (percent) multiplied by the lowest 1-hour average activated carbon injection rate measured according to Table 6 to this subpart during the most recent performance stack test demonstrating compliance with the applicable emission limits.

*Minimum oxygen level* means the lowest 1-hour average oxygen level

measured according to Table 6 of this subpart during the most recent performance stack test demonstrating compliance with the applicable CO emission limit.

*Minimum PM scrubber pressure* drop means the lowest 1-hour average PM scrubber pressure drop measured according to Table 6 to this subpart during the most recent performance stack test demonstrating compliance with the applicable emission limit.

*Minimum sorbent flow rate* means the boiler load (percent) multiplied by the lowest 2-hour average sorbent (or activated carbon) injection rate measured according to Table 6 to this subpart during the most recent performance stack test demonstrating compliance with the applicable emission limits.

*Minimum voltage or amperage* means the lowest 1-hour average total electric power value (secondary voltage × secondary current = secondary electric power) to the electrostatic precipitator measured according to Table 6 to this subpart during the most recent performance stack test demonstrating compliance with the applicable emission limits.

*Natural gas* means:

(1) A naturally occurring mixture of hydrocarbon and nonhydrocarbon gases found in geologic formations beneath the earth's surface, of which the principal constituent is methane including intermediate gas streams generated during processing of natural gas at production sites or at gas processing plants; or

(2) Liquefied petroleum gas, as defined by the American Society for Testing and Materials in ASTM D1835 (incorporated by reference, see § 63.14).

(3) A mixture of hydrocarbons that maintains a gaseous state at ISO conditions. Additionally, natural gas must either be composed of at least 70 percent methane by volume or have a gross calorific value between 34 and 43 megajoules (MJ) per dry standard cubic meter (910 and 1,150 Btu per dry standard cubic foot).

(4) Propane or propane-derived synthetic natural gas. Propane means a colorless gas derived from petroleum and natural gas, with the molecular structure $C_3H_8$.

*Oil subcategory* includes any boiler that burns any liquid fuel and is not in either the biomass or coal subcategories. Gas-fired boilers that burn liquid fuel during periods of gas curtailment, gas supply emergencies, or for periodic testing not to exceed 48 hours during any calendar year are not included in this definition.

*Opacity* means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

*Particulate matter (PM)* means any finely divided solid or liquid material, other than uncombined water, as measured by the test methods specified under this subpart, or an alternative method.

*Performance testing* means the collection of data resulting from the execution of a test method used (either by stack testing or fuel analysis) to demonstrate compliance with a relevant emission standard.

*Period of natural gas curtailment or supply interruption* means a period of time during which the supply of natural gas to an affected facility is halted for reasons beyond the control of the facility. The act of entering into a contractual agreement with a supplier of natural gas established for curtailment purposes does not constitute a reason that is under the control of a facility for the purposes of this definition. An increase in the cost or unit price of natural gas does not constitute a period of natural gas curtailment or supply interruption.

*Qualified energy assessor* means:

(1) someone who has demonstrated capabilities to evaluate a set of the typical energy savings opportunities available in opportunity areas for steam generation and major energy using systems, including, but not limited to:

(i) Boiler combustion management.

(ii) Boiler thermal energy recovery, including

(A) Conventional feed water economizer,

(B) Conventional combustion air preheater, and

(C) Condensing economizer.

(iii) Boiler blowdown thermal energy recovery.

(iv) Primary energy resource selection, including

(A) Fuel (primary energy source) switching, and

(B) Applied steam energy versus direct-fired energy versus electricity.

(v) Insulation issues.

(vi) Steam trap and steam leak management.

(vi) Condensate recovery.

(viii) Steam end-use management.

(2) Capabilities and knowledge includes, but is not limited to:

(i) Background, experience, and recognized abilities to perform the assessment activities, data analysis, and report preparation.

(ii) Familiarity with operating and maintenance practices for steam or process heating systems.

(iii) Additional potential steam system improvement opportunities including improving steam turbine operations and reducing steam demand.

(iv) Additional process heating system opportunities including effective utilization of waste heat and use of proper process heating methods.

(v) Boiler-steam turbine cogeneration systems.

(vi) Industry specific steam end-use systems.

*Responsible official* means responsible official as defined in § 70.2.

*Solid fossil fuel* includes, but not limited to, coal, petroleum coke, and tire derived fuel.

*Waste heat boiler* means a device that recovers normally unused energy and converts it to usable heat. Waste heat boilers are also referred to as heat recovery steam generators.

*Work practice standard* means any design, equipment, work practice, or operational standard, or combination thereof, which is promulgated pursuant to section 112(h) of the Clean Air Act.

TABLE 1 TO SUBPART JJJJJJ OF PART 63—EMISSION LIMITS

[As stated in § 63.11201, you must comply with the following applicable emission limits:]

| If your boiler is in this subcategory | For the following pollutants. . . | You must achieve less than or equal to the following emission limits, except during periods of startup and shutdown. . . |
|---|---|---|
| 1. New coal-fired boiler with heat input capacity of 30 million Btu per hour or greater. | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| | b. Mercury | 0.0000048 lb per MMBtu of heat input. |
| | c. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen. |
| 2. New coal-fired boiler with heat input capacity of between 10 and 30 million Btu per hour. | a. Particulate Matter | 0.42 lb per MMBtu of heat input. |

TABLE 1 TO SUBPART JJJJJJ OF PART 63—EMISSION LIMITS—Continued

[As stated in § 63.11201, you must comply with the following applicable emission limits:]

| If your boiler is in this subcategory | For the following pollutants. . . | You must achieve less than or equal to the following emission limits, except during periods of startup and shutdown. . . |
|---|---|---|
| | b. Mercury | 0.0000048 lb per MMBtu of heat input. |
| | c. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen. |
| 3. New biomass-fired boiler with heat input capacity of 30 million Btu per hour or greater. | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| 4. New biomass fired boiler with heat input capacity of between 10 and 30 million Btu per hour. | a. Particulate Matter | 0.07 lb per MMBtu of heat input. |
| 5. New oil-fired boiler with heat input capacity of 10 million Btu per hour or greater. | a. Particulate Matter | 0.03 lb per MMBtu of heat input. |
| 6. Existing coal (units with heat input capacity of 10 million Btu per hour or greater). | a. Mercury | 0.0000048 lb per MMBtu of heat input. |
| | b. Carbon Monoxide | 400 ppm by volume on a dry basis corrected to 3 percent oxygen. |

TABLE 2 TO SUBPART JJJJJJ OF PART 63—WORK PRACTICE STANDARDS, EMISSION REDUCTION MEASURES, AND MANAGEMENT PRACTICES

[As stated in § 63.11201, you must comply with the following applicable work practice standards, emission reduction measures, and management practices:]

| If your boiler is in this subcategory. . . | You must meet the following. . . |
|---|---|
| 1. Existing or new coal, new biomass, and new oil (units with heat input capacity of 10 million Btu per hour or greater). | Minimize the boiler's startup and shutdown periods following the manufacturer's recommended procedures. If manufacturer's recommended procedures are not available, you must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available. |
| 2. Existing or new coal (units with heat input capacity of less than 10 million Btu per hour). | Conduct a tune-up of the boiler biennially as specified in § 63.11223. |
| 3. Existing or new biomass or oil | Conduct a tune-up of the boiler biennially as specified in § 63.11223. |
| 4. Existing coal, biomass, or oil (units with heat input capacity of 10 million Btu per hour and greater). | Must have a one-time energy assessment performed by a qualified energy assessor. An energy assessment completed on or after January 1, 2008, that meets or is amended to meet the energy assessment requirements in this table satisfies the energy assessment requirement. The energy assessment must include:<br>(1) A visual inspection of the boiler system,<br>(2) An evaluation of operating characteristics of the facility, specifications of energy using systems, operating and maintenance procedures, and unusual operating constraints,<br>(3) Inventory of major systems consuming energy from affected boiler(s),<br>(4) A review of available architectural and engineering plans, facility operation and maintenance procedures and logs, and fuel usage,<br>(5) A list of major energy conservation measures,<br>(6) A list of the energy savings potential of the energy conservation measures identified,<br>(7) A comprehensive report detailing the ways to improve efficiency, the cost of specific improvements, benefits, and the time frame for recouping those investments. |

TABLE 3 TO SUBPART JJJJJJ OF PART 63—OPERATING LIMITS FOR BOILERS WITH EMISSION LIMITS

[As stated in § 63.11201, you must comply with the applicable operating limits:]

| If you demonstrate compliance with applicable emission limits using . . . | You must meet these operating limits. . . |
|---|---|
| 1. Fabric filter control | a. Maintain opacity to less than or equal to 10 percent opacity (daily block average); OR<br>b. Install and operate a bag leak detection system according to § 63.11224 and operate the fabric filter such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during each 6-month period. |
| 2. Electrostatic precipitator control | a. Maintain opacity to less than or equal to 10 percent opacity (daily block average); OR<br>b. Maintain the secondary power input of the electrostatic precipitator at or above the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations. |
| 3. Wet PM scrubber control | Maintain the pressure drop at or above the lowest 1-hour average pressure drop across the wet scrubber and the liquid flow-rate at or above the lowest 1-hour average liquid flow rate measured during the most recent performance test demonstrating compliance with the PM emission limitation. |

TABLE 3 TO SUBPART JJJJJJ OF PART 63—OPERATING LIMITS FOR BOILERS WITH EMISSION LIMITS—Continued

[As stated in § 63.11201, you must comply with the applicable operating limits:]

| If you demonstrate compliance with applicable emission limits using . . . | You must meet these operating limits. . . |
|---|---|
| 4. Dry sorbent or carbon injection control | Maintain the sorbent or carbon injection rate at or above the lowest 2-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emissions limitation. When your boiler operates at lower loads, multiply your sorbent or carbon injection rate by the load fraction (e.g., actual heat input divided by the heat input during performance stack test, for 50 percent load, multiply the injection rate operating limit by 0.5). |
| 5. Any other add-on air pollution control type | This option is for boilers that operate dry control systems. Boilers must maintain opacity to less than or equal to 10 percent opacity (daily block average). |
| 6. Fuel analysis | Maintain the fuel type or fuel mixture (annual average) such that the mercury emission rates calculated according to § 63.11211(b) is less than the applicable emission limits for mercury. |
| 7. Performance stack testing | For boilers that demonstrate compliance with a performance stack test, maintain the operating load of each unit such that is does not exceed 110 percent of the average operating load recorded during the most recent performance stack test. |
| 8. Continuous Oxygen Monitor | Maintain the oxygen level at or above the lowest 1-hour average oxygen level measured during the most recent CO performance stack test. |

TABLE 4 TO SUBPART JJJJJJ OF PART 63—PERFORMANCE (STACK) TESTING REQUIREMENTS

[As stated in § 63.11212, you must comply with the following requirements for performance (stack) test for affected sources:]

| To conduct a performance test for the following pollutant. . . | You must. . . | Using. . . |
|---|---|---|
| 1. Particulate Matter | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A–1 to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A–2 to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A–2 to part 60 of this chapter, or ASTM D6522–00 (Reapproved 2005),[a] or ANSI/ASME PTC 19.10–1981.[a] |
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A–3 to part 60 of this chapter. |
| | e. Measure the particulate matter emission concentration. | Method 5 or 17 (positive pressure fabric filters must use Method 5D) in appendix A–3 and A–6 to part 60 of this chapter and a minimum 1 dscm of sample volume per run. |
| | f. Convert emissions concentration to lb/MMBtu emission rates. | Method 19 F-factor methodology in appendix A–7 to part 60 of this chapter. |
| 2. Mercury | a. Select sampling ports location and the number of traverse points. | Method 1 in appendix A–1 to part 60 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G in appendix A–2 to part 60 of this chapter. |
| | c. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A–2 to part 60 of this chapter, or ASTM D6522–00 (Reapproved 2005),[a] or ANSI/ASME PTC 19.10–1981.[a] |
| | d. Measure the moisture content of the stack gas. | Method 4 in appendix A–3 to part 60 of this chapter. |
| | e. Measure the mercury emission concentration. | Method 29, 30A, or 30B in appendix A–8 to part 60 of this chapter or Method 101A in appendix B to part 61 of this chapter or ASTM Method D6784–02.[a] Collect a minimum 2 dscm of sample volume with Method 29 of 101A per run. Use a minimum run time of 2 hours with Method 30A. |
| | f. Convert emissions concentration to lb/MMBtu emission rates. | Method 19 F-factor methodology in appendix A–7 to part 60 of this chapter. |
| 3. Carbon Monoxide | a. Select the sampling ports location and the number of traverse points. | Method 1 in appendix A–1 to part 60 of this chapter. |
| | b. Determine oxygen and carbon dioxide concentrations of the stack gas. | Method 3A or 3B in appendix A–2 to part 60 of this chapter, or ASTM D6522–00 (Reapproved 2005),[a] or ANSI/ASME PTC 19.10–1981.[a] |
| | c. Measure the moisture content of the stack gas. | Method 4 in appendix A–3 to part 60 of this chapter. |

TABLE 4 TO SUBPART JJJJJJ OF PART 63—PERFORMANCE (STACK) TESTING REQUIREMENTS—Continued

[As stated in § 63.11212, you must comply with the following requirements for performance (stack) test for affected sources:]

| To conduct a performance test for the following pollutant. . . | You must. . . | Using. . . |
|---|---|---|
| | d. Measure the carbon monoxide emission concentration. | Method 10, 10A, or 10B in appendix A–4 to part 60 of this chapter or ASTM D6522–00 (Reapproved 2005) [a] and a minimum 1 hour sampling time per run. |

[a] Incorporated by reference, see § 63.14.

TABLE 5 TO SUBPART JJJJJJ OF PART 63—FUEL ANALYSIS REQUIREMENTS

[As stated in § 63.11213, you must comply with the following requirements for fuel analysis testing for affected sources:]

| To conduct a fuel analysis for the following pollutant . . . | You must. . . | Using . . . |
|---|---|---|
| 1. Mercury | a. Collect fuel samples | Procedure in § 63.11213(b) or ASTM D2234/D2234M [a] (for coal) or ASTM D6323 [a] (for biomass) or equivalent. |
| | b. Compose fuel samples | Procedure in § 63.11213(b) or equivalent. |
| | c. Prepare composited fuel samples | EPA SW–846–3050B [a] (for solid samples) or EPA SW–846–3020A [a] (for liquid samples) or ASTM D2013/D2013M [a] (for coal) or ASTM D5198 [a] (for biomass) or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865 [a] (for coal) or ASTM E711 [a] (for biomass) or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173 [a] or ASTM E871 [a] or equivalent. |
| | f. Measure mercury concentration in fuel sample | ASTM D6722 [a] (for coal) or EPA SW–846–7471B [a] (for solid samples) or EPA SW–846–7470A [a] (for liquid samples) or equivalent. |
| | g. Convert concentrations into units of lb/MMBtu of heat content | |

[a] Incorporated by reference, see § 63.14.

TABLE 6 TO SUBPART JJJJJJ OF PART 63—ESTABLISHING OPERATING LIMITS

[As stated in § 63.11211, you must comply with the following requirements for establishing operating limits:]

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must. . . | Using. . . | According to the following requirements |
|---|---|---|---|---|
| 1. Particulate matter or mercury. | a. Wet scrubber operating parameters. | i. Establish a site-specific minimum pressure drop and minimum flow rate operating limit according to § 63.11211(b). | (1) Data from the pressure drop and liquid flow rate monitors and the particulate matter or mercury performance stack test. | (a) You must collect pressure drop and liquid flow-rate data every 15 minutes during the entire period of the performance stack tests; |
| | (b) Determine the average pressure drop and liquid flow-rate for each individual test run in the three-run performance stack test by computing the average of all the 15-minute readings taken during each test run.. | | | |
| | b. Electrostatic precipitator operating parameters (option only for units that operate wet scrubbers). | i. Establish a site-specific minimum secondary electric power according to § 63.11211(b). | (1) Data from the secondary electric power monitors during the particulate matter or mercury performance stack test. | (a) You must collect secondary electric power input data every 15 minutes during the entire period of the performance stack tests;<br>(b) Determine the secondary electric power input for each individual test run in the three-run performance stack test by computing the average of all the 15-minute readings taken during each test run. |

TABLE 6 TO SUBPART JJJJJJ OF PART 63—ESTABLISHING OPERATING LIMITS—Continued

[As stated in § 63.11211, you must comply with the following requirements for establishing operating limits:]

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must. . . | Using. . . | According to the following requirements |
|---|---|---|---|---|
| 2. Mercury | a. Activated carbon injection. | i. Establish a site-specific minimum activated carbon injection rate operating limit according to § 63.11211(b). | (1) Data from the activated carbon rate monitors and mercury performance stack tests. | (a) You must collect activated carbon injection rate data every 15 minutes during the entire period of the performance stack tests;<br>(b) Determine the average activated carbon injection rate for each individual test run in the three-run performance stack test by computing the average of all the 15-minute readings taken during each test run.<br>(c) When your unit operates at lower loads, multiply your activated carbon injection rate by the load fraction (e.g., actual heat input divided by heat input during performance stack test, for 50 percent load, multiply the injection rate operating limit by 0.5) to determine the required injection rate. |
| 3. Carbon monoxide | a. Oxygen | i. Establish a unit-specific limit for minimum oxygen level according to § 63.11211(b). | (1) Data from the oxygen monitor specified in § 63.11224(a). | (a) You must collect oxygen data every 15 minutes during the entire period of the performance stack tests;<br>(b) Determine the average oxygen concentration for each individual test run in the three-run performance stack test by computing the average of all the 15-minute readings taken during each test run. |

TABLE 7 TO SUBPART DDDDD OF PART 63—DEMONSTRATING CONTINUOUS COMPLIANCE

[As stated in § 63.11222, you must show continuous compliance with the emission limitations for affected sources according to the following:]

| If you must meet the following operating limits. . . | You must demonstrate continuous compliance by. . . |
|---|---|
| 1. Opacity | a. Collecting the opacity monitoring system data according to § 63.11224(e) and § 63.11221; and<br>b. Reducing the opacity monitoring data to 6-minute averages; and<br>c. Maintaining opacity to less than or equal to 10 percent (daily block average). |
| 2. Fabric filter bag leak detection operation | Installing and operating a bag leak detection system according to § 63.11224 and operating the fabric filter such that the requirements in § 63.11222(a)(4) are met. |
| 3. Wet scrubber pressure drop and liquid flow-rate. | a. Collecting the pressure drop and liquid flow rate monitoring system data according to §§ 63.11224 and 63.11221; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average pressure drop and liquid flow-rate at or above the operating limits established during the performance test according to § 63.1140. |
| 4. Dry scrubber sorbent or carbon injection rate | a. Collecting the sorbent or carbon injection rate monitoring system data for the dry scrubber according to §§ 63.11224 and 63.11220; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average sorbent or carbon injection rate at or above the minimum sorbent or carbon injection rate as defined in § 63.11237. |
| 5. Electrostatic precipitator secondary amperage and voltage, or total power input. | a. Collecting the secondary amperage and voltage, or total power input monitoring system data for the electrostatic precipitator according to §§ 63.11224 and 63.11220; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average secondary amperage and voltage, or total power input at or above the operating limits established during the performance test according to § 63.11214. |
| 6. Fuel pollutant content | a. Only burning the fuel types and fuel mixtures used to demonstrate compliance with the applicable emission limit according to § 63.11214 as applicable; and<br>b. Keeping monthly records of fuel use according to § 63.11222. |
| 7. Oxygen content | a. Continuously monitor the oxygen content in the combustion exhaust according to § 63.11224.<br>b. Maintain the 12-hour average oxygen content at or above the operating limit established during the most recent carbon monoxide performance test. |

TABLE 8 TO SUBPART JJJJJJ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJJ

[As stated in § 63.11235, you must comply with the applicable General Provisions according to the following:]

| General provisions cite | Subject | Does it apply? |
|---|---|---|
| § 63.1 | Applicability | Yes. |
| § 63.2 | Definitions | Yes. Additional terms defined in § 63.11237. |
| § 63.3 | Units and Abbreviations | Yes. |
| § 63.4 | Prohibited Activities and Circumvention | Yes. |
| § 63.5 | Preconstruction Review and Notification Requirements. | No |
| § 63.6(a), (b)(1)–(b)(5), (b)(7), (c), (f)(2)–(3), (g), (i), (j) | Compliance with Standards and Maintenance Requirements. | Yes. |
| § 63.6(e)(1)(i) | General Duty to minimize emissions | No. *See* § 63.11205 for general duty requirement. |
| § 63.6(e)(1)(ii) | Requirement to correct malfunctions ASAP. | No. |
| § 63.6(e)(3) | SSM Plan | No. |
| § 63.6(f)(1) | SSM exemption | No. |
| § 63.6(h)(1) | SSM exemption | No. |
| § 63.6(h)(2) to (9) | Determining compliance with opacity emission standards. | Yes. |
| § 63.7(a), (b), (c), (d) , (e)(2)–(e)(9), (f), (g), and (h) | Performance Testing Requirements | Yes. |
| § 63.7(e)(1) | Performance testing | No. *See* § 63.11210. |
| § 63.8(a), (b), (c)(1), (c)(1)(ii), (c)(2) to (c)(9), (d)(1) and (d)(2), (e),(f), and (g). | Monitoring Requirements | Yes. |
| § 63.8(c)(1)(i) | General duty to minimize emissions and CMS operation. | No. |
| § 63.8(c)(1)(iii) | Requirement to develop SSM Plan for CMS. | No. |
| § 63.8(d)(3) | Written procedures for CMS | Yes, except for the last sentence, which refers to an SSM plan. SSM plans are not required. |
| § 63.9 | Notification Requirements | Yes. |
| § 63.10(a) and (b)(1) | Recordkeeping and Reporting Requirements. | Yes. |
| § 63.10(b)(2)(i) | Recordkeeping of occurrence and duration of startups or shutdowns. | No. |
| § 63.10(b)(2)(ii) | Recordkeeping of malfunctions | No. *See* § 63.11225 for recordkeeping of (1) occurrence and duration and (2) actions taken during malfunctions. |
| § 63.10(b)(2)(iii) | Maintenance records | Yes. |
| § 63.10(b)(2)(iv) and (v) | Actions taken to minimize emissions during SSM. | No. |
| § 63.10(b)(2)(vi) | Recordkeeping for CMS malfunctions | Yes. |
| § 63.10(b)(2)(vii) to (xiv) | Other CMS requirements | Yes. |
| § 63.10(b)(3) | Recordkeeping requirements for applicability determinations. | No. |
| § 63.10(c)(1) to (9) | Recordkeeping for sources with CMS | Yes. |
| § 63.10(c)(10) | Recording nature and cause of malfunctions. | No. *See* § 63.11225 for malfunction recordkeeping requirements. |
| § 63.10(c)(11) | Recording corrective actions | No. *See* § 63.11225 for malfunction recordkeeping requirements. |
| § 63.10(c)(12) and (13) | Recordkeeping for sources with CMS | Yes. |
| § 63.10(c)(15) | Allows use of SSM plan | No. |
| § 63.10(d)(1) and (2) | General reporting requirements | Yes. |
| § 63.10(d)(3) | Reporting opacity or visible emission observation results. | No. |
| § 63.10(d)(4) | Progress reports under an extension of compliance. | Yes. |
| § 63.10(d)(5) | SSM reports | No. *See* § 63.11225 for malfunction reporting requirements. |
| § 63.10(e) and (f) | | Yes. |
| § 63.11 | Control Device Requirements | No. |
| § 63.12 | State Authority and Delegation | Yes. |
| § 63.13–63.16 | Addresses, Incorporation by Reference, Availability of Information, Performance Track Provisions. | Yes. |
| § 63.1(a)(5), (a)(7)–(a)(9), (b)(2), (c)(3)–(4), (d), 63.6(b)(6), (c)(3), (c)(4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv), 63.8(a)(3), 63.9(b)(3), (h)(4), 63.10(c)(2)–(4), (c)(9). | Reserved | No. |

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Part V

## Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

**[EPA–HQ–OAR–2002–0058; FRL–9272–8]**

**RIN 2060–AQ25**

# National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** On September 13, 2004, under authority of section 112 of the Clean Air Act, EPA promulgated national emission standards for hazardous air pollutants for new and existing industrial/commercial/institutional boilers and process heaters. On June 19, 2007, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the standards.

In response to the Court's vacatur and remand, EPA is, in this action, establishing emission standards that will require industrial/commercial/institutional boilers and process heaters located at major sources to meet hazardous air pollutants standards reflecting the application of the maximum achievable control technology. This rule protects air quality and promotes public health by reducing emissions of the hazardous air pollutants listed in section 112(b)(1) of the Clean Air Act.

**DATES:** This final rule is effective on May 20, 2011. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of May 20, 2011.

**ADDRESSES:** EPA established a single docket under Docket ID No. EPA–HQ–OAR–2002–0058 for this action. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information 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 through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1741.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian Shrager, Energy Strategies Group, Sector Policies and Programs Division, (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541–7689; Fax number (919) 541–5450; E-mail address: *shrager.brian@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The information presented in this preamble is organized as follows:

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J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. General Information

### *A. Does this action apply to me?*

The regulated categories and entities potentially affected by the final standards include:

| Category | NAICS code [1] | Examples of potentially regulated entities |
|---|---|---|
| Any industry using a boiler or process heater as defined in the final rule. | 211 ..... | Extractors of crude petroleum and natural gas. |

| Category | NAICS code [1] | Examples of potentially regulated entities |
|---|---|---|
| | 321 | Manufacturers of lumber and wood products. |
| | 322 | Pulp and paper mills. |
| | 325 | Chemical manufacturers. |
| | 324 | Petroleum refineries, and manufacturers of coal products. |
| | 316, 326, 339 | Manufacturers of rubber and miscellaneous plastic products. |
| | 331 | Steel works, blast furnaces. |
| | 332 | Electroplating, plating, polishing, anodizing, and coloring. |
| | 336 | Manufacturers of motor vehicle parts and accessories. |
| | 221 | Electric, gas, and sanitary services. |
| | 622 | Health services. |
| | 611 | Educational services. |

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility, company, business, organization, etc., would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.7485 of subpart DDDDD (National Emission Standards for Hazardous Air Pollutants (NESHAP) for Industrial, Commercial, and Institution Boilers and Process Heaters). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permitting authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

*B. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of this action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of the action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

*C. Judicial Review*

Under the Clean Air Act (CAA) section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by May 20, 2011. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

## II. Background Information

*A. What is the statutory authority for this final rule?*

Section 112(d) of the CAA requires EPA to set emissions standards for hazardous air pollutants (HAP) emitted by major stationary sources based on the performance of the maximum achievable control technology (MACT). The MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources (for which the Administrator has emissions information) or the best performing 5 sources for source categories with less than 30 sources (CAA section 112(d)(3)(A) and (B)). This level of minimum stringency is called the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled similar source (CAA section 112(d)(3)). EPA also must consider more stringent "beyond-the-floor" control options. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in emissions of HAP, but must take into account costs, energy, and nonair environmental impacts when doing so.

With respect to alkylated lead compounds; polycyclic organic matter (POM); hexachlorobenzene; mercury (Hg); polychlorinated biphenyls; 2,3,7,8-tetrachlorodibenzofurans; and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the CAA section 112(c)(6) requires EPA to list categories and subcategories of sources assuring that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under subsection 112(d)(2) or (d)(4). Standards established under CAA section 112(d)(2) must reflect the performance of MACT. "Industrial Coal Combustion," "Industrial Oil Combustion," "Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" are listed as source categories for regulation pursuant to CAA section 112(c)(6) due to emissions of POM and Hg (63 FR 17838, 17848, April 10, 1998). In the documentation for the 112(c)(6) listing, the commercial fuel combustion categories included institutional fuel combustion ("1990 Emissions Inventory of Section 112(c)(6) Pollutants, Final Report," April 1998).

CAA section 129(a)(1)(A) requires EPA to establish specific performance standards, including emission limitations, for "solid waste incineration units" generally, and, in particular, for "solid waste incineration units combusting commercial or industrial waste" (section 129(a)(1)(D)). Section 129 defines "solid waste incineration unit" as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public."

Section 129(g)(1). Section 129 also provides that "solid waste" shall have the meaning established by EPA pursuant to its authority under the Resource Conservation and Recovery Act. Section 129(g)(6).

In *Natural Resources Defense Council* v. *EPA,* 489 F. 3d 1250, 1257–61 (D.C. Cir. 2007), the court vacated the Commercial and Industrial Solid Waste Incineration (CISWI) Definitions Rule, 70 FR 55568 (September 22, 2005), which EPA issued pursuant to CAA section 129(a)(1)(D). In that rule, EPA defined the term "commercial or industrial solid waste incineration unit" to mean a combustion unit that combusts "commercial or industrial waste." The CISWI definitions rule defined "commercial or industrial waste" to mean waste combusted at a unit that does not recover thermal energy from the combustion for a useful purpose. Under these definitions, only those units that combusted commercial or industrial waste and were not designed to, or did not operate to, recover thermal energy from the combustion would be subject to section 129 standards. The District of Columbia Circuit (DC Circuit) rejected the definitions contained in the CISWI Definitions Rule and interpreted the term "solid waste incineration unit" in CAA section 129(g)(1) "to unambiguously include among the incineration units subject to its standards any facility that combusts any commercial or industrial solid waste material at all—subject to the four statutory exceptions identified in [CAA section 129(g)(1).]" *NRDC* v. *EPA,* 489 F.3d 1250, 1257–58. A more detailed discussion of this decision, as well as other court decisions relevant to today's action, can be found in the June 4, 2010, preamble to the proposed rule. See 75 FR 32009.

CAA section 129 covers any facility that combusts any solid waste; CAA section 129(g)(6) directs the Agency to the Resource Conservation and Recovery Act (RCRA) in terms of the definition of solid waste. In this **Federal Register**, EPA is issuing a definition of solid waste for purposes of Subtitle D of RCRA. If a unit combusts solid waste, it is subject to CAA section 129 of the Act, unless it falls within one of the four specified exceptions in CAA section 129(g).

The solid waste definitional rulemaking under RCRA is being finalized in a parallel action and is relevant to this proceeding because some industrial, commercial, or institutional boilers and process heaters combust secondary materials as alternative fuels. If industrial, commercial, or institutional boilers or process heaters combust secondary materials that are solid waste under the final definitional rule, those units would be subject to emission standards issued under section 129. The units subject to this final rule include those industrial, commercial, or institutional boilers and process heaters that do not combust solid waste, as well as boilers and process heaters that combust solid waste but qualify for one of the statutory exclusions contained in section 129(g)(1). EPA recognizes that it has imperfect information on the exact nature of the secondary materials which boilers and process heaters combust, including, for example, how much processing of such materials occurs, if any. We used the information currently available to the Agency to determine which units combust solid waste materials and, therefore, are subject to CAA section 129, and which units do not combust solid waste (or qualify for an exclusion from section 129) and, therefore, are subject to CAA section 112.

*B. EPA's Response to the Vacatur*

A description of EPA's information collection efforts and a description of the development of EPA's proposed response to the *NRDC* v. *EPA* mandate is contained in the preamble to the proposed rule. *See* 75 FR 32010–32011. After consideration of public comments on the proposed rule, we have made appropriate revisions to the final rule, and a description of the major changes is provided in this preamble. The changes reflect EPA's consideration of public comments and the consideration of additional information and emissions data provided through the public comment process. The changes also reflect adjustments to the definition of non-hazardous solid waste as set forth in a parallel final action. That final rule contains some revisions to the definition of non-hazardous solid waste proposed by EPA in June 2010. Accordingly, the population of combustion units subject to CAA section 129 (because they combust solid waste) and the population of boilers and process heaters subject to CAA section 112 (because they do not combust solid waste) were established considering the final solid waste definition issued today. We used the updated inventories and all available data, as appropriate, to develop the final standards for boilers and process heaters under CAA section 112 and, in a separate parallel action, the final standards for commercial and industrial solid waste incineration units covered by CAA section 129. We used all of the appropriate information available to the Administrator to calculate the MACT floors, set emission limits, and evaluate the emission impacts of various regulatory options for these final rulemakings.

*C. What is the relationship between this final rule and other combustion rules?*

This final rule addresses the combustion of non-solid waste materials in boilers and process heaters located at major sources of HAP. If an owner or operator of an affected source subject to these standards were to start combusting a solid waste (as defined by the Administrator under RCRA), the affected source would cease to be subject to this action and would instead be subject to regulation under CAA section 129. A rulemaking under CAA section 129 is being finalized in a parallel action and is relevant to this action because it would apply to boilers and process heaters that combust any solid waste and are located at a major source. In this final boiler rulemaking, EPA is providing specific language to ensure clarity regarding the necessary steps that must be followed for combustion units that begin combusting non-hazardous solid waste materials and become subject to section 129 standards instead of section 112 standards or combustion units that discontinue combustion of non-hazardous solid waste materials and become subject to section 112 standards instead of section 129 standards.

In addition to combustion units that may switch between the section 112 boiler standards and the section 129 incinerator standards, there are certain instances where boilers and process heaters are already regulated under other MACT standards. In such cases, the boilers and process heaters that are already subject to another MACT standard are not subject to the boiler standards.

In 1986, EPA codified new source performance standards (NSPS) for industrial boilers (40 CFR part 60, subparts Db and Dc) and portions of those standards were revised in 1999 and 2006. The NSPS regulates emissions of particulate matter (PM), sulfur dioxide ($SO_2$), and nitrogen oxide ($NO_X$) from boilers constructed after June 19, 1984. Sources subject to the NSPS will also be subject to the final CAA section 112(d) standards for boilers and process heaters because the section 112(d) standards regulate HAP emissions while the NSPS do not. However, in developing this final rule, we considered the monitoring requirements, testing requirements, and recordkeeping requirements of the NSPS to avoid duplicating requirements.

*D. What are the health effects of pollutants emitted from industrial/commercial/institutional boilers and process heaters?*

This final rule protects air quality and promotes the public health by reducing emissions of some of the HAP listed in CAA section 112(b)(1). As noted above, emissions data collected during development of the rule show that hydrogen chloride (HCl) emissions represent the predominant HAP emitted by industrial, commercial, and institutional (ICI) boilers, accounting for 69 percent of the total HAP emissions.[1] ICI boilers and process heaters also emit lesser amounts of hydrogen fluoride, accounting for about 21 percent of total HAP emissions, and metals (arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese (Mn), Hg, nickel, and selenium) accounting for about 6 percent of total HAP emissions. Organic HAP (formaldehyde, POM, acetaldehyde, benzene) account for about 4 percent of total HAP emissions. Exposure to these HAP, depending on exposure duration and levels of exposures, can be associated with a variety of adverse health effects. These adverse health effects may include, for example, irritation of the lung, skin, and mucus membranes, effects on the central nervous system, damage to the kidneys, and alimentary effects such as nausea and vomiting. We have classified two of the HAP as human carcinogens (arsenic and chromium VI) and four as probable human carcinogens (cadmium, lead, dioxins/furans, and nickel). We do not know the extent to which the adverse health effects described above occur in the populations surrounding these facilities. However, to the extent the adverse effects do occur, this final rule would reduce emissions and subsequent exposures.

*E. What are the costs and benefits of this final rule?*

EPA estimated the costs and benefits associated with the final rule, and the results are shown in the following table. For more information on the costs and benefits for this rule, *see* the Regulatory Impact Analysis (RIA).

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER MACT IN 2014

[Millions of 2008$]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| **Selected** | | |
| Total Monetized Benefits [2] | $22,000 to $54,000 | $20,000 to $49,000 |
| Total Social Costs [3] | $1,500 | $1,500 |
| Net Benefits | $20,500 to $52,500 | $18,500 to $47,500 |
| Non-monetized Benefits | 112,000 tons of CO, 30,000 tons of HCl, 820 tons of HF, 2,800 pounds of Hg. | |
| | 2,700 tons of other metals, 23 grams of dioxins/furans (TEQ), Health effects from $SO_2$ exposure, Ecosystem effects, Visibility impairment. | |
| **Alternative** | | |
| Total Monetized Benefits [2] | $18,000 to $43,000 | $16,000 to $39,000 |
| Total Social Costs [3] | $1,900 | $1,900 |
| Net Benefits | $16,100 to $41,100 | $14,100 to $37,100 |
| Non-monetized Benefits | 112,000 tons of CO, 22,000 tons of HCl, 620 tons of HF, 2,400 pounds of Hg, 2,600 tons of other metals, 23 grams of dioxins/furans (TEQ), Health effects from $SO_2$ exposure, Ecosystem effects, Visibility impairment. | |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $SO_2$, as well as reducing exposure to ozone through reductions of VOCs. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope *et al.* (2002) to Laden *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at $23 million for the selected option and $35 million for the alternative option. Ozone benefits are valued at $3.6 to $15 million for both options.

[3] The methodology used to estimate social costs for one year in the multimarket model using surplus changes results in the same social costs for both discount rates.

## III. Summary of This Final Rule

This section summarizes the requirements of this action. Section IV below provides a summary of the significant changes to this final rule following proposal.

*A. What is the source category regulated by this final rule?*

ICI boilers and process heaters located at major sources of HAP are regulated by this final rule. Waste heat boilers and boilers and process heaters that combust solid waste, except for specific exceptions to the definition of a solid waste incineration unit outlined in section 129(g)(1), are not subject to this final rule.

*B. What is the affected source?*

This final rule affects industrial boilers, institutional boilers, commercial boilers, and process heaters. A process heater is defined as a unit in which the combustion gases do not directly come into contact with process material or gases in the combustion chamber (*e.g.,* indirect fired). A boiler is defined as an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water.

[1] *See* Memorandum "Methodology for Estimating Impacts from Industrial, Commercial, Institutional Boilers and Process Heaters at Major Sources of Hazardous Air Pollutant Emissions" located in the docket.

*C. What are the pollutants regulated by this final rule?*

This final rule regulates HCl (as a surrogate for acid gas HAP), PM (as a surrogate for non-Hg HAP metals), carbon monoxide (CO) (as a surrogate for non-dioxin/furan organic HAP), Hg, and dioxin/furan emissions from boilers and process heaters.

*D. What emission limits and work practice standards must I meet?*

You must meet the emission limits presented in Table 1 of this preamble. This final rule includes 15 subcategories. Emission limits are established for new and existing sources for each of the subcategories, which are based on unit design.

Metallic HAP (regulated using PM as a surrogate), HCl, and Hg are "fuel-based pollutants" that are a direct result of contaminants in the fuels that are combusted. For those pollutants, if your new or existing unit combusts at least 10 percent solid fuel on an annual basis, your unit is subject to emission limits that are based on data from all of the solid fuel-fired combustor designs. If your new or existing unit combusts at least 10 percent liquid fuel and less than 10 percent solid fuel and your facility is located in the continental United States, your unit is subject to the liquid fuel emission limits for the fuel-based pollutants. If your facility is located outside of North America (referred to as a non-continental unit for the remainder of the preamble and in this final rule) and your new or existing unit combusts at least 10 percent liquid fuel and less than 10 percent solid fuel, your unit is subject to the non-continental liquid fuel emission limits for the fuel-based pollutants. Finally, for the fuel-based pollutants, if your unit combusts gaseous fuel that does not qualify as a "Gas 1" fuel, your unit is subject to the Gas 2 emission limits in Table 1 of this preamble. If your unit is a Gas 1 unit (that is, it combusts only natural gas, refinery gas, or equivalent fuel (other gas that qualifies as Gas 1 fuel)), with limited exceptions for gas curtailments and emergencies, your unit is subject to a work practice standard that requires an annual tune-up in lieu of emission limits.

For the combustion-based pollutants, CO (used as a surrogate for non-dioxin organic HAP) and dioxin/furan, your unit is subject to the emission limits for the design-based subcategories shown in Table 1 of this preamble. If your new or existing boiler or process heater burns at least 10 percent biomass on an annual average heat input [2] basis, the unit is in one of the biomass subcategories. If your new or existing boiler or process heater burns at least 10 percent coal, on an annual average heat input basis, and less than 10 percent biomass, on an annual average heat input basis, the unit is in one of the coal subcategories. If your facility is located in the continental United States and your new or existing boiler or process heater burns at least 10 percent liquid fuel (such as distillate oil, residual oil) and less than 10 percent coal and less than 10 percent biomass, on an annual average heat input basis, your unit is in the liquid subcategory. If your non-continental new or existing boiler or process heater burns at least 10 percent liquid fuel (such as distillate oil, residual oil) and less than 10 percent coal and less than 10 percent biomass, on an annual average heat input basis, your unit is in the non-continental liquid subcategory. Finally, for the combustion-based pollutants, if your unit combusts gaseous fuel that does not qualify as a "Gas 1" fuel, your unit is subject to the Gas 2 emission limits in Table 1. If your unit combusts only natural gas, refinery gas, or equivalent fuel (other gas that qualifies as Gas 1 fuel), with limited exceptions for gas curtailment and emergencies, your unit is subject to a work practice standard that requires an annual tune-up in lieu of emission limits.

TABLE 1—EMISSION LIMITS FOR BOILERS AND PROCESS HEATERS

[Pounds per million British thermal units]

| Subcategory | Particulate matter (PM) | Hydrogen chloride (HCl) | Mercury (Hg) | Carbon monoxide (CO) (ppm @3% oxygen) | Dioxin/furan (TEQ) (ng/dscm) |
|---|---|---|---|---|---|
| Existing—Coal Stoker | 0.039 | 0.035 | 0.0000046 | 270 | 0.003 |
| Existing—Coal Fluidized Bed | 0.039 | 0.035 | 0.0000046 | 82 | 0.002 |
| Existing—Pulverized Coal | 0.039 | 0.035 | 0.0000046 | 160 | 0.004 |
| Existing—Biomass Stoker/other | 0.039 | 0.035 | 0.0000046 | 490 | 0.005 |
| Existing—Biomass Fluidized Bed | 0.039 | 0.035 | 0.0000046 | 430 | 0.02 |
| Existing—Biomass Dutch Oven/Suspension Burner | 0.039 | 0.035 | 0.0000046 | 470 | 0.2 |
| Existing—Biomass Fuel Cells | 0.039 | 0.035 | 0.0000046 | 690 | 4 |
| Existing—Biomass Suspension/Grate | 0.039 | 0.035 | 0.0000046 | 3,500 | 0.2 |
| Existing—Liquid | 0.0075 | 0.00033 | 0.0000035 | 10 | 4 |
| Existing—Gas 2 (Other Process Gases) | 0.043 | 0.0017 | 0.000013 | 9.0 | 0.08 |
| Existing—non-continental liquid | 0.0075 | 0.00033 | 0.00000078 | 160 | 4 |
| New—Coal Stoker | 0.0011 | 0.0022 | 0.0000035 | 6 | 0.003 |
| New—Coal Fluidized Bed | 0.0011 | 0.0022 | 0.0000035 | 18 | 0.002 |
| New—Pulverized Coal | 0.0011 | 0.0022 | 0.0000035 | 12 | 0.003 |
| New—Biomass Stoker | 0.0011 | 0.0022 | 0.0000035 | 160 | 0.005 |
| New—Biomass Fluidized Bed | 0.0011 | 0.0022 | 0.0000035 | 260 | 0.02 |
| New—Biomass Dutch Oven/Suspension Burner | 0.0011 | 0.0022 | 0.0000035 | 470 | 0.2 |
| New—Biomass Fuel Cells | 0.0011 | 0.0022 | 0.0000035 | 470 | 0.003 |
| New—Biomass Suspension/Grate | 0.0011 | 0.0022 | 0.0000035 | 1,500 | 0.2 |
| New—Liquid | 0.0013 | 0.00033 | 0.00000021 | 3 | 0.002 |
| New—Gas 2 (Other Process Gases) | 0.0067 | 0.0017 | 0.0000079 | 3 | 0.08 |
| New—non-continental liquid | 0.0013 | 0.00033 | 0.00000078 | 51 | 0.002 |

[2] Heat input means heat derived from combustion of fuel in a boiler or process heater and does not include the heat derived from preheated combustion air, recirculated flue gases or exhaust from other sources (such as stationary gas turbines, internal combustion engines, and kilns).

The emission limits in Table 1 apply only to new and existing boilers and process heaters that have a designed heat input capacity of 10 million British thermal units per hour (MMBtu/hr) or greater. We also are providing optional output-based standards in this final rule. Pursuant to CAA section 112(h), we are requiring a work practice standard for four particular classes of boilers and process heaters: New and existing units that have a designed heat input capacity of less than 10 MMBtu/hr, and new and existing units in the Gas 1 (natural gas/refinery gas) subcategory and in the metal process furnaces subcategory. The work practice standard for these boilers and process heaters requires the implementation of a tune-up program as described in section III.F of this preamble.

We are also finalizing a beyond-the-floor standard for all existing major source facilities having affected boilers or process heaters that would require the performance of a one-time energy assessment, as described in section III.F of this preamble, by qualified personnel, on the affected boilers and facility to identify any cost-effective energy conservation measures.

*E. What are the requirements during periods of startup, shutdown, and malfunction?*

Consistent with *Sierra Club* v. *EPA*, EPA has established standards in this final rule that apply at all times. In establishing the standards in this final rule, EPA has taken into account startup and shutdown periods and, for the reasons explained below, has established different standards for those periods.

EPA has revised this final rule to require sources to meet a work practice standard, which requires following the manufacturer's recommended procedures for minimizing periods of startup and shutdown, for all subcategories of new and existing boilers and process heaters (that would otherwise be subject to numeric emission limits) during periods of startup and shutdown. As discussed in Section V.F of this preamble, we considered whether performance testing, and therefore, enforcement of numeric emission limits, would be practicable during periods of startup and shutdown. EPA determined that it is not technically feasible to complete stack testing—in particular, to repeat the multiple required test runs—during periods of startup and shutdown due to physical limitations and the short duration of startup and shutdown periods. Therefore, we have established the separate work practice standard for periods of startup and shutdown.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * * "(40 CFR 63.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. In *Mossville Environmental Action Now* v. *EPA*, 370 F.3d 1232, 1242 (D.C. Cir. 2004), the court upheld as reasonable standards that had factored in variability of emissions under all operating conditions. However, nothing in section 112(d) or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards. *See, Weyerhaeuser* v. *Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.")

Further, it is reasonable to interpret section 112(d) as not requiring EPA to account for malfunctions in setting emissions standards. For example, we note that Section 112 uses the concept of "best performing" sources in defining MACT, the level of stringency that major source standards must meet. Applying the concept of "best performing" to a source that is malfunctioning presents significant difficulties. The goal of best performing sources is to operate in such a way as to avoid malfunctions of their units.

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for boilers and process heaters. As noted above, by definition, malfunctions are sudden and unexpected events and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

Finally, EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. (*See, e.g.,* State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983)). EPA is, therefore, adding to this final rule an affirmative defense to civil penalties for exceedances of numerical emission limits that are caused by malfunctions. *See* 40 CFR 63.7575 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.). We also have added other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 63.7501. (*See* 40 CFR 22.24). The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment,

process equipment, or a process to operate in a normal or usual manner * * *." The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with section 63.7500(a)(3) and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that "[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *" and that "[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *." In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with Section 113 of the CAA (*see also* 40 CFR 22.77).

*F. What are the testing and initial compliance requirements?*

We are requiring that the owner or operator of a new or existing boiler or process heater must conduct performance tests to demonstrate compliance with all applicable emission limits. Affected units would be required to conduct the following compliance tests where applicable:

(1) Conduct initial and annual stack tests to determine compliance with the PM emission limits using EPA Method 5 or 17.

(2) Conduct initial and annual stack tests to determine compliance with the Hg emission limits using EPA method 29 or ASTM–D6784–02 (Ontario Hydro Method).

(3) Conduct initial and annual stack tests to determine compliance with the HCl emission limits using EPA Method 26A or EPA Method 26 (if no entrained water droplets in the sample).

(4) Use EPA Method 19 to convert measured concentration values to pound per million Btu values.

(5) Conduct initial and annual test to determine compliance with the CO emission limits using EPA Method 10.

(6) Conduct initial test to determine compliance with the dioxin/furan emission limits using EPA Method 23.

As part of the initial compliance demonstration, we are requiring that you monitor specified operating parameters during the initial performance tests that you would conduct to demonstrate compliance with the PM, Hg, HCl, CO, and dioxin/furan emission limits. You must calculate the average hourly parameter values measured during each test run over the three run performance test. The lowest or highest hourly average of the three test run values (depending on the parameter measured) for each applicable parameter would establish the site-specific operating limit. The applicable operating parameters for which operating limits would be required to be established are based on the emissions limits applicable to your unit as well as the types of add-on controls on the unit. The following is a summary of the operating limits that we are requiring to be established for the various types of the following units:

(1) For boilers and process heaters with wet PM scrubbers, you must measure pressure drop and liquid flow rate of the scrubber during the performance test, and calculate the average hourly values during each test run. The lowest hourly average determined during the three test runs establishes your minimum site-specific pressure drop and liquid flow rate operating levels.

(2) If you are complying with an HCl emission limit using a wet acid gas scrubber, you must measure pH and liquid flow rate of the scrubber sorbent during the performance test, and calculate the average hourly values during each test run of the performance test for HCl and determine the lowest hourly average of the pH and liquid flow rate for each test run for the performance test. This establishes your minimum pH and liquid flow rate operating limits.

(3) For boilers and process heaters with sorbent injection, you must measure the sorbent injection rate for each acid gas sorbent used during the performance tests for HCl and for activated carbon for Hg and dioxin/furan and calculate the hourly average for each sorbent injection rate during each test run. The lowest hourly average measured during the performance tests becomes your site-specific minimum sorbent injection rate operating limit. If different acid gas sorbents and/or injection rates are used during the HCl test, the lowest hourly average value for each sorbent becomes your site-specific operating limit. When your unit operates at lower loads, multiply your sorbent injection rate by the load fraction (operating heat input divided by the average heat input during your last compliance test for the appropriate pollutant) to determine the required parameter value.

(4) For boilers and process heaters with fabric filters not subject to PM Continuous Emission Monitoring System (CEMS) or continuous compliance with an opacity limit (*i.e.,* COMS), the fabric filter must be operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period unless a CEMS is installed to measure PM.

(5) For boilers and process heaters with electrostatic precipitators (ESP) not subject to PM CEMS or continuous compliance with an opacity limit (*i.e.,* COMS) and you must measure the secondary voltage and secondary current of the ESP collection fields during the Hg and PM performance test. You then calculate the average total secondary electric power value from these parameters for each test run. The lowest average total secondary electric power measured during the three test runs establishes your site-specific minimum operating limit for the ESP.

(6) For boilers and process heaters that choose to demonstrate compliance with the Hg emission limit on the basis of fuel analysis, you are required to measure the Hg content of the inlet fuel that was burned during the Hg performance test. This value is your maximum fuel inlet Hg operating limit.

(7) For boilers and process heaters that choose to demonstrate compliance with the HCl emission limit on the basis of fuel analysis, you are required to measure the chlorine content of the inlet fuel that was burned during the HCl performance test. This value is your maximum fuel inlet chlorine operating limit.

(8) For boilers and process heaters that are subject to a CO emission limit and a dioxin/furan emission limit, you are required to measure the oxygen concentration in the flue gas during the initial CO and dioxin/furan performance test. The lowest hourly average oxygen concentration measured during the most recent performance test is your operating limit, and your unit must operate at or above your operating limit on a 12-hour block average basis.

These operating limits do not apply to owners or operators of boilers or process heaters having a heat input capacity of less than 10 MMBtu/hr or boilers or process heaters of any size which combust natural gas or other clean gas, metal process furnaces, or limited use units, as discussed in section IV.D.3 of this preamble. Instead, owners or operators of such boilers and process heaters shall submit to the delegated authority or EPA, as appropriate, if requested, documentation that a tune-up meeting the requirements of this final rule was conducted. In order to comply with the work practice standard, a tune-up procedure must include the following:

(1) Inspect the burner, and clean or replace any components of the burner as necessary,

(2) Inspect the flame pattern and make any adjustments to the burner necessary to optimize the flame pattern consistent with the manufacturer's specifications,

(3) Inspect the system controlling the air-to-fuel ratio, and ensure that it is correctly calibrated and functioning properly,

(4) Optimize total emissions of CO consistent with the manufacturer's specifications,

(5) Measure the concentration in the effluent stream of CO in parts per million by volume dry (ppmvd), before and after the adjustments are made,

(6) Submit to the delegated authority or EPA an annual report containing the concentrations of CO in the effluent stream in ppmvd, and oxygen in percent dry basis, measured before and after the adjustments of the boiler, a description of any corrective actions taken as a part of the combustion adjustment, and the type and amount of fuel used over the 12 months prior to the annual adjustment.

Further, all owners or operators of major source facilities having boilers and process heaters subject to this final rule are required to submit to the delegated authority or EPA, as appropriate, documentation that an energy assessment was performed, by a qualified energy assessor, and the cost-effective energy conservation measures indentified.

*G. What are the continuous compliance requirements?*

To demonstrate continuous compliance with the emission limitations, we are requiring the following:

(1) For units combusting coal, biomass, or residual fuel oil (*i.e.,* No 4, 5 or 6 fuel oil) with heat input capacities of less than 250 MMBtu/hr that do not use a wet scrubber, we are requiring that opacity levels be maintained to less than 10 percent (daily average) for existing and new units with applicable emission limits. Or, if the unit is controlled with a fabric filter, instead of continuous monitoring of opacity, the fabric filter must be continuously operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period (unless a PM CEMS is used).

(2) For units combusting coal, biomass, or residual oil with heat input capacities of 250 MMBtu/hr or greater, we are requiring that PM CEMS be installed and operated and that PM levels (monthly average) be maintained below the applicable PM limit.

(3) For boilers and process heaters with wet PM scrubbers, we are requiring that you monitor pressure drop and liquid flow rate of the scrubber and maintain the 12-hour block averages at or above the operating limits established during the performance test to demonstrate continuous compliance with the PM emission limits.

(4) For boilers and process heaters with wet acid gas scrubbers, you must monitor the pH and liquid flow rate of the scrubber and maintain the 12-hour block average at or above the operating limits established during the most recent performance test to demonstrate continuous compliance with the HCl emission limits.

(5) For boilers and process heaters with dry scrubbers, we are requiring that you continuously monitor the sorbent injection rate and maintain it at or above the operating limits, which include an adjustment for load, established during the performance tests. When your unit operates at lower loads, multiply your sorbent injection rate by the load fraction (operating load divided by the load during your last compliance test for the appropriate pollutant) to determine the required parameter value.

(6) For boilers and process heaters having heat input capacities of less than 250 MMBtu/hr with an ESP, we are requiring that you monitor the voltage and current of the ESP collection plates and maintain the 12-hour block total secondary electric power averages at or above the operating limits established during the Hg or PM performance test.

(7) For units that choose to comply with either the Hg emission limit or the HCl emission limit based on fuel analysis rather than on performance testing, you must maintain monthly fuel records that demonstrate that you burned no new fuels or fuels from a new supplier such that the Hg content or the chlorine content of the inlet fuel was maintained at or below your maximum fuel Hg content operating limit or your chlorine content operating limit set during the performance tests. If you plan to burn a new fuel, a fuel from a new mixture, or a new supplier's fuel that differs from what was burned during the initial performance tests, then you must recalculate the maximum Hg input and/or the maximum chlorine input anticipated from the new fuels based on supplier data or own fuel analysis, using the methodology specified in Table 6 of this final rule. If the results of recalculating the inputs exceed the average content levels established during the initial test then, you must conduct a new performance test(s) to demonstrate continuous compliance with the applicable emission limit.

(8) For all boilers and process heaters, except those that are exempt from the incinerator standards under section 129 because they are qualifying facilities burning a homogeneous waste stream, you must maintain records of fuel use that demonstrate that your fuel was not solid waste.

(9) For boilers and process heaters with an oxygen monitor installed for this final rule, you must maintain an oxygen concentration level, on a 12-hour block average basis, no less than lowest hourly average oxygen concentration measured during the most recent performance test.

(10) For boilers and process heaters that demonstrate compliance using a performance test. You must maintain an operating load no greater than 110 percent of the operating load established during the performance test.

If an owner or operator would like to use a control device other than the ones specified in this section to comply with this final rule, the owner/operator should follow the requirements in 40 CFR 63.8(f), which presents the procedure for submitting a request to the Administrator to use alternative monitoring.

*H. What are the notification, recordkeeping and reporting requirements?*

All new and existing sources are required to comply with certain requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 10 of this final rule. The General Provisions include specific requirements for notifications, recordkeeping, and reporting.

Each owner or operator is required to submit a notification of compliance status report, as required by § 63.9(h) of the General Provisions. This final rule requires the owner or operator to include in the notification of compliance status report certifications of compliance with rule requirements.

Semiannual compliance reports, as required by § 63.10(e)(3) of subpart A, are required only for semiannual reporting periods when a deviation from any of the requirements in the rule occurred, or any process changes occurred and compliance certifications were reevaluated.

This final rule requires records to demonstrate compliance with each emission limit and work practice standard. These recordkeeping requirements are specified directly in the General Provisions to 40 CFR part

63, and are identified in Table 10. Owners or operators of sources with units with heat input capacity of less than 10 MMBtu/hr, units combusting natural gas or other clean gas, metal process furnaces, limited use units, and temporary use units must keep records of the dates and the results of each required boiler tune-up.

Records of either continuously monitored parameter data for a control device if a device is used to control the emissions or CEMS data are required.

You are required to keep the following records:

(1) All reports and notifications submitted to comply with this final rule.

(2) Continuous monitoring data as required in this final rule.

(3) Each instance in which you did not meet each emission limit and each operating limit (*i.e.,* deviations from this final rule).

(4) Daily hours of operation by each source.

(5) Total fuel use by each affected source electing to comply with an emission limit based on fuel analysis for each 30-day period along with a description of the fuel, the total fuel usage amounts and units of measure, and information on the supplier and original source of the fuel.

(6) Calculations and supporting information of chlorine fuel input, as required in this final rule, for each affected source with an applicable HCl emission limit.

(7) Calculations and supporting information of Hg fuel input, as required in this final rule, for each affected source with an applicable Hg emission limit.

(8) A signed statement, as required in this final rule, indicating that you burned no new fuel type and no new fuel mixture or that the recalculation of chlorine input demonstrated that the new fuel or new mixture still meets chlorine fuel input levels, for each affected source with an applicable HCl emission limit.

(9) A signed statement, as required in this final rule, indicating that you burned no new fuels and no new fuel mixture or that the recalculation of Hg fuel input demonstrated that the new fuel or new fuel mixture still meets the Hg fuel input levels, for each affected source with an applicable Hg emission limit.

(10) A copy of the results of all performance tests, fuel analysis, opacity observations, performance evaluations, or other compliance demonstrations conducted to demonstrate initial or continuous compliance with this final rule.

(11) A copy of your site-specific monitoring plan developed for this final rule as specified in 63 CFR 63.8(e), if applicable.

We are also requiring that you submit the following reports and notifications:

(1) Notifications required by the General Provisions.

(2) Initial Notification no later than 120 calendar days after you become subject to this subpart, even if you submitted an initial notification for the vacated standards that were promulgated in 2004.

(3) Notification of Intent to conduct performance tests and/or compliance demonstration at least 60 calendar days before the performance test and/or compliance demonstration is scheduled.

(4) Notification of Compliance Status 60 calendar days following completion of the performance test and/or compliance demonstration.

(5) Compliance reports semi-annually.

*I. Submission of Emissions Test Results to EPA*

EPA must have performance test data and other compliance data to conduct effective reviews of CAA Section 112 and 129 standards, as well as for many other purposes including compliance determinations, emissions factor development, and annual emissions rate determinations. In conducting these required reviews, we have found it ineffective and time consuming not only for us but also for regulatory agencies and source owners and operators to locate, collect, and submit emissions test data because of varied locations for data storage and varied data storage methods. One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for cumbersome paper copies.

In this action, we are taking a step to improve data accessibility. Owners and operators of ICI boilers located at major source facilities will be required to submit to EPA an electronic copy of reports of certain performance tests required under this final rule. Data will be collected through an electronic emissions test report structure called the Electronic Reporting Tool (ERT) that will be used by the staff as part of the emissions testing project. The ERT was developed with input from stack testing companies who generally collect and compile performance test data electronically and offices within State and local agencies which perform field test assessments. The ERT is currently available, and access to direct data submittal to EPA's electronic emissions database (WebFIRE) is scheduled to become available by December 31, 2011.

The requirement to submit source test data electronically to EPA will not require any additional performance testing and will apply to those performance tests conducted using test methods that are supported by ERT. The ERT contains a specific electronic data entry form for most of the commonly used EPA reference methods. The Web site listed below contains a listing of the pollutants and test methods supported by ERT. In addition, when a facility submits performance test data to WebFIRE, there will be no additional requirements for emissions test data compilation. Moreover, we believe industry will benefit from development of improved emissions factors, fewer follow-up information requests, and better regulation development as discussed below. The information to be reported is already required for the existing test methods and is necessary to evaluate the conformance to the test method.

One major advantage of collecting source test data through the ERT is that it provides a standardized method to compile and store much of the documentation required to be reported by this final rule while clearly stating what testing information we require. Another important benefit of submitting these data to EPA at the time the source test is conducted is that it will substantially reduce the effort involved in data collection activities in the future. Specifically, because EPA would already have adequate source category data to conduct residual risk assessments or technology reviews, there would likely be fewer or less substantial data collection requests (e.g., CAA Section 114 letters). This results in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests).

State/local/Tribal agencies may also benefit in that their review may be more streamlined and accurate because the States will not have to re-enter the data to assess the calculations and verify the data entry. Finally, another benefit of submitting these data to WebFIRE electronically is that these data will improve greatly the overall quality of the existing and new emissions factors by supplementing the pool of emissions test data upon which the emissions factor is based and by ensuring that data are more representative of current industry operational procedures. A common complaint we hear from industry and regulators is that emissions factors are outdated or not representative of a particular source category. Receiving and incorporating

data for most performance tests will ensure that emissions factors, when updated, represent accurately the most current operational practices. In summary, receiving test data already collected for other purposes and using them in the emissions factors development program will save industry, State/local/Tribal agencies, and EPA time and money and work to improve the quality of emissions inventories and related regulatory decisions.

As mentioned earlier, the electronic data base that will be used is EPA's WebFIRE, which is a database accessible through EPA's TTN. The WebFIRE database was constructed to store emissions test and other data for use in developing emissions factors. A description of the WebFIRE data base can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main.*

Source owners and operators will be able to transmit data collected via the ERT through EPA's Central Data Exchange (CDX) network for storage in the WebFIRE data base. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html.*

Source owners and operators must register with the CDX system to obtain a user name and password before being able to submit data to the CDX. The CDX registration page can be found at: *https://cdx.epa.gov/SSL/CDX/regwarning.asp?Referer=registration.* If they have a current CDX account (*e.g.,* they submit reports for EPA's Toxic Release Inventory Program to the CDX), then the existing user name and password can be used to log in to the CDX.

## IV. Summary of Significant Changes Since Proposal

### *A. Applicability*

Since proposal, several changes to the applicability of this final rule have been made. First, at proposal, we excluded all units that combust solid waste from the standards, but we have extended the coverage of this final rule to boilers and process heaters that combust solid waste but are exempt, by statute, from section 129 incinerator rules because they are qualifying small power producers or cogeneration units that combust a homogeneous waste stream. This final rule continues to exclude other waste burning units. This is a clarifying change that is consistent with the intent of the proposed rule to establish emissions standards for all boilers and process heaters that are not solid waste incineration units subject to regulation under section 129.

The proposed rule definition of coal was revised to include all types of fossil-based fuels in the coal definition. The final coal definition is: "*Coal* means all solid fuels classifiable as anthracite, bituminous, sub-bituminous, or lignite by the American Society for Testing and Materials in ASTM D388–991, "Standard Specification for Classification of Coals by Rank" (incorporated by reference, *see* § 63.14(b)), coal refuse, and petroleum coke. For the purposes of this subpart, this definition of "coal" includes synthetic fuels derived from coal for the purpose of creating useful heat, including but not limited to, solvent-refined coal, coal-oil mixtures, and coal-water mixtures. Coal derived gases are excluded from this definition." Similarly, for biomass, the definition of biomass fuel was revised to include any potential biomass-based fuels. This is also a clarifying change consistent with the intent of the proposed rule as described above. The final definition is: "Biomass or bio-based solid fuel means any solid biomass-based fuel that is not a solid waste. This may include, but is not limited to, the following materials: Wood residue; wood products (*e.g.,* trees, tree stumps, tree limbs, bark, lumber, sawdust, sanderdust, chips, scraps, slabs, millings, and shavings); animal manure, including litter and other bedding materials; vegetative agricultural and silvicultural materials, such as logging residues (slash), nut and grain hulls and chaff (*e.g.,* almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds. This definition of biomass fuel is not intended to suggest that these materials are or not solid waste."

The proposed rule included a definition of waste heat boiler that excluded from the definition units with supplemental burners that are designed to supply 50 percent or more of the total rated heat input capacity. The final definition was revised to include all waste heat boilers. The final definition is: "Waste heat boiler means a device that recovers normally unused energy and converts it to usable heat. Waste heat boilers are also referred to as heat recovery steam generators." Similarly, the waste heat process heater definition was revised to read as follows: "Waste heat process heater means an enclosed device that recovers normally unused energy and converts it to usable heat. Waste heat process heaters are also referred to as recuperative process heaters." These changes were made in order to exempt the types of units intended at proposal.

The proposed rule exempted blast furnace gas fuel-fired boiler or process heaters, and defined these units as units combusting 90 percent or more of its total heat input from blast furnace gas. We have changed the requirement to 90 percent or more of its total volume of gas in this final rule. This change was made so that the units that were intended to be exempted from this final rule would be exempted. The wording of the proposed exemption did not exempt units that were intended to be exempted because the heating value of blast furnace gas is not as high as that of natural gas.

The proposed rule exempted units that are an affected source in another MACT standard. We amended this language to include any unit that is part of the affected source subject to another MACT standard. We also exempted any unit that is used as a control device to comply with another MACT standard, provided that at least 50 percent of the heat input is provided by the gas stream that is regulated under another MACT standard. This change was made in order to encourage the recovery of energy from high heating value gases that would otherwise be flared.

### *B. Subcategories*

In the proposed rule, for the fuel-dependent HAP (metals, Hg, acid gases), we identified the following five basic unit types as subcategories: (1) Units designed to burn coal, (2) units designed to burn biomass, (3) units designed to burn liquid fuel, (4) units designed to burn natural gas/refinery gas, and (5) units designed to burn other process gases. In this final rule, for fuel-dependent HAP, we combined the subcategories for units designed to combust coal and biomass into a subcategory for units designed to burn solid fuels. We changed the subcategory for units designed to burn natural gas/refinery gas to a subcategory for units that burn natural gas, refinery gas, and other clean gas. We also added subcategories for non-continental liquid units and limited-use units.

As described in the preamble to the proposed rule, within the basic unit types there are different designs and combustion systems that, while having a minor effect on fuel-dependent HAP emissions, have a much larger effect on pollutants whose emissions depend on the combustion conditions in a boiler or process heater. In the case of boilers and process heaters, the combustion-related pollutants are the organic HAP. In the proposed rule, we identified the

following 11 subcategories for organic HAP: (1) Pulverized coal units; (2) stokers designed to burn coal; (3) fluidized bed units designed to burn coal; (4) stokers designed to burn biomass; (5) fluidized bed units designed to burn biomass; (6) suspension burners/dutch ovens designed to burn biomass; (7) fuel cells designed to burn biomass; (8) units designed to burn liquid fuel; (9) units designed to burn natural gas/refinery gas; (10) units designed to burn other gases; and (11) metal process furnaces. In this final rule, we added subcategories for biomass suspension/grate units, non-continental liquid units, and limited-use units.

*C. Emission Limits*

The proposed rule included numerical emission limits for PM, Hg, HCl, CO, and dioxin/furan, and limits for those same pollutants are included in this final rule. Unlike the proposed rule, we included a compliance alternative in the final rule to allow owners and operators of existing affected sources to demonstrate compliance on an output-basis instead of on a heat input basis. Compliance with the alternate output-based emission limits would require measurement of boiler operating parameters associated with the mass rate of emissions and energy outputs. If you elect to comply with the alternate output-based emission limits, you must use equations provided in the final rule to demonstrate that emissions from the applicable units do not exceed the output-based emission limits specified in the final rule. If you use this compliance alternative using the emission credit approach, you must also establish a benchmark, calculate and document the emission credits generated from energy conservation measures implemented, and develop and submit the implementation plan no later than 180 days before the date that the facility intends to demonstrate compliance.

*D. Work Practices*

This final rule includes work practice standards for most of the same units for which we proposed work practice standards, including new and existing units in the Gas 1 subcategory, existing units with heat input capacity less than 10 MMBtu/hr, and new and existing metal process furnaces. In addition to those subcategories for which we proposed work practices, this final rule includes work practices for all units during periods of startup and shutdown, new units with heat input capacity less than 10 MMBtu/hr, limited use units, and units combusting other clean gases. Other clean gases are gases, other than natural gas and refinery gas (as defined in this final rule), that meet contaminant level specifications that are provided in the final rule.

*E. Energy Assessment Requirements*

In this final rule, we have expanded the definition of energy assessment with respect to the requirements of Table 3 of this final rule, by providing a duration for performing the energy assessment and defining the evaluation requirements for each boiler system and energy use system. These requirements are based on the total annual heat input to the affected boilers and process heaters.

This final rule requires an energy assessment for facilities with affected boilers and process heaters using less than 0.3 trillion Btu per year (TBtu/y) heat input to be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the energy output from these units must be evaluated to identify energy savings opportunities within the limit of performing a one day energy assessment. An energy assessment for a facility with affected boilers and process heaters using 0.3 to 1 TBtu/year must be three days in length maximum. From these boilers, the boiler system and any energy use system accounting for at least 33 percent of the energy output will be evaluated, within the limit of performing a three day energy assessment. For facilities with affected boilers and process heaters using greater than 1 TBtu/year heat input, the energy assessment must address the boiler system and any energy use system accounting for at least 20 percent of the energy output to identify energy savings opportunities.

The expanded definition for energy assessment clarifies the duration and requirements for each energy assessment for various units based on energy use. We have also added a definition for steam and process heating systems to clarify the components for each boiler system which must be considered during the energy assessment, including elements such as combustion management, thermal energy recovery, energy resource selection, and the steam end-use management of each affected boiler.

Lastly, we have clarified the requirement in Table 3 to evaluate facility energy management practices as part of the energy assessment and a definition of an energy management program was added. The use of the ENERGY STAR Facility Energy Assessment Matrix as part of this review is recommended, but it was removed as a requirement in Table 3. The definition of an energy management program added to the rule is consistent with the ENERGY STAR Guidelines for Energy Management that can be referenced for further guidance. ENERGY STAR provides a variety of tools and resources that support energy management programs. For more information, visit *http://www.energystar.gov.*

*F. Requirements During Startup, Shutdown, and Malfunction*

For startup, shutdown, and malfunction (SSM), the requirements have changed since proposal. For periods of startup and shutdown, EPA is finalizing work practice standards, which require following manufacturers specifications for minimizing periods of startup and shutdown, in lieu of numeric emission limits. For malfunctions, EPA added affirmative defense language to this final rule for exceedances of the numerical emission limits that are caused by malfunctions.

*G. Testing and Initial Compliance*

The first significant change to the testing and initial compliance requirements is that units greater than 100 MMBtu/hr must comply with the CO limits using a stack test rather than CO CEMS. EPA also added optional output-based limits that promote energy efficient boiler operation. Another significant change is that for units combusting gaseous fuels other than natural gas or refinery gas, in order to qualify for the Gas 1 subcategory work practice standard, the gases that will be combusted must be certified to meet the contaminant levels specified for Hg and hydrogen sulfide ($H_2S$) in this final rule. Finally, EPA has changed the dioxin/furan testing requirement to a one-time compliance demonstration due to the low dioxin/furan emissions demonstrated by the vast majority of sources that have tested for dioxin/furan.

*H. Continuous Compliance*

The only significant change to the continuous compliance requirements is for monitoring of CO. Rather than using CO CEMS, as proposed, units will be required to continuously monitor and record the oxygen level in their flue gas during the initial compliance test and establish an operating limit that requires that the unit operate at an oxygen percentage of at least 90 percent of the operating limit on a 12-hour block average basis. Units will be required to continuously monitor oxygen to ensure continuous compliance.

*I. Notification, Recordkeeping, and Reporting*

In this final action, we are requiring that owners or operators of boilers that choose to commence or recommence combustion of solid waste must provide 30 days notice of the date upon which the source will commence or recommence combustion of solid waste. The notification must identify the name of the owner or operator of the affected source, the location of the source, the boiler(s) or process heater(s) that will commence burning solid waste, and the date of the notice; the currently applicable subcategory under this subpart; the date on which the unit became subject to the currently applicable emission limits; and the date upon which the unit will commence or recommence combusting solid waste.

For each limited-use unit, owners or operators must monitor and record the operating hours on a monthly basis for the unit. This will ensure that units qualify for the limited-use subcategory.

We also added a requirement that sources keep records of operating load in order to demonstrate continuous compliance with the operating load operating limit.

When malfunctions occur, owners or operators must keep records of the occurrence and duration of each malfunction of the boiler or process heater, or of the associated air pollution control and monitoring equipment, as well as records of actions taken during periods of malfunction to minimize emissions, including corrective actions to restore the malfunctioning boiler or process heater, air pollution control, or monitoring equipment to its normal or usual manner of operation.

Finally, for facilities that elect to use emission credits from energy conservation measures to demonstrate compliance, owners or operators must keep a copy of the Implementation Plan required in this rule and copies of all data and calculations used to establish credits.

*J. Technical/Editorial Corrections*

In this final action, we are making a number of technical corrections and clarifications to subpart DDDDD. These changes improve the clarity and procedures for implementing the emission limitations to affected sources. We are also clarifying several definitions to help affected sources determine their applicability. We have modified some of the regulatory language that we proposed based on public comments.

In several places throughout the subpart, including the associated tables, we have corrected the cross-references to other sections and paragraphs of the subpart.

We revised 40 CFR 63.7485 to clarify that for the purposes of subpart DDDDD, a major source of HAP is as defined in 40 CFR 63.2, except that for oil and gas facilities a major source of HAP is as defined in 40 CFR 63.761 (40 CFR part 63, subpart HH, National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities). This change was made because facilities subject to subpart HH contain units that will be subject to subject DDDDD.

The word "specifically" was removed from § 63.7491(i) in order to clarify the exclusion for boilers and process heaters regulated by other HAP regulations.

We revised 40 CFR 63.7505(c) to clarify that performance testing is needed only if a boiler or process heater is subject to an applicable emission limit listed in Table 2.

We made several changes to the initial compliance demonstration requirements. We revised 40 CFR 63.7510(a) to clarify that sources using a second fuel only for start up, shut down, and/or transient flame stability are still considered to be sources using a single fuel. We revised 40 CFR 63.7510(c) to clarify that boilers and process heaters with a heat input capacity below 10 MMBtu per hour are not required to conduct a performance test for CO because they are not subject to a numerical emission limit for CO. In 40 CFR 63.7510(d), we clarified that boilers and process heaters that use a CEMS for PM are exempt from the performance testing and operating limit requirements specified in 40 CFR 63.7510(a) because the CEMS demonstrates continuous compliance. We revised 40 CFR 63.7510(c) and (d) to clarify that compliance for those provisions does not apply to units burning natural gas or refinery gas.

We changed the performance testing requirements in 40 CFR 63.7515(b), (c), and (d) to state that performance testing for a given pollutant may be performed every 3 years, instead of annually, if measured emissions during 2 consecutive annual performance tests are less than 75 percent of the applicable emission limit.

In 40 CFR 63.7515(e), we clarified that boilers and process heaters with a heat input capacity below 10 MMBtu per hour are required to conduct tune-ups biennially, while larger natural gas and other Gas 1 units are required to conduct annual tune-ups.

We revised 40 CFR 63.7515(f) to clarify that monthly fuel analyses are required only for fuel types for which emission limits apply.

We made several changes to 40 CFR 63.7520 to clarify the performance testing requirements. We revised paragraph (c) to clarify that performance tests must be conducted at representative operating load conditions, instead of at the maximum normal operating load. Language was also added to this section and to Table 4 to subpart DDDDD to establish an operating limit for the boiler or process heater and clarified that the operating load must not exceed 110 percent of the load used during the performance test. We revised paragraph (d) to clarify that compliance with operating limits using a continuous parameter monitoring systems are based on the 4-hour block averages of the data collected by the continuous parameter monitoring systems.

In 40 CFR 63.7522, we made several changes to the provisions for using emissions averaging. In paragraph (a), we clarified that average emissions must be "* * * not more than 90 percent of the applicable emission limit." We also added a sentence to clarify that new boilers and process heaters may not be included in an emissions average used to demonstrate compliance according to that section. Equations 2 and 3 were revised to correct the discount factor from 0.9 to 1.1 because the actual emissions are multiplied by the discount factor. We also revised paragraph (c) to clarify that the deadline to establish emission caps to demonstrate compliance with the emission averaging option is 60 days after the publication of the final rule as referenced in paragraph (g)(2)(i), and revised paragraph (g) to clarify that facilities are required to submit an implementation plan as referenced in § 63.7522(g)(1).

We made several clarifying changes to the monitoring requirements in 40 CFR 63.7525. We revised paragraph (a) to clarify that only boilers or process heaters subject to a CO limit are required to install a continuous oxygen monitoring system. We adopted language from § 63.7525(d)(2) to § 63.7525(a)(6) to clarify what constitutes a deviation. In 40 CFR 63.7525(c)(7), we clarified that owners/operators are required to determine 6-minute and daily block averages excluding data from periods in which the continuous opacity monitoring system is out of control.

The initial compliance provisions in 40 CFR 63.7530(b) were revised to clarify that facilities are exempted from the initial compliance requirements of conducting a fuel analysis if only one

fuel type is used. We revised 40 CFR 63.7530(d) to clarify that units less than 10 MMBtu per hour are required to submit a signed statement with the Notification of Compliance Status report that indicates a tune-up has been conducted.

We revised 40 CFR 63.7540(a)(9)(i) to remove the reference to Procedure 2 in Appendix F to 40 CFR part 60; Procedure 2 specifies the ongoing QA/QC requirements for PM CEMS after certification and is correctly referenced in paragraph (a)(9)(iii) of that section.

We revised the notification requirements in 40 CFR 63.7545 to clarify that notifications should be submitted to the delegated authority, and to clarify that the Notification of Intent to conduct a performance test must be submitted 60 days before the test is scheduled to begin.

The reporting requirements originally in 40 CFR 63.7550(g) and (g)(1) through (g)(3) are more correctly considered notification requirements, so they were moved to § 63.7545(e)(8).

In response to comments asking for clarification, we have added definitions to 40 CFR 63.7575 for "Calendar year," "Operating day," "Refinery gas," and "Valid hourly average." We have also revised several definitions in that section based on public comments. For example, we revised the definition of "boiler" to describe what is meant by the term "controlled flame combustion" as used in that definition; revised "metal processing furnace" to include homogenizing furnaces; revised the definitions of "dry scrubber," "electrostatic precipitator," and "fabric filter," to indicate that these are all considered dry control systems. The definition of "wet scrubber" was revised to clarify that, "A wet scrubber creates an aqueous stream or slurry as a byproduct of the emissions control process."

The definition of "Tune-up" was removed from 40 CFR 63.7575 because all of the requirements for a tune-up are provided in the rule language at 40 CFR 63.7540(a)(10), making the definition unnecessary.

Several of the definitions in 40 CFR 64.7575 were revised to clarify the types of equipment to which different standards apply. For example, the definition of "Temporary boiler" was revised to include additional criteria that could be used to identify temporary boilers from permanently installed units. The definition of "Unit designed to burn oil subcategory" was revised to exclude periods of gas curtailment and gas supply emergency from the 48-hour limit on liquid fuel combustion. Likewise, the definition of "Period of natural gas curtailment" was revised to clarify that contractual agreements for curtailed gas usage or fluctuations in price do not constitute periods of gas curtailment under the scope of this regulation. The definition of "Waste heat boiler" was revised to remove the criteria that 50 percent of total rated heat input capacity had to be from waste gases. We also revised the definition of "Natural gas" to include gas derived from naturally occurring mixtures found in geological formations as long as the principal constituent is methane, consistent with the definition provided in 40 CFR part 60 subpart Db. A definition of propane, was also incorporated into the definition of natural gas.

Several changes were made to the tables to subpart DDDDD as a result of the public comments on the proposed rule.

In Tables 1 and 2, the references to "Other gases" were revised to "Gas 2" to clarify that units burning natural gas, refinery gas, or other clean gases are not subject to emission limitations. The emission limits in these two tables were also revised to include averaging times for those pollutants for which measurements are taken with a continuous emission monitor.

In Table 3, the references to "§ 63.11202 and § 63.11203" in the table heading were revised to correctly reference 40 CFR 63.7540. The text in the first and second column of Table 3 was revised to clarify that the requirements apply to both boilers and process heaters. A new row was added to clarify that work practice standards apply to new boilers or process heaters with a rated heat input capacity less than 10 MMBtu per hour. Language was also added to clarify that the energy assessment is a one-time requirement for existing boilers and process heaters. Additionally, new language was added clarifying the evaluation of the facility's energy management program as part of the energy assessment.

In Table 4, operating limits for pH added to Item 1 for wet scrubbers, as specified in 40 CFR 63.7530(b)(3)(i). Item 5 revised to clarify that "Any other control type" only means add-on air-pollution control devices. The operating limits were also revised to clarify which units and control combinations were required to install and operate a bag leak detection system, to install and operate a continuous opacity monitor, or to monitor voltage and amperage of an ESP. These changes removed the appearance that some units would need to do more than one type of monitoring for control of PM. This table was also revised to include a row for an operating limit for unit operating load for those units that demonstrate compliance using a performance test.

Table 5 was revised to include EPA Method 23 as the accepted method for measuring dioxin/furan. A new Table 11 was also added to document the toxic equivalency factors that should be used to demonstrate compliance with the toxic equivalents (TEQ) emission limits.

Table 7 was revised to include dry scrubbers and activated carbon injection used to comply with Hg or dioxin/furan emission limitations, and to include procedures for determining the corresponding operating limit requirements. Procedures were also added for determining the operating limit for unit operating load for units that demonstrate compliance through performance testing. Finally, this table was revised to clarify how the operating limits should be determined for wet scrubbers and for ESPs operated with wet scrubbers.

Table 8 was revised to correct certain cross-references to 40 CFR 63.7530, and to include procedures for demonstrating continuous compliance with the operating limit for unit operating load.

Table 9 was revised to correct cross-references to 40 CFR 63.7550(c) and Table 3 for work practice standards. Language in Item 1.c. revised to more clearly match the language in 40 CFR 63.7530(d) and (e), and Item 1.c. was split into Items 1.c. and 1.d.

*K. Other*

The definition of a boiler and the definition of a process heater have been revised to include units that combust solid waste but are exempt, by statute, from section 129. This change was necessary in order to provide coverage of units that would otherwise be exempt from any requirements. The revised definitions read as follows:

*Boiler* means an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Controlled flame combustion refers to a steady-state, or near steady-state, process wherein fuel and/or oxidizer feed rates are controlled. A device combusting solid waste, as defined in 40 CFR 241.3, is not a boiler unless the device is exempt from the definition of a solid waste incineration unit as provided in CAA section 129(g)(1). Waste heat boilers are excluded from this definition.

*Process heater* means an enclosed device using controlled flame, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit,

instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. For purposes of this subpart, a device combusting solid waste, as defined in 40 CFR 241.3, is not a process heater unless the device is exempt from the definition of a solid waste incineration unit as provided in CAA section 129(g)(1). Process heaters do not include units used for comfort heat or space heat, food preparation for on-site consumption, or autoclaves.

As a result of new data received for the floor calculations, revised treatment of low reported CO data to consider measurement error, and a new subcategorization scheme, some of the final CO limits for new sources in Table 1 of this final rule are more stringent than proposed, as are some of the other limits for certain subcategories (e.g., PM and Hg for liquid fuel units, and PM and HCl for solid fuel units when compared to the proposed new source limits for the proposed biomass/bio-based fuel subcategory). Where a final limit is more stringent than proposed, 40 CFR 63.6 of subpart A (General Provisions), requires that new sources that commenced construction between proposal and promulgation be allowed to comply with the proposed limits for 3 years (i.e., up to the existing source compliance date) and then comply with the final limits for new sources listed in Table 1 of this final rule. In this final rule we have added a new Table 12 to outline the emission limits applicable to sources that commenced construction between proposal and promulgation and updated the rule language to provide instructions on which limits apply to them for the 3 year period after this final rule is published. These sources have the option to comply with Table 1 (final) limits from the start, if they choose.

## V. Major Source Public Comments and Responses

### *A. MACT Floor Analysis*

#### 1. Pollutant-by-Pollutant Approach

*Comment:* Many commenters raised concerns about the way EPA determined the MACT floors using a pollutant-by-pollutant approach. Commenters contended that such a methodology produced limits that are not achievable in combination, and as such, the limits do not comport with the intent of the statute or the recent court decision (*NRDC* v. *EPA*, 2007). Commenters argue that while the Court's 2007 decision in *NRDC* v. *EPA* vacating the first ICI boiler and process heater MACT standard directed EPA to consider individual HAPs, it did not direct EPA to establish a separate floor for each HAP. Commenters further added that the Clean Air Act (CAA) directs EPA to set standards based on the overall performance of "sources" and sections 112(d)(1), (2), and (3) specify that emissions standards be established on the "in practice" performance of a "source" in the category or subcategory. If Congress had intended for EPA to establish MACT floor levels considering the achievable emission limits of individual HAPs, it could have worded 112(d)(3) to refer to the best-performing sources "for each pollutant." Many commenters added that EPA's discretion in setting standards is limited to distinguishing among classes, types, and sizes of sources. However, Congress limited EPA's authority to parse units and sources with similar design and types but it does not allow EPA to "distinguish" units and sources by individual pollutant as proposed in this rule [*Sierra Club* v. *EPA,* 551 F.3d 1019, 1028 (D.C. Cir. 2008)]. By calculating each MACT floor independently of the other pollutants, the combination of HAP limits results in a set of standards that only a hypothetical "best performing" unit could achieve.

Many commenters who criticized the pollutant-by-pollutant approach also filed comments on other rules such as the recent Portland Cement NESHAP and the NSPS and Emission Guidelines for Hospital/Medical Infectious Waste Incinerators (HMIWI). Some commenters expressed concern that EPA used a similar pollutant-by-pollutant approach in the HMIWI rulemaking and that rulemaking is being challenged before the D.C. Circuit. Commenters also submitted a variety of suggestions on calculating a multi-pollutant approach. Some commenters suggested that human health be considered by weighting pollutants according to relative-toxicity and then ranking the units in each subcategory according to their weighted emission totals in order to identify the best performing 12 percent of sources for all pollutants.

*Response:* We disagree with the commenters who believe MACT floors cannot be set on a pollutant-by-pollutant basis. Contrary to the commenters' suggestion, section 112(d)(3) does not mandate a total facility approach. A reasonable interpretation of section 112(d)(3) is that MACT floors may be established on a HAP-by-HAP basis, so that there can be different pools of best performers for each HAP. Indeed, as illustrated below, the total facility approach not only is not compelled by the statutory language but can lead to results so arbitrary that the approach may simply not be legally permissible.

Section 112(d)(3) is ambiguous as to whether the MACT floor is to be based on the performance of an entire source or on the performance achieved in controlling particular HAP. Congress specified in section 112(d)(3) the minimum level of emission reduction that could satisfy the requirement to adopt MACT. For new sources, this floor level is to be "the emission control that is achieved in practice by the best controlled similar source." For existing sources, the floor level is to be "the average emission limitation achieved by the best performing 12 percent of the existing sources" for categories and subcategories with 30 or more sources, or "the average emission limitation achieved by the best performing 5 sources" for categories and subcategories with fewer than 30 sources. Commenters point to the statute's reference to the best performing "sources," and claim that Congress would have specifically referred to the best performing sources "for each pollutant" if it intended for EPA to establish MACT floors separately for each HAP. EPA disagrees. The language of the Act does not address whether floor levels can be established HAP-by-HAP or by any other means. The reference to "sources" does not lead to the assumption the commenters make that the best performing sources can only be the best-performing sources for the entire suite of regulated HAP. Instead, the language can be reasonably interpreted as referring to the source as a whole or to performance as to a particular HAP. Similarly, the reference in the new source MACT floor provision to "emission control achieved by the best controlled similar source" can mean emission control as to a particular HAP or emission control achieved by a source as a whole.

Industry commenters also stressed that section 112(d) requires that floors be based on actual performance from real facilities, pointing to such language as "existing source", "best performing", and "achieved in practice". EPA agrees that this language refers to sources' actual operation, but again the language says nothing about whether it is referring to performance as to individual HAP or to single facility's performance for all HAP. Industry commenters also said that Congress could have mandated a HAP-by-HAP result by using the phrase "for each HAP" at appropriate points in section 112(d). The fact that Congress did not do so does not compel any inference that Congress was *sub-silentio* mandating a different result

when it left the provision ambiguous on this issue. The argument that MACT floors set HAP-by-HAP are based on the performance of a hypothetical facility, so that the limitations are not based on those achieved in practice, just re-begs the question of whether section 112(d)(3) refers to whole facilities or individual HAP. All of the limitations in the floors in this rule of course reflect sources' actual performance and were achieved in practice. Finally, there are a number of existing units that *meet all* of the final existing source emission limits.

Commenters also point to EPA's subcategorization authority, and claim that because Congress authorized EPA to distinguish among classes, types, and sizes of units, EPA cannot distinguish units by individual pollutant, as they allege EPA did in the proposed rule. However, that statutory language addresses EPA's authority to subcategorize sources within a source category prior to setting standards, which EPA has done for boilers and process heaters. EPA is not distinguishing within each subcategory based on HAP emitted. Rather, it is establishing emissions standards based on the emissions limits achieved by units in each subcategory. Therefore, EPA's subcategorization authority is irrelevant to the question of how EPA establishes MACT floor standards once it has made the decision to distinguish among sources and create subcategories.

EPA's long-standing interpretation of the Act is that the existing and new source MACT floors are to be established on a HAP-by-HAP basis. One reason for this interpretation is that a whole plant approach could yield least common denominator floors—that is floors reflecting mediocre or no control, rather than performance which is the average of what best performers have achieved. *See* 61 FR at 173687 (April 19, 1996); 62 FR at 48363–64 (September 15, 1997) (same approach adopted under the very similar language of section 129(a)(2)). Such an approach would allow the performance of sources that are outside of the best-performing 12 percent for certain pollutants to be included in the floor calculations for those same pollutants, and it is even conceivable that the worst performing source for a pollutant could be considered a best performer overall, a result Congress could not have intended. Inclusion of units that are outside of the best performing 12 percent for particular pollutants would lead to emission limits that do not meet the requirements of the statute.

For example, if the best performing 12 percent of facilities for HAP metals were also the worst performing units for organics, the floor for organics or metals would end up not reflecting best performance. In such a situation, EPA would have to make some type of value judgment as to which pollutant reductions are most critical to decide which sources are best controlled.[3] Such value judgments are antithetical to the direction of the statute at the MACT floor-setting stage. Commenters suggested that a multi-pollutant approach could be implemented by weighting pollutants according to relative toxicity and calculating weighted emissions totals to use as a basis for identifying and ranking best performers. This suggested approach would require EPA to essentially prioritize the regulated HAP based on relative risk to human health of each pollutant, where risk is a criterion that has no place in the establishment of MACT floors, which are required by statute to be based on technology.

The central purpose of the amended air toxic provisions was to apply strict technology-based emission controls on HAPs. *See, e.g.*, H. Rep. No. 952, 101st Cong. 2d sess. 338. The floor's specific purpose was to assure that consideration of economic and other impacts not be used to "gut the standards. While costs are by no means irrelevant, they should by no means be the determining factors. There needs to be a minimum degree of control in relation to the control technologies that have already been attained by the best existing sources." A Legislative History of the Clean Air Act *Vol. II* at 2897 (statement of Rep. Collins). An interpretation that the floor level of control must be limited by the performance of devices that only control some of these pollutants effectively "guts the standards" by including worse performers in the averaging process, whereas EPA's interpretation promotes the evident Congressional objective of having the floor reflect the average performance of best performing sources. Since Congress has not spoken to the precise question at issue, and the Agency's interpretation effectuates statutory goals and policies in a reasonable manner, its interpretation must be upheld. *See Chevron* v. *NRDC,* 467 U.S. 837 (1984).[4]

It is true that legislative history can sometimes be so clear as to give clear meaning to what is otherwise ambiguous statutory text. As just explained, EPA's HAP-by-HAP approach fulfills the evident statutory purpose and is supported by the most pertinent legislative history. A few industry commenters nonetheless indicated that a HAP-by-HAP approach is inconsistent with legislative history to section 112(d), citing to page 169 of the Senate Report. Since this Report was to a version of the bill which did not include a floor provision at all (much less the language at issue here), it is of no relevance. *National Lime II,* 233 F. 3d at 638.

Industry commenters also noted that EPA retains the duty to investigate and, if justifiable, to adopt beyond the floor standards, so that potential least common denominator floors resulting from the whole facility approach would not have to "gut the standards." That EPA may adopt more stringent standards based on what is "achievable" after considering costs and other factors is irrelevant to how EPA is required to set MACT floors. MACT floors must be based on the emission limitation achieved by the best performing 12 percent of existing sources, and, for new sources, on the level achieved by the best controlled similar source, and EPA must make this determination without consideration of cost. At best, standards reflecting a beyond-the-floor level of performance will have to be cost-justified; at worst, standards will remain at levels reflecting mediocre performance. Under either scenario, Congress' purpose in requiring floors is compromised.

EPA notes, however, that if optimized performance for different HAPs is not technologically possible due to mutually inconsistent control technologies (for example, metals performance decreases if organics reduction is optimized), then this would have to be taken into account by EPA in establishing a floor (or floors). The Senate Report indicates that if certain types of otherwise needed controls are mutually exclusive, EPA is to optimize the part of the standard providing the most environmental protection. S. Rep. No. 228, 101st Cong. 1st sess. 168 (although, as noted, the bill accompanying this Report contained no floor provisions). It should be

[3] *See* Petitioners Brief in *Medical Waste Institute et al.* v. *EPA*, No. 09–1297 (D.C. Cir.) pointing out, in this context, that "the best performers for some pollutants are the worst performers for others" (p. 34) and "[s]ome of the best performer for certain pollutants are among the worst performers for others."

[4] Since industry commenters argued that the statute can only be read to allow floors to be determined on a single source basis, commenters offered no view of why their reading could be viewed as reasonable in light of the statute's goals and objectives. It is not evident how any statutory goal is promoted by an interpretation that allows floors to be determined in a manner likely to result in floors reflecting emissions from worst or mediocre performers.

emphasized, however, that "the fact that no plant has been shown to be able to meet all of the limitations does not demonstrate that all the limitations are not achievable." *Chemical Manufacturers Association* v. *EPA,* 885 F. 2d at 264 (upholding technology-based standards based on best performance for each pollutant by different plants, where at least one plant met each of the limitations but no single plant met all of them).

All available data for boilers and process heaters indicate that there is no technical problem achieving the floor levels contained in this final rule for each HAP simultaneously, using the MACT floor technology. Data demonstrating a technical conflict in meeting all of the limits have not been provided, and, in addition, there are a number of units that meet all of the final existing source emission limits.

2. Minimum Number of Units To Set New Source Floors

*Comment:* Many commenters indicated that section 112 requires that data from a minimum of 5 units is required to set MACT floors for existing sources. Commenters noted that EPA's use of less than 5 units for subcategories with greater than 30 units is a legalistic reading of section 112 that could result in such absurd results as using 5 units to set MACT floors for a subcategory with 29 units and data for only 10 units, but using a single unit to set MACT floors for a subcategory with 31 units and data for only 10 units.

*Response:* EPA does not agree that section 112(d)(3) mandates a minimum of 5 sources in all instances, notwithstanding the incongruity of having less data to establish floors for larger source categories than is mandated for smaller ones. The literal language of the provision appears to compel this result. Section 112(d)(3) states that for categories and subcategories with at least 30 sources, the MACT floor for existing sources shall be no less stringent than the average emission limitation achieved by the best-performing twelve percent of the sources for which the Administrator has emissions information. The plain language of this provision requires that, for subcategories with at least 30 sources but where the Administrator only has emissions information on a small number of units, the floor can be no less stringent than the average emission limitation achieved by the best-performing twelve percent of those sources.

3. Treatment of Detection Levels

*Comment:* When setting the MACT floors, non-detect values are present in many of the datasets from best performing units. Commenters provided input on how these non-detect values should be treated in the MACT floor analysis. Some commenters agreed that it is appropriate to keep the detection levels as reported; while certain commenters suggested that the detection levels should be replaced using a value of half the method detection limit (MDL). Many other commenters stated that data that are below the detection limit should not be used in setting the floors, and these data should be replaced with a higher value including either the MDL, limit of quantitation (LOQ), practical quantitation limit (PQL), or reporting limit (RL) for the purposes of the MACT floor calculations. Other commenters stated all non-detect values should be excluded from the floor analysis, or all values should be treated as 0. Some commenters stated it is necessary to keep the data as reported because changing values would lead to an upward bias. Additional commenters agreed with this basic premise, but suggested that replacing non-detect data with a value of half the MDL is appropriate while still minimizing the bias. They noted that treating measurements below the MDL as occurring at the MDL is statistically incorrect and violates the statute's "shall not be less stringent than" requirement for MACT floors. One commenter also provided a reference for a statistical method based on a log-normal distribution of the data which estimated the "maximum likelihood" of data values; this result is slightly higher than half the MDL. Some commenters stated that it is necessary to substitute the MDL value when performing the MACT floor calculations. With MDL defined as the lowest concentration that can be distinguished from the blank at a defined level of statistical significance, this is an appropriate value. If MDL values are not reported, one commenter suggested an approach for estimating an MDL equivalent value, but recognized that the background laboratory and test report files may not be available to EPA in order to derive these estimates. Most commenters representing industry and industry trade groups argued that either LOQ or PQL values should replace non-detects. The LOQ is defined as the smallest concentration of the analyte which can be measured. These commenters contended that the LOQ leads to a quantifiable amount of the substance with an acceptable level of uncertainty. A few commenters provided calculations showing some of the proposed MACT floors were below the LOQ. Additionally, some of these commenters stated that using LOQ or PQL values also incorporates additional sources of random and inherent sampling error throughout the testing process, which is necessary. These errors occur during sample collection, sample recovery, and sample analysis; MDL values only account for method specific (e.g., instrument) errors. These commenters contended that the three times the MDL approach discussed in the proposal accounts for some measurement errors but does not account for these unavoidable sampling errors. The commenters also noted that an LOQ is calculated as 3.18 times the MDL, and PQL is calculated as 5–10 times the MDL. Many of the commenters in support of using either an LOQ or PQL value ultimately believed a work practice is more appropriate where a MACT floor limit is below either of these two values. They cited 112(h)(1) which allows work practices under 112(h)(2) if "the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations". These commenters stated that the inability of sources to accurately measure a pollutant at the level of the MACT floor qualifies as such a technological limitation that warrants a work practice standard.

Where the proposed MACT floor is below the LOQ or PQL then that source category has a technological measurement limitation. A few commenters suggested RL values should be used when developing the floor limits. They stated that the RL is the lowest level at which the entire analytical system gives reliable signals and includes an acceptable calibration point. They added that use of an acceptable calibration point is critical in showing that numbers are real versus multiplying the MDL by various factors.

Several commenters stated that all non-detect values should be excluded from MACT floor calculations. They believed that excluding all non-detect values would eliminate any potential errors or accuracy issues related to testing for compliance. Due to inconsistencies of the MDL value reported for non-detect data, one commenter suggested treating all such values as zero. This would provide a consistent approach for setting the floor as well as determining compliance. Issues discussed by a multitude of commenters were that a wide range of detection limit values were reported and

that data from Phase I and Phase II information collection requests (ICR) are inconsistent. For all non-detect data, facilities participating in the Phase II ICR were instructed to report a detection limit, but this resulted in a variety of interpretations by the laboratories who reported data. As such, commenters provided examples where detected values were lower than non-detect values, and in some cases measured values were reported lower than typical method detection limits. Many of the commenters stated it is critical that EPA conduct a thorough quality review of the data to determine if non-detect values have been appropriately flagged and to normalize the data on a consistent basis. One commenter presented an example dataset and the potential implications of the treatment of non-detect data for Hg emissions in the biomass subcategory. This commenter noted that a number of the units with Phase I tests would no longer be considered top performers if their data were made consistent with the Phase II criteria. Several commenters provided remarks for EPA's proposed method of three times the MDL as an option for setting limits. A few commenters in support noted that this approach provided a reasonable method to account for data variability as it took into account more than just analytical instrument precision. Many other commenters argued that this method results in limits which are too low, namely that it is still lower than the LOQ value which they are in favor of as a substitute for any reported non-detect data. On the contrary, some other commenters disagreed with this method and claimed that it would lead to results which introduce a high bias in the floor setting process. A few contended that multiplying by 3 would introduce a 300 percent error into the floor, resulting in a floor that is less stringent than required by the Act. Others suggested that the MDL values are antiquated and already too high and thus it is not appropriate to multiply them by three. Also, a few commenters suggested multiplying the MDL by three would not reflect the actual lower emissions achieved by any source and as such is unlawful under section 112(d).

*Response:* After consideration of the various comments related to treatment of detection limits in the development of MACT floors, EPA's approach for this final rule is as follows. While commenters suggested using values less than the MDL, such values have not been demonstrated to have been met during the corresponding test run. Therefore, EPA concluded that it is not appropriate, for development of MACT floors, to use any value less than the MDL. EPA also disagrees with comments that emission levels at or near the MDLs are appropriate levels to use for standard setting without consideration of measurement imprecision, because the actual performance of sources may differ significantly from the measured values or the MDL. Accordingly, for the boiler and process heater source category, which includes many sources with emission levels at or near the MDL for the various pollutants, EPA concluded that measurement imprecision was a significant factor that should be included in the development of emission limits. To determine an appropriate methodology, EPA examined the contribution of test method measurement imprecision to the variability of a set of emissions data. One element of variability is associated with method detection capabilities and a second is a function of the measurement value. Measurement imprecision is proportionally highest for values measured below or near a method's detection level and proportionally decreasing for values measured above the method detection level.

The probability procedures applied in calculating the floor or an emissions limit inherently and reasonably account for emissions data variability including measurement imprecision when the database represents multiple tests from multiple emissions units for which all of the data are measured significantly above the method detection level. That is less true when the database includes emissions occurring below method detection capabilities and are reported as the method detection level values.

EPA's guidance to respondents for reporting pollutant emissions used to support the data collection specified the criteria for determining test-specific method detection levels. Those criteria insure that there is only about a 1 percent probability of an error in deciding that the pollutant measured at the method detection level is present when in fact it was absent. Such a probability is also called a false positive or the alpha, Type I, error. Because of sample and emissions matrix effects, laboratory techniques, sample size, and other factors, method detection levels normally vary from test to test for any specific test method and pollutant measurement. The expected measurement imprecision for an emissions value occurring at or near the method detection level is about 40 to 50 percent. Pollutant measurement imprecision decreases to a consistent relative 10 to 15 percent for values measured at a level about three times the method detection level.[5]

Also in accordance with our guidance, source owners identified emissions data which were measured below the method detection level and reported those values as equal to the method detection level as determined for that test. An effect of reporting data in this manner is that the resulting database is truncated at the lower end of the measurement range (i.e., no values reported below the test-specific method detection level). A floor or emissions limit based on a truncated database or otherwise including values measured near the method detection level may not adequately account for measurement imprecision contribution to the data variability. That is, an emission limit set based on the use of the MDL to represent data below the MDL may be significantly different than the actual levels achieved by the best performing units due to the imprecision of the measurements. This fact, combined with the low levels of emissions measured from many of the best performing units, led EPA to develop a procedure to account for the contribution of measurement imprecision to data variability.

We applied the following procedures to account for the effect of measurement imprecision associated with a database that includes method detection level data. The first step was to define a method detection level that is representative of the data used in establishing the floor or emissions limit and that also minimizes the influence of an outlier test-specific method detection level value. We reviewed each pollutant-specific data set to identify the highest test-specific method detection level reported that was also equal to or less than the average emissions level (*i.e.,* unadjusted for probability confidence level) calculated for the data set. We believe that this approach is representative of the data collected to develop the floor or emissions limit while to some degree minimizing the effect of a test(s) with an inordinately high method detection level (*e.g.,* the sample volume was too small, the laboratory technique was insufficiently sensitive, or the procedure for determining the detection level was other than that specified).

The second step in the process is to calculate three times the representative

[5] American Society of Mechanical Engineers, *Reference Method Accuracy and Precision (ReMAP): Phase 1, Precision of Manual Stack Emission Measurements,* CRTD Vol. 60, February 2001.

method detection level[6] and compare that value to the calculated floor or emissions limit. If three times the representative method detection level were less than the calculated floor or emissions limit calculated from the upper prediction limit (UPL), we would conclude that measurement variability was adequately addressed because the measurement inprecision at that level is a consistent 10 to 15 percent. The calculated floor or emissions limit would need no adjustment. If, on the other hand, the value equal to three times the representative method detection level were greater than the UPL-based emission limit, we would conclude that the calculated floor or emission limit does not account entirely for measurement variability. If indicated, we substituted the value equal to three times the representative method detection level to apply as the adjusted floor or emissions limit. This adjusted value would ensure measurement variability is adequately addressed in the floor or the emissions limit.

In response to comments that EPA should have used the PQL, RL, or LOQ values in place of non-detect values, we disagree that use of those values is appropriate for calculating the MACT floors for two reasons. First, these terms are not defined statistically or consistently from method to method but are relatively arbitrary multiples (*e.g.,* 3 times, 5 times, or 10 times) of the MDL. In some cases, a RL, LOQ, or PQL is a value determined based on a laboratory-specific procedure and not standardized by the method. We could not apply data arbitrarily adjusted or subject to laboratory-specific variables in establishing the floor. Second, we used a value equal to three times a representative MDL to compare with the floor and to adjust the applicable emissions limit, if necessary. We believe that using a value equal to three times the MDL sufficiently accounts for measurement uncertainty for the purposes of establishing compliance and there is no need to try to define or apply a PQL, LOQ, or RL for this purpose.

4. Instrument Span for CO

*Comment:* Many commenters stated that the reported data and limits for CO are within the error range of analyzers and CO CEMS. For Method 10, the calibrated analyzers have an error of ±2 percent of the instrument span, with spans ranging from 50 parts per million (ppm) to 1000 ppm or greater. As such, at a minimum there is a potential error of 1 ppm to 20 ppm (2 percent of 50 ppm and 1000 ppm, respectively) while the liquid and other process gas categories have floor limits set at 1 ppm. Similarly, commenters noted that CO CEMS have an allowable drift of 5 percent of the span, with similar span ranges as Method 10. Commenters questioned the technical feasibility of complying with such low limits given the range in span values and suggested that EPA should review the data and establish more appropriate limits in consideration of measurement precision concerns.

*Response:* EPA agrees with the comment that many of the CO measurements are within the error range of analyzers, and EPA has taken steps to mitigate the potential bias of such measurements. The resulting emission limits represent a level of performance that has been demonstrated to be achieved by the average of the best performing 12 percent of sources while considering variability introduced by imprecision of the CO analyzers. As explained below, our assessment indicated that the site-specific estimated measurement errors in some cases may be higher than some of the reported emissions levels. Therefore, for each emission test used in the MACT floor calculations we substituted the site-specific estimated measurement error for reported values below those values in order to ensure the quality of the data used to set the floors.

In response to the comments received, we reviewed the quality of the data relative to information provided for each emissions test. Method 10 is structured such that we can assess measurement data quality relative to the calibration span of the instrument (see *http://www.epa.gov/ttn/emc/promgate/method10r06.pdf* and *http://www.epa.gov/ttn/emc/promgate/method7E.pdf).* For example, the allowable calibration error, system bias, and drift requirements are directly proportional to the site-specific instrument calibration span (*i.e.,* ± 2.0 percent of the calibration span value). For instrument calibration span values of 25 ppmv and less, the allowable calibration error, bias, or drift values are each ± 0.5 ppmv.

We can estimate the equivalent of the method detection level for a measurement with an instrumental test method (e.g., EPA Methods 3A, 6C, 7E, and 10) using a square root formula and these allowable data quality criteria. For example, in the case of a calibration span value of 25 ppmv, the square root formula (i.e., square root of the sum of the squares) would indicate a value of 0.9 ppmv. Consistent with the methodology we applied for non-instrumental methods, discussed in the previous comment response where we established limits no less than 3 times the MDL in order to avoid a large degree of measurement imprecision, this estimated measurement error value would translate to a limit of 3.0 ppmv (rounded up from 2.7 ppmv). For tests done with calibration spans of greater than 25 ppmv, the corresponding estimated measurement error would be greater. For example, the estimated measurement error using the square root formula for a calibration span of 100 ppmv would be about 4 ppmv which would translate to a limit of 12 ppmv. For a calibration span of 1000 ppmv, the estimated measurement error would be 35 ppmv or a limit of about 100 ppmv.

5. Achievability of Limits

*Comment:* Several commenters were concerned that only small subsets of sources in each subcategory have emissions stack test data. These commenters added that less data means the pool from which the best performing 12 percent of the existing sources are drawn is smaller and, therefore, the actual number of sources used to determine the MACT floor is smaller. The commenters suggested that EPA should collect more data or provide assurances that the limited available data are representative for each subcategory. Commenters suggested that EPA could supplement testing data with "emissions information" such as fuel records, production records and associated emission factors, commercial warranties and guarantees.

Commenters raised concerns that existing units would have difficulty demonstrating compliance with the MACT floor limits. They suggested best performers with advanced air pollution control technologies should not be required to install additional add-on equipment to meet the emission limits. Commenters requested that EPA assess how many existing boilers and process heaters in each subcategory will be able to meet the standards without taking any further control measures. Several commenters contacted manufacturers regarding a retrofit project for their boilers and process heaters and they noted that manufacturers were unwilling to guarantee a retrofit would meet the limits.

Similarly, commenters raised concerns that new units would have even more difficulty demonstrating compliance with the MACT floor limits. These commenters had difficulty identifying a single source whose emissions testing data demonstrated they could achieve all of the MACT

[6] *Ibid.*

floors for new sources in combination. Several commenters contacted boiler and process heater manufacturers; all were unable to offer commercial emissions guarantees that a new unit would meet the proposed limits. Some commenters raised concerns about the impacts of these stringent new unit floors including: Deterring sources from upgrading to new boilers as efficiency gains provided by a new unit would be offset by extensive controls and threatening fuel diversity.

Some commenters expressed concern that EPA had not properly evaluated whether there are technically feasible means of achieving the MACT floors. The commenters contended that the approach does not identify reasons why best performing sources achieve emissions levels reflected in the test data and they suggested that the intent of the MACT floor standard setting process is to discover effective control techniques so that other performers in the source category could emulate those techniques, reduce their emissions, and achieve similar emission levels. Commenters added that EPA has not adequately considered air pollution control device (APCD) conflicts with one another or compatibility of controls on certain boilers. Additionally, choosing to optimize controls for one pollutant may preclude optimization of controls for another pollutant e.g., minimizing CO in the combustion system is opposed to minimizing $NO_X$ in most boiler burners.

*Response:* As mentioned elsewhere in this preamble, EPA is required to establish MACT floor levels based on emissions limits achieved by sources for which emissions information is available to the Administrator. EPA has revised the proposed MACT floors as well as the proposed subcategories, as explained above. EPA also examined several ways in which it might be able to use other types of emissions information in addition to actual emissions measurements. However, EPA concluded that there was no appropriate method of using different types of information in a manner that could be incorporated into the variability analyses. EPA first assessed the potential for estimating emissions for sources that lacked actual emissions data through the use of emission factors. However, the emission factors lack any degree of variability. Therefore, the use of such data in this rulemaking would have distorted the data variability in many cases, leading to standards that were more stringent than those developed using emissions data only and that likely underestimated actual variability. EPA also considered whether it could otherwise estimate emissions of sources that did not provide emissions data. However, EPA concluded that such estimations were not possible without the development of a technically appropriate approach to evaluate relevant information, and commenters did not provide any such approaches. EPA's approach provides MACT floors that are consistent with the requirements of section 112, because the floors are based on the average emissions performance of the best performers for which the Administrator has emissions information that is appropriate to use in setting the floors.

EPA agrees with commenters who note that many of the data sets are small. However, stakeholders were encouraged to provide additional data, and EPA significantly revised some of the proposed emission limits based on new test data. We received little or no additional data for some subcategories for which data sets were small at proposal. For all data sets, the final emission limits are based on the available data and reflect EPA's assessment of variability. Moreover, after consideration of the comments on the achievability of the emission limits, EPA performed additional analyses and detailed examinations of the data and developed revised limits that are based on what has been demonstrated to be achieved in practice. As described in more detail in the docket memorandum entitled "Revised MACT Floor Analysis (2011) for the Industrial, Commercial, and Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Major Source," EPA has made adjustments to treatment of non-detect values, the statistical methodology, and monitoring requirements, and also incorporated new data and data corrections into our analyses. Accordingly, the final emission limits better reflect the performance of the MACT floor units than the proposed limits. EPA notes that for each subcategory, there are existing units that are meeting the MACT floor limits or are expected to meet the limits through application of available control technology.

Finally, in response to comments about low CO limits conflicting with a unit's ability to meet $NO_X$ requirements, EPA does not have specific information on the $NO_X$ limits and $NO_X$ emissions for most of the units that will be subject to the standard. However, the CO limits have been revised as discussed elsewhere in this preamble, and compliance is based on a full load test, while periods of startup and shutdown are subject to a work practice standard. To the extent that units cannot meet the CO floor and maintain $NO_X$ at the required level, oxidation catalysts can be used to reduce CO without an increase in $NO_X$. EPA has included costs for these controls for many units in the cost analysis, although data on $NO_X$ requirements were not sufficient to allow $NO_X$ to be part of the analyses. Commenters did not provide any data supporting claims that any of the other emission limits or projected control devices would interfere with a source's ability to meet any of the other emission limits.

6. Comments on Technical Approaches

*Comment:* Several commenters offered suggestions for adjusting the treatment of data from common stacks. Commenters suggested that it is improper to count the data twice if two boilers, in the same subcategory, exhaust through a common stack. A test conducted on the common stack does not represent the actual emissions from a single boiler, but rather reflects emissions from the combined simultaneous operation of the two boilers and their associated control device(s). The commenters contended that it is impossible to claim the test result would be exactly the same for each boiler and they added that if a common stack test turns out to be in the lowest 12 percent in a subcategory, counting it twice distorts the average of the best performers and skews the variability calculations. Commenters also noted that it is also not appropriate to divide emissions evenly between each boiler. Instead these commenters suggested that EPA use the data from common stacks only a single time in the MACT floor ranking and UPL calculations.

*Response:* EPA's current approach is a reasonable approach for comingled emissions, particularly in light of the limited dataset available for some subcategories, because EPA can not accurately separate the fraction of the emissions that came from the combustion units and process emission points that are comingled in the same stack. Applying the emissions equally to multiple units exhausting through a common stack accurately represents the emissions of those units on average. Further, although the use of a data point twice may dampen variability, the inclusion of an extra unit in the floor has the opposite effect on the overall emission limit by increasing the denominator of the floor calculation. Either method could be used, but the results would not differ significantly. Furthermore, for existing sources, MACT cannot be less stringent than the average emission limitation achieved by

the best performing 12 percent of existing sources (for which emission information is available). If EPA ignored boilers that exhaust through a common stack, it would be ignoring available emissions information that is relevant to setting the MACT floor standards.

*Comment:* Some commenters raised concerns that the MACT floor methodology doesn't adequately address the inherent variability with respect to operating conditions and control device performance. Operational variability can include warm-ups, shutdowns, load swings, and variations in fuel quality. They contended that emissions data relied upon in the proposal were produced during reference method performance testing under very limited operating conditions and with a very limited variation in potential fuel quality. Other commenters raised concerns that EPA has not properly acknowledged the impact of fuel quality on emissions. One commenter urged caution to EPA when considering variability to generate compliance margins that are palatable to industry; suggesting that this concept is not incorporated in the statute.

*Response:* EPA is mindful of the need to account for sources' variability in assessing sources' performance when developing technology-based standards. EPA reviewed subcategory floor calculations in light of these comments and believes that the two-step MACT floor analysis process adequately addresses: (1) Performance testing variability and (2) fuel analysis variability estimations. EPA revised the MACT floor calculations in light of data submitted during and after the public comment period and also modified the approaches used at proposal for various aspects of the floor calculations.

EPA first took fuel into consideration, to the extent it is reflected in differences in boiler design, when we divided the source category into subcategories. EPA is aware that differences between given types of units, and fuel, can affect technical feasibility of applying emission control techniques, and has addressed this concern in the final rule. For a fuel based pollutant, such as PM, performance testing must be conducted under representative full load operating conditions, which, along with the parameter monitoring requirements, provides an assurance that the standards are being met at all times. For Hg and HCl, we modified the fuel based variability analysis in consideration of comments received on this approach. The first modification to the analysis was the introduction of a solid fuel subcategory, which includes any unit burning at least 10 percent, on an annual heat input basis, of any coal, fossil solid, biomass, or bio-based solid fuel. Given the wide variety in fuel types that compose the floor, the statistical analysis accounts for some of the inter-unit variability for different fuel types identified to be in the floor. The second modification was the development of a fuel variability factor (FVF). The FVF calculations were similar to the calculations used at proposal, but they were simplified to remove the control efficiency calculation and the method for identifying outliers in the data was also adjusted. The revised FVF analysis calculated a ratio for all fuel analysis data points for units in the top 12 percent for existing units and the top performing unit for new units in each subcategory. This ratio compared the reported fuel analysis data, converted to units of lb/MMBtu, to the emission test outlet data, converted to units of lb/MMBtu, during the stack tests. At proposal we conducted an outlier analysis of only the maximum ratios for each unit, but we revised the outlier analysis to consider all of the ratios from top performers within each subcategory. We then defined and identified outliers using the test of 3 times the standard deviation and 3 minus the standard deviation for all of the ratios in the subcategory. After removing outliers, the remaining maximum ratio for each subcategory was identified and multiplied by the 99 percent UPL.

For a discussion of how EPA considered other non-fuel variability operations, such as boiler load, see response to the comments provided under "What did we do with the CO Limits".

*Comment:* Several commenters argued that it is inappropriate to rank units according to the minimum stack test since any boiler can experience a good compliance test if conditions are favorable. Many of these commenters suggested that EPA should instead rank the data on the average of all stack tests. Another commenter suggested that the different emission levels achieved by different sources are just differences in performance and basing the ranking on the average would be more appropriate. This commenter suggested that at a minimum, the data used to rank and the data used as inputs into the MACT floor upper prediction limit calculation should be consistent.

*Response:* In this final rule, EPA has reasonably determined that the best-controlled source is the source with the lowest stack test. EPA selected the lowest stack test as a measure of best performer because many units had only a single test available, and the comparison of average performance from two or more tests is not directly comparable to a single test measurement. However, all emission tests of acceptable quality were used to assess variability. As such, all data were considered in the floor analyses. EPA recognizes that each stack test data point represents a true assessment of the emissions for a combustor at a given point in time. However, where units had more than one test available, EPA also considers these other tests to be representative of the unit and relevant to assess run-to-run and test-to-test variability in the MACT floor UPL calculation. EPA did screen and remove certain test data from the MACT floor calculations if that data were not deemed representative of current operating conditions.

7. Statistical Approach

There were several comments made on specific aspects of the statistical variability analysis including suggestions for the appropriate confidence interval, appropriate statistic, and EPA's methods for determining the distribution of the dataset. The specific comments and EPA responses are outlined below.

*Comment:* Industry, industry representatives, and environmental advocacy groups had different perspectives on the appropriateness of the proposed 99 percent UPL. Commenters from environmental advocacy groups requested a lower UPL with suggestions ranging between 50 to 95 percent. One commenter stated that EPA over-counts for the potential for future variability by using the 99 percent UPL for the entire data set and it does not adequately account for all variability, such as how unit maintenance and operator training may limit upward variability's effect on emission levels, and requests that EPA explain and justify the selection of the 99 percent UPL as opposed to the 90 or 95 percent UPL. Another commenter stated that most statistical analyses use 90 or 95 percent confidence intervals and prediction intervals. The commenter also claimed that 99 percent is overly conservative and results in twice as much HAP emissions and reduced health benefits compared to a lower UPL. Consequently the commenter stated a lower UPL would better withstand judicial review. One commenter mentioned that there is precedent for setting limits based on the 90th percentile and cited a 2006 analysis where EPA determined the best demonstrated technology, which found Hg reductions based on 90th percentile

and deemed the 90th percentile "reasonable" because of how compliance was to be determined and the high Hg content of the fuel used when the emissions data were collected. These commenters also suggested that EPA did not provide adequate rationale for selecting the 99th percentile instead of the 50th. These commenters noted that civil enforcement of environmental standards is based on a "preponderance of the evidence" which merely requires that a violation be more likely than not.

Commenters from industry and industry representatives advocated for a higher UPL. Commenters requested that EPA increase the UPL to 99.9 percent in order to better encompass unit emissions variability and represent a manageable risk. Industry, like environmental advocacy groups, also requested that EPA take into account operator training and its effect on emissions. The commenters claimed that operators are compelled to set emissions targets lower than limits to create a compliance margin which helps avoid violations and their consequences. Commenters also cited recent consideration of a 99.9 percent UPL in the proposed HMIWI MACT rule. Commenters claimed that since the HMIWI database consisted of a small dataset, it was unlikely full variability was observed and thus EPA had no valid statistical basis for the decisions to use 99 percent in the final HWIMI rule. The commenters suggested similar data limitations in the boiler dataset and argued that the 99.9 percent UPL should be used to allow more of a margin for all operating conditions and sample collection variation due to the limited data for the boiler MACT rule.

*Response:* In this final rule, EPA has reasonably determined that 99 percent UPL is appropriate for fuel based HAP, and dioxin/furan, and a 99.9 percent UPL is appropriate for CO. For fuel-based HAP the 99 percent confidence level is consistent with other recent rulemakings. See 75 FR 54975. Many of the subcategories had limited data to establish the MACT floor calculations and EPA determined it was inappropriate to use a confidence level lower than 99 percent to set the standard because doing so would result in limits that the best performers would be expected to exceed, while this final rule requires that units meet the limits at all times. Finally, for the fuel-based pollutants, there are well established control measures currently used on units in the source category (fabric filters for PM and Hg and wet or dry scrubbers for HCl) that serve to mitigate, to some degree, the variability in emissions that can be expected. Given this additional consideration for fuel-based HAP, but recognizing the emission limits must be met at all times yet are based on short term stack test data, EPA selected the 99 percent confidence level. A lower confidence level would result in emission limits that even the best performing sources would be expected to exceed.

For CO, EPA considered several comments from industry and States, which provided both quantitative and qualitative comments on how CO emissions vary with load, fuel mixes and other routine operating conditions. After considering these comments EPA determined that a 99.9 percent confidence level for CO would better account for some of these fluctuations. While a good deal of CO data are available, at least for some of the subcategories, the data show highly variable emissions that can result from situations beyond the control of the operator, such as fuel moisture content after a rain event, elevated moisture in the air, and fuel feed issues or inconsistency in the fuel. The higher confidence level selected for CO is intended to reflect the high degree of variability in the emissions. For dioxin/furan, we also are maintaining the 99 percent UPL. Although much of the uncertainty associated with dioxin/furan testing will be mitigated by the requirement in EPA Method 23 to report non-detect values as zero for compliance purposes, the dioxin emission limits remain quite low and the 99 percent UPL provides a high degree of confidence that the best performing units will be able to meet the standards.

*Comment:* Several commenters also addressed concerns with how EPA determined the distribution of the dataset. Many commenters stated that normal distribution theory has been incorrectly applied to positively skewed or log normally distributed emissions data. Based on this, commenters claimed that sample means, and consequently the 99 percent UPL calculation, were incorrectly determined. Commenters suggested that sample means should be computed based on the arithmetic mean of lognormal distribution. One commenter requested that EPA consider using non-normal distributions or non-parametric methods in the analysis. Two commenters noted that the technique used by EPA based on logarithmic transformation underestimates the prediction limit for the mean and requested that EPA use the 2004 Bhaumik and Gibbons procedure for computing the UPL for log-normally distributed data. Three commenters stated that EPA is not following its own guidance document, *Data Quality Assessment: Statistical Methods for Practitioners EPA QA/G–9S,* for determining whether or not a data set is normally distributed and should explain the reasons for not doing so. The commenters then go on to request that EPA follow its guidance documents which recommend use other tests aside from the skewness and kurtosis tests when data are limited or if critical test values are not available.

*Response:* EPA appreciates the detailed suggestions for alternative approaches to determine the dataset and it has revised its default selection of data distributions consistent with its guidance document *Data Quality Assessment: Statistical Methods for Practitioners EPA QA/G–9S.* This document indicates that most environmental data are lognormally distributed, so EPA has modified its assumptions when the results of the skewness and kurtosis tests result in a tie, or when there are not enough data to complete the skewness and kurtosis tests. Some of the commenters suggested that more advanced tests are necessary to determine the dataset, such as the Shapiro-Wilkes test. These tests needs a sample size of 50 or more, and would not be appropriate for many of the small sample sizes used to compute the MACT floor UPL.

With respect to the methods used to compute the UPL for a dataset that is determined to be lognormally distributed, EPA also considered the commenters suggested revisions to the calculations in order to avoid skewing the UPL by calculating the UPL of an arithmetic mean instead of the UPL of a geometric mean. To adjust the calculation EPA considered a scale bias correction approach as well as a new UPL equation based on a Bhaumik and Gibbons 2004 paper, which calculates "An Upper Prediction Limit for the Arithmetic Mean of a Lognormal Random Variable". Given data availability, EPA selected the Bhaumik and Gibbons 2004 approach which addresses commenters concerns with the proposed computations.

*Comment:* Several commenters suggested alternatives to the UPL statistics such as upper tolerance limit (UTL), upper limit (UL) and upper confidence limit (UCL). Several commenters stated that EPA's UPL calculation was flawed and did not fully account for variability. Commenters then suggested that if the proposed UPL approach was maintained EPA should adopt the modified UPL equation in the Portland cement NESHAP. Commenters argued that this statistic would

represent floors achieved in practice and account for total variability instead of EPA's proposed UPL statistic based on sample variability. Several commenters claimed the data set was limited and suggested that EPA should use the UTL when data available do not represent the entire population. One commenter claimed that the upper UCL used in the HMIWI MACT rule was not a true prediction limit because it did not adjust the standard deviation for the number of test runs in the future compliance average and it should not be used in the boiler MACT rule.

*Response:* EPA considered these comments and reviewed each of the separate statistics. Because statistics is a tool and many statistical approaches could be considered valid, EPA considered the comments and adjusted the approach used to provide a reasonable and technically correct statistical methodology. MACT floors for existing sources must reflect the average emission limitation achieved by the best-performing 12 percent of existing sources. As explained below, only the UCL and UPL adequately get at the notion of average emissions. Use of the UPL is also consistent with other recent rulemakings. *See* 75 FR 54975.

In general, confidence intervals are used to quantify one's knowledge of a parameter or some other characteristic of a population based on a random sample from that population. The most frequently used type of confidence interval is the one that contains the population mean. Given this definition, the 99 percent UCL represents the value which we can expect the mean of the population to fall below 99 percent of the time in repeated sampling. Whereas a confidence interval covers a population parameter with a stated confidence, that is, a certain proportion of the time, there is also a way to cover a fixed proportion of the population with a stated confidence. Such an interval is called a tolerance interval. Confidence limits are limits within which we expect a given population parameter, such as the mean, to lie. Statistical tolerance limits are limits within which we expect a stated proportion of the population to lie. Given these definitions, the 99 percent UTL represents the value which we can expect 99 percent of the measurements to fall below 99 percent of the time in repeated sampling. In other words, if we were to obtain another set of emission observations from the five sources, we can be 99 percent confident that 99 percent of these measurements will fall below a specified level. Since you must calculate the sample percentile, and the sample sizes for the boiler MACT floor data are small, the 99th percentile is underestimated. The UTL should only be used where one can calculate a sample percentile, *e.g.,* where there is a sample size of at least 100, and we do not have that many sources represented in any MACT floor.

In contrast to a confidence interval or a tolerance interval, a prediction interval for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what future values will be, based upon present or past background samples taken. Given this definition, the UPL represents the value which we can expect the mean of 3 future observations (3-run average) to fall below, based upon the results of the independent sample of size n from the same population. Finally, the upper limit (UL) is roughly equivalent to the percentile of the actual data distribution for the sample. The UL does not have a robust statistical foundation. Basically, the UL formulation assumes that the data: (1) Represent the population rather than a random sample from that population, and (2) are normally distributed. The data used to develop the MACT floors for this rule do not represent the entire population for any subcategory, and most of the data sets are not normally distributed. For these reasons, EPA concluded that it is not appropriate to use the UL in setting the MACT floor limits.

*Comment:* Some commenters suggested that EPA's UPL approach fails to accomplish predicting the level of performance achieved by the best performing sources under all operating conditions, not because of a poor statistical framework but because of an inadequate database. These commenters added that as a result, the inputs into the UPL equations are not representative of a distribution of values that reflect all operating conditions.

*Response:* Section 112(d) of the Act requires EPA to base MACT floor standards for existing sources on the average emission limitation achieved by the best performing 12 percent of existing sources for which EPA has emissions information. EPA has incorporated new data and data corrections received during the public comment period. EPA also has considered the requests for further subcategorization of the source category in light of limits on the dataset that caution against over-partitioning of the database. The revised analysis is based on all emission stack test data of appropriate quality available to EPA, and the UPL approach provides as complete a picture of variability as possible given the limited data available.

*Comment:* Some commenters questioned whether the statistical approach met EPA's legal obligations under Section 112 of the CAA. One commenter stated that in order to withstand judicial review, the UPL should be calculated based on the best 6 percent of sources instead of the best 12 percent in order to establish a floor that would require 94 percent of sources to reduce emissions. One commenter stated that the courts did not endorse the proposed UPL procedure and that its appropriateness should be reviewed. The commenter goes on to say that on a statistical and technical basis, the UPL procedure is antithetical to the instruction in Section 112(d)(3)(A) and contradicts the strong endorsement of the high floor implementation as the best reading of the statutory language.

*Response:* While the commenter is correct that the entire MACT floor data pool was used in the calculation of the UPL, EPA notes that statistics is a tool that is used to estimate variability and it is entirely appropriate to consider the variability within the best forming 12 percent of sources in developing emission limits based on the average performance of those sources. As far as the concept that the floors should require 94 percent of the sources to reduce emissions, that is not what is required by the statute. Rather, the statute requires that the MACT floor standards for existing sources be no less stringent than the average emission limitation achieved by the best performing 12 percent of existing sources for which EPA has emissions information. For example, if a category had 100 units and the performance of the best 50 of those units was the same, the emission limits would be based on those 50 units and they all would be projected to meet the limits. While this is a hypothetical scenario, it illustrates that there is no specific percentage of sources that must reduce emissions in order for the MACT floor limits to be consistent with the statutory requirement.

*Comment:* One commenter suggested that EPA should incorporate different statistical methods according to the amount and type of data available in each subcategory instead of a one-size-fits-all approach. This commenter also suggested that the approach taken by EPA must be validated by looking at the result it creates and examining whether the end result is reasonable. The commenter suggested applying a simple test to identify whether the resulting

floor requires a substantial majority of each subcategory to make some degree of emission reduction.

*Response:* EPA has revised its statistical approach to include a mixed use of confidence levels, as discussed above, as well as a mix of statistical tools to consider the distribution of the datasets and what types of data are used as inputs into the floor analysis. For example, the MACT floor computations for Hg emissions from liquid fuel units were modified to consider data from both fuel analysis and stack test results. EPA appreciates the suggestion for validating the results of the statistical computations and has determined that the final floor levels require a significant number of sources to make some degree of emission reduction. However, EPA also notes that the number of sources that will need to achieve some degree of emissions reduction from current levels is not the statutory basis for establishing emissions standards under section 112(d), as noted above.

*Comment:* One commenter representing manufacturers of monitoring and control technologies suggested that statistical variability should not be incorporated into the floor computations for CO and Hg. This commenter suggested that EPA base the floors on the straight averages of each data set.

Other commenters suggested that emissions variability is not statistical but instead based on different operating conditions of individual units. The commenters added that the variability of each unit should be averaged based on individual units and then used to establish UPL calculations instead of assessing a UPL based on individual tests or test runs.

*Response:* The UPL calculation is a statistical formula designed to estimate a MACT floor level that is equivalent to the average of the best performing sources based on future compliance tests. If we did not account for variability in this manner and instead set the limit based solely on the average (mean) performance, then these units could exceed the limit half the time or more. The MACT floors for existing sources must reflect the average emission limitation achieved by the best-performing 12 percent of existing sources. Therefore, it is appropriate to consider statistical variability in order to ensure that units could meet the floors at all times. EPA agrees with the commenter that the variability of emissions is not solely statistical, but also represents some operational variability that may occur between different tests at the same unit (intra-unit variability) as well as different tests at different units (inter-unit variability) in the floor. Since the floor calculations represent the average of the best-performing 12 percent of existing sources, it is reasonable for EPA to use an appropriate statistical analysis to assess the impact both intra-unit and inter-unit variability have on the emissions profiles.

8. Alternative Units for Emission Limits

*Comment:* Several commenters from industry, State agencies, and environmental non-governmental organizations submitted a variety of alternatives to the concentration-based and mass-based MACT floor limits. Some commenters suggested emission reductions or removal efficiencies. These commenters cited regulatory precedence for a percent reduction limit in 40 CFR part 60 subpart Db, the New Source Performance Standards for Industrial, Commercial Institutional Boilers as well as New Source Performance Standards and Emission Guidelines for Large and Small Municipal Waste Combustors (40 CFR part 60 subparts Ca, Cb, Ea and Eb). Several other commenters suggested that EPA adopt an alternative output-based emissions standard to promote boiler efficiency improvements as a pollution prevention technique. One commenter called attention to several previous examples of output-based standards in recent air regulations, including the New Source Performance Standard for Electric Utility Steam Generating Units (40 CFR part 60 subpart Da) which includes an output-based emissions standard for Hg, PM, $SO_2$, and $NO_X$) as well as the New Source Performance Standard for Industrial Commercial Institutional Boilers (40 CFR part 60 subpart Db) which includes an output-based emissions standard for $NO_X$. This commenter also provided examples of output-based emissions regulations in 12 states, including 4 that regulate non-electricity thermal output, such as from combined heat and power systems. Many commenters encouraged EPA to investigate opportunities to develop and implement output-based emissions standards for ICI facilities. Some commenters tied in the appropriateness of output-based standards to the Agency's other pollution prevention techniques included in the proposal, such as the energy assessments. The commenter added that by providing an output-based regulatory option, the user will have further incentive to implement energy efficiency opportunities identified during the energy assessment.

*Response:* With respect to the commenters' request for the development of percent reduction standards, sufficient data were not available to determine the percent reduction from the best performing units. In order to determine such standards, we would need emissions data from testing conducted at both the APCD inlet and outlet for the best performing sources, or at least for a reasonable number of best performing sources. However, we only have APCD inlet and outlet data for one pollutant (PM) for two subcategories, and based on this overwhelming lack of data available to calculate percent reduction standards, EPA did not pursue this option. We do agree with the commenters that output-based standards would provide incentives for implementation of energy conservation measures identified in an energy assessment. This final rule includes a compliance alternative that allows owners and operators of existing affected sources to demonstrate compliance on an output-basis. This alternate output-based limit will promote energy efficiency in industrial, commercial, and institutional steam-generating facilities, and are equivalent to the MACT emissions limits that are in heat-input format. EPA has established pollution prevention as one of its highest priorities. One of the opportunities for pollution prevention lies in simply using energy efficient technologies to minimize the generation of emissions. Therefore, as part of EPA's general policy of encouraging the use of flexible compliance approaches where they can be properly monitored and enforced, we are including alternate output-based emission limits in this final rule. The alternate output-based emission limits provide sources the flexibility to comply in the least costly manner while still maintaining regulation that is workable and enforceable. We investigated ways to promote energy efficiency in boilers by changing the manner in which we regulate flue gas emissions. The alternate output-based emission limits further this goal without reducing the stringency of the emissions standards.

Traditionally, boiler emissions have been regulated on the basis of boiler input energy (lb of pollutant/MMBtu heat input). However, input-based limitations allow units with low operating efficiency to emit more of each pollutant per output (steam or electricity) produced than more efficient units. Considering two units of equal capacity, under current regulations, the less efficient unit will emit more

pollutants because it uses more fuel to produce the same amount of output (steam or electricity) than a more efficient unit. One way to regulate mass emissions and encourage plant efficiency is to express the emission standards in terms of output energy. Thus, output-based emission standards provide a regulatory incentive to enhance unit operating efficiency and reduce emissions. An example of such an output-based standard is the $NO_X$ standard under the New Source Performance Standards (subpart Da) for electric utility boilers.

The criteria used for selecting a specific output-based format were based on the following: (1) Provide flexibility in promotion of plant efficiency; (2) permit measurement of parameters related to stack emissions and plant efficiency, on a continuous basis; and (3) be suitable for equitable application on a variety of facility configurations. The output-based option of mass of pollutant emitted per boiler energy output (lb/MMBtu energy output) meets all three criteria. The majority of ICI boilers produce steam only for process operation or heating and, in this case, the energy output of the boiler is the energy content of the boiler steam output. For those ICI boilers that supply steam to generate, or cogenerate, electricity, the boiler's energy output can include both electrical and thermal (process steam) outputs. There are also some industrial boilers that only generate electricity. Technologies are readily available to measure these energy outputs, and they currently are measured routinely in many industrial plants. Therefore, emission limits based on this format can be applied equitably on a variety of facility configurations. Based on this analysis, an emission limit format based on mass of pollutant emissions per energy output was selected for the alternate output-based standards.

In the case of a boiler that produces steam for process or heating only (no power generation), the lb/MMBtu output-based emission limit is based on the mass rate of emissions from the boiler and the energy content in terms of MMBtu of the boiler steam output. At cogeneration facilities (also known as combined heat and power (CHP)), energy output includes both electricity and process steam. The steam from the boiler is first used to generate electricity. The thermal energy (steam) exiting the electricity generating equipment is then used for a variety of useful purposes, such as manufacturing processes, space heating and cooling, water heating, and drying. The electricity output and the useful energy present in the steam exiting the turbine must both be accounted for in determining the overall energy output from the boiler and converted to a common basis of lb/MMBtu consistent with the output-based standard for steam-only units.

The efficiency and associated environmental benefits of CHP result from avoiding emissions from the generation of electricity at a central station power plant. The avoided emissions at most times are from a less-efficient unit that consequently also has higher emissions. Consequently, the electricity output of the CHP facility in kWh should be valued at the equivalent heat rate of the avoided central station power, nominally 10,000 Btu/kWh. Therefore, the lb/MMBtu output-based emission limit used for compliance with a CHP boiler is based on the mass rate of emissions from the boiler and a total energy output, which is the sum of the energy content of the steam exiting the turbine and sent to process in MMBtu and the energy of the electricity generated converted to MMBtu at a rate of 10,000 Btu per kWh generated (10 MMBtu per MWh).

Compliance with the alternative output-based emission limits would require continuous measurement of boiler operating parameters associated with the mass rate of emissions and energy outputs. In the case of boilers producing steam for process use or heating only (no power generation), the boiler steam output flow conditions would have to be measured to determine the energy content of the boiler steam output. In the case of CHP plants, where process steam and electricity are output products, methods would have to be provided to measure electricity output and the flow conditions of the steam exiting the electrical generating equipment and going to process uses. These conditions will determine the energy content of the steam going to process uses. Instrumentation already exists in many facilities to conduct these measurements since the instrumentation is required to support normal facility operation. Consequently, compliance with the alternate output-based emission limits is not expected to require any additional instrumentation in many facilities. However, additional signal input wiring and programming is expected to be required to convert the above measurements into the compliance format (lb/MMBtu energy).

Since the June 4, 2010, proposal, we obtained steam data (flow, temperature, and pressure) from the best performing units that made up the MACT floor at proposal. In determining alternate equivalent output-based emission limits, we first determined for each of the best performing units the Btu output of the steam and then calculated the boiler efficiency for each of the boilers having available steam/heat input data. Boiler efficiency is defined as steam Btu output divided by fuel Btu input. Next, we determined the average boiler efficiency factor for each subcategory from the best performing units in that subcategory. We then applied the average boiler efficiency factor to the final MACT limits that are in the current format of lb/MMBtu heat input to develop the alternate output-based limits. The efficiency factor approach was selected because the alternative of converting all the reported data in the database to an output-basis would require extensive data gathering and analyses. Applying an average boiler efficiency factor, based on the individual boiler efficiency of the best performing units, essentially converts the heat input-based limits to output-based emission limits.

The alternate output-based emission limits in this final rule do not lessen the stringency of the MACT floor limits and would provide flexibility in compliance and cost and energy savings to owners and operators. We also have ensured that the alternate emission limits can be implemented and enforced, will be clear to sources, and most importantly, will be no less stringent than implementation of the MACT floor limits.

*B. Beyond the Floor*

1. Energy Assessment Requirement

*Comment:* In the proposal preamble, we solicited comments on various aspects of the energy assessment requirement. The proposed standards included the requirement to perform an energy assessment to identify cost-effective energy conservation measures. Since there was insufficient information to determine if also making the implementation of cost-effective measures a requirement was economically feasible, we requested comment on this point. We also specifically requested comment on: (1) Whether our estimates of the assessment costs are correct; (2) is there adequate access to certified assessors; (3) are there organizations other than for certifying energy engineers; (4) are online tools adequate to inform the facility's decision to make efficiency upgrades; (5) is the definition of "cost-effective" appropriate in this context since it refers to payback of energy saving investments without regard to the impact on HAP reduction; (6) what rate of return should

be used; and (7) are there other guidelines for energy management beside ENERGY STAR's that would be appropriate. The energy assessment requirement has been revised in this final rule and alternate equivalent output-based emission limits have been incorporated into this final rule as an alternative means of complying with the emission limits in final rule. The alternate output-based emission limits allow a facility implementing energy conservation measures that result in decreased fuel use to comply with that emission limit by applying emission credits earned from the implementation of the energy conservation measure.

Commenters stated that EPA should provide a clear, statutory-based definition of "Boiler," and the scope of the required energy assessment. Commenters also stated that if EPA includes an energy assessment requirement in this final rule, it should regulate only the emission source over which it has § 112 authority to regulate. The "boiler" logically includes the combustion unit (the emissions source) and closely associated equipment, from flame to last heat recovery. EPA should adopt this definition of "boiler system," which reflects the extent of its section 112 authority.

Commenters also recommended that an energy assessment previously conducted of a facility that has not had significant changes to the boilers and associated equipment should be acceptable for initial compliance. Energy performance of facilities strongly depends on equipment configuration, equipment performance, and fuels fired. If these do not change from the time an energy assessment was conducted to the time the Initial Compliance energy assessment report is submitted, the report would be representative of an accurate depiction of the facility.

Several commenters supported the use of energy assessments as a "beyond the floor" control measure and advocated for output-based standards (noting that such an approach is critically important to encourage CHP since input-based emissions regulations fail to credit CHP systems for their greater efficiency, reducing the incentive for CHP to be installed and used throughout U.S. industry). Moreover, since this final boiler rule will apply to a wide variety of manufacturing facilities in multiple sectors producing a variety of final products, normalizing pollutant output per useful energy output is a good way to ensure all affected facilities can be assessed on similar baselines. Several commenters also applauded recognition of energy efficiency measures to achieve pollution reductions and encouraged EPA to continue to view energy efficiency investments favorably. Some commenters criticized EPA's failure to require implementation of findings of the energy assessments.

*Response:* We agree that EPA should provide a clear definition of what the energy assessment should encompass. However, we disagree that the energy assessment should be limited to only the boiler and associated equipment, and in fact the proposed rule included a broader scope. EPA has properly exercised the authority granted to it pursuant to CAA section 112(d)(2) which states that "Emission standards promulgated * * * and applicable to new or existing sources shall require the maximum degree of reduction in [HAP] emissions that the Administrator determines * * * is achievable * * * through application of measures, processes, methods, systems or techniques including, but not limited to measures which * * * reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications * * *." The energy assessment requirement is squarely within the scope of this authority. The purpose of an energy assessment is to identify energy conservation measures (such as process changes or other modifications to the facility) that can be implemented to reduce the facility energy demand from the affected boiler, which would result in reduced fuel use. Reduced fuel use will result in a corresponding reduction in HAP, and non-HAP, emissions from the affected boiler.

We agree that the scope of the required energy assessment presented in the proposed rule needs to be clarified and we have done this in this final rule. In the proposed Boiler MACT, the intended scope of the energy assessment did extend beyond the affected boiler. The energy assessment included a requirement that a facility energy management program be developed. The energy assessment was intended to be broader than the affected boiler and process heater and included other systems or processes that used the energy from the boiler and process heater. We disagree that the scope of the energy assessment should be limited to the boiler and directly associated components such as the feed water system, combustion air system, fuel system (including burners), blow down system, combustion control system, and heat recovery of the combustion fuel gas. Including all of the energy using systems in the energy assessment can result in decreased fuel use that results in emission reductions, the result articulated in 112(d)(2). We have included in this final rule a definition of what the energy assessment should include for various size fuel consuming facilities. We also have included a definition of the qualified assessors who must be used to conduct those energy assessments. We have clarified the requirement that the energy assessment include a review of the facility's energy management program and identify recommendations for improvements that are consistent with the definition of an energy management program. A definition of an energy management program that is compatible with the ENERGY STAR Guidelines for Energy Management and other similar approaches was added.

We also agree that a facility should be exempt from the requirement to conduct an energy assessment if an energy assessment has recently been conducted. We have revised the final rule to allow facilities to comply with the requirement by submitting an energy assessment that has been conducted within 3 years prior to the promulgation date of this final rule.

*Comment:* The principle arguments against an energy assessment requirement are: (1) EPA lacks authority to impose requirements on portions of the source that are not designated as part of the affected source, such as non-emitting energy using systems at a facility; (2) EPA has not quantified the reductions associated with the energy assessment requirement, therefore it cannot be "beyond the floor;" and (3) the bare requirement to perform an audit without being required to implement its findings is not a standard under CAA section 112(d).

*Response:* With respect to the first argument, we have carefully limited the requirement to perform an energy audit to specific portions of the source that directly affect emissions from the affected source. The emissions that are being controlled come from the affected source. The process changes resulting from a change in an energy using system will reduce the volume of emissions at the affected source by reducing fuel consumption and the HAP released through combustion of fuel. The requirement controls the emissions of the affected source and, as explained above, is within the scope of EPA's authority under section 112(d)(2).

With respect to the second argument, the energy assessment will generate emission reductions through the reduction in fuel use beyond those reductions required by the floor. While the precise quantity of emission reductions will vary from source to

source and cannot be precisely estimated, the requirement is clearly directionally sound and thus consistent with the requirement to examine beyond the floor controls. By definition, any emission reduction would be cost effective or else it would not be implemented.

Finally, with respect to the third argument, the requirement to perform the energy audit is, of course, a requirement that can be enforced and thus a standard. As noted, while we do not know the precise reductions that will occur at individual sources, the record indicates that energy assessments reduce fuel consumption and that parties will implement recommendations from an auditor that they believe are prudent. Therefore, the requirement to perform an energy assessment can both be enforced and will result in emission reductions.

We agree that EPA should provide a clear definition of what the energy assessment should encompass. However, we disagree that the energy assessment should be limited to only the boiler and associated equipment. EPA has properly exercised the authority granted to it pursuant to CAA section 112(d)(2) which states that "Emission standards promulgated * * * and applicable to new or existing sources shall require the maximum degree of reduction in [HAP] emissions that the Administrator determines * * * is achievable * * * through application of measures, processes, methods, systems or techniques including, but not limited to measures which * * * reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications * * *." The purpose of an energy assessment is to identify energy conservation measures (such as, process changes or other modifications to the facility) that can be implemented to reduce the facility energy demand from the affected boiler which would result in reduced fuel use. Reduced fuel use will result in a corresponding reduction in HAP, and non-HAP, emissions from the affected boiler. Reducing the energy demand from the plant's energy using systems can result in additional reductions in fuel use and associated emissions from the affected boilers. We agree that the scope of the required energy assessment needs to be clarified. However, in the proposed Boiler MACT, the intended scope of the energy assessment did extend beyond the affected boiler. The energy assessment did include a requirement that a facility energy management program be developed. The energy assessment was intended to be broader than the affected boiler and process heater and included other systems or processes that used the energy from the boiler and process heater. We disagree that the scope of the energy assessment should be limited to the boiler and directly associated components such as the feed water system, combustion air system, fuel system (including burners), blow down system, combustion control system, and heat recovery of the combustion fuel gas. Including the facility's energy using systems and energy management practices in the energy assessment can identify measures that result in decreased fuel use and related emission reductions. We have included in this final rule a definition of what the energy assessment should include for various size fuel consuming facilities. We also have included a definition of the qualified assessors who must be used to conduct those energy assessments.

We also agree that a facility should be exempt from the requirement to conduct an energy assessment if an energy assessment had recently been conducted. We have revised this final rule to allow facilities to comply with the requirement by submitting an energy assessment that had been conducted within 3 years prior to the promulgation date of this final rule.

*C. Rationale for Subcategories*

Many commenters stated that EPA should have proposed more subcategories, while others believed that too many subcategories were proposed. Many different issues were raised, and some of the key issues that led to changes in the rule include: The need for a limited use subcategory for boilers that operate for only a small percentage of hours during a year; the unique suspension/grate design of units that combust bagasse; the need for a non-continental liquid fuel subcategory for island units that have limited fuel options and other unique circumstances; and the appropriate subcategory for mixed fuel units. The comments and EPA responses are provided below.

1. Limited Use Subcategory

*Comment:* Industry representatives and State and local governments argued that limited use units are significantly different from steady-state units and requested that they have their own subcategory. Commenters requested various thresholds for a limited-use subcategory including 10 percent annual capacity factor or 1,000 hours of operation per year. Several commenters stated that due to their function, limited use boilers spend a larger percentage of time in startup, shutdown, or other reduced-efficiency operating conditions than either base-loaded or load-following (continuously operated) units. Operating more frequently in these conditions makes emissions profiles of limited use units very different from sources which operate in more efficient steady-state modes. Based on this, commenters claimed it would be technically infeasible for limited-use units to meet the proposed emission limits.

In addition to technical reasoning, commenters also submitted requests for a limited-use subcategory on the basis of regulatory precedent, citing the 2010 RICE MACT and 2004 vacated Boiler MACT. Several commenters requested a subcategory and work practices similar to those in the Stationary RICE NESHAP. Several other commenters also stated that the subcategory was warranted because it was included in the previous Boiler MACT rule. These commenters argued that EPA had not provided any justification for eliminating the subcategory in the proposed rule. Some of these commenters also stated that the recordkeeping requirements that were proposed in Section 63.7555(d)(3) for limited-use boilers and process heaters should be the only requirement for these units.

The majority of commenters that requested a limited use subcategory also requested for EPA to adopt a work practice standard for limited use units and not subject the subcategory to emissions testing or monitoring. Commenters argued that EPA has acknowledged that there is no proven control technology for organic HAP emissions from limited use units. Limited use units, such as emergency and backup boilers, cannot be tested effectively due to their limited operating schedules. Based on existing test methods, which require a unit to operate in a steady state, limited use units would have to operate for the sole purpose of emissions testing. One commenter claimed that the proposed rule performance testing would require, not including startup and stabilization, operating at least 15 additional hours of per year, or 24 hours per year if testing for all pollutants is required. Commenters also noted that because the operation of these units is neither predictable nor routine over a 30 day period, back-up boilers would not benefit from 30-day emissions averaging. Commenters argued that establishing numerical standards for limited use units is contrary to the goals of the CAA and will lead to creating

emissions for the sole purpose of demonstrating compliance.

Many commenters also mentioned the economic impacts of a numerical limit on limited-use units and requested work practice standards. Commenters stated that it would not be cost effective to install controls on units that operate at 10 percent capacity or less annually. They claimed that the additional controls would produce minimal emission reductions and would result in the shutdown of limited-use units.

Several commenters claimed that the current distinction between natural gas and oil-fired limited-use units is unnecessary, and that additional requirements for oil-fired units do not produce environmental benefits. Commenters recommended that EPA create a separate subcategory for limited use, oil-fired boilers and suggest that the work practice standard proposed for gas-fired boilers be applied in lieu of emissions standards for these units. Other commenters stated that the limited use subcategory should include new/reconstructed limited use units as well as existing units for all fuel categories. One commenter recommended a tiered approach and stated that for very limited use boilers, EPA should establish a standard with no additional controls or requirements, other than monitoring annual hours of operation. They defined very limited use as <500 hours of operation per year.

*Response:* EPA agrees that a subcategory for limited use units is appropriate for many of the reasons stated by the commenters. The fact that the nature of these units is such that they operate for unpredictable periods of time, limited hours, and at less than full load in many cases has lead EPA to determine that limited use units are a unique class of unit based on the unique way in which they are used and EPA is including a subcategory for these units in the final rule. The unpredictable operation of this class of units makes emission testing for the suite of pollutants being regulated impracticable. In order to test the units, they would need to be operated specifically to conduct the emissions testing because the nature and duration of their use does not allow for the required emissions testing. As commenters noted, such testing and operation of the unit when it is not needed is also economically impracticable, and would lead to increased emissions and combustion of fuel that would not otherwise be combusted. Therefore, we are regulating these units with a work practice standard that requires a biennial tune-up, which will limit HAP by ensuring that these units operate at peak efficiency during the limited hours that they do operate.

2. Combination Grate/Suspension Firing

*Comment:* Several commenters requested EPA further subcategorize boilers and process heaters according to combustor design. Three industry and collective trade group representatives requested EPA consider adding a bagasse boiler subcategory. These commenters claimed that bagasse boilers are different from other biomass boilers based on both fuel type and boiler design. The commenter suggested four factors EPA should consider when establishing similar sources or subcategories: (1) Do the units in the category have comparable emissions; (2) are the units structurally similar in design; (3) are the units structurally similar in size; and, (4) are the units capable of installing the same control technology. The commenter elaborated on the fuel density and moisture of bagasse fuel and highlights the unique combustor design needed to heat and evaporate the moisture from the fuel using a combination of suspension and grate firing. Several commenters requested that EPA set separate subcategories for organic HAP (or CO) and for metal HAP and PM for bagasse boilers (between 48 to 55 percent moisture), suspension burners designed to burn dry biomass (defined as less than 30 percent moisture), suspension burners designed to burn wet biomass (greater than 30 percent moisture), and Dutch ovens.

One commenter also requested that the regulatory definition of bagasse boiler be altered to take into account that bagasse boilers are hybrid suspension and grate/floor-fired boilers uniquely designed to dry and burn bagasse. The commenter goes on to explain that the majority of drying and combustion take place in suspension and the combustion is completed on the grate or floor. The boilers are designed to have high heat release rates and high excess air rates which are to evaporate high fuel moisture content and this design impacts CO, PM, and organic HAP formation. Under the proposal, most bagasse-fired boilers would be categorized as "suspension burners/dutch ovens designed to burn biomass." However, the commenter claimed that the CO limit for this subcategory was driven largely by emissions data from units which fire dry biomass (*i.e.,* less than 20 to 30 percent moisture fuel) that do not need to undergo this initial drying process, since the fuel is already dry enough to combust. The commenter elaborated that emissions of organic HAP and PM from these dry biomass suspension boilers are much different than boilers that must use a combination of suspension firing and grate firing in order to achieve complete combustion of a wet fuel such as bagasse.

One commenter went on the say that EPA has inappropriately subcategorized suspension burners/dutch ovens designed to burn biomass as a single subcategory. Hybrid suspension/grate-floor burners are designed such that the wet fuel first undergoes drying and then combustion in suspension within the furnace, with any remaining unburned fuel falling onto the grate to complete combustion. Another commenter also provided technical design elements to highlight the differences between dutch ovens, suspension burners, and the above mentioned hybrid suspension grate burners. This commenter indicated that dutch ovens have two chambers. Solid fuel is dropped down into a refractory lined chamber where drying and gasification take place in the fuel pile. Gases pass over a wall into the second chamber where combustion is completed. Dutch ovens are capable of burning high moisture fuels such as bark, but have low thermal efficiency and are unable to respond rapidly to changes in steam demand. On the contrary, suspension burners combust fine, dry fuels such as sawdust and sander dust in suspension. Rapid changes in combustion rate are possible with this firing method. This commenter added that some dutch oven units located at particleboard, hardboard, and medium density fiberboard plants were misclassified and there are less than 30 true dry-fired suspension burners in operation, and only a small handful of true dutch oven boilers.

*Response:* EPA agrees that for combustion-related pollutants (used as a surrogate for organic HAP emissions), the design differences for hybrid suspension grate boilers (also referred to as comination suspension/grate boilers) are significant, and that combustion conditions in these types of units are not similar to those in dutch ovens or true suspension burners that combust fine, dry fuels. Therefore, EPA has added a hybrid suspension grate boiler subcategory for CO and dioxin/furan emissions. However, the differences discussed by the commenters with respect to PM are less indicative of the design of the boiler and more indicative of the types of air pollution controls that are used. In keeping with the subcategorization approach being used for this final rule, these units, and all other solid fuel units, will be included

in a subcategory for units combusting solid fuels for PM, Hg, and HCl.

3. Non-Continental Units

*Comment:* Commenters from affected island refineries and trade groups representing the petroleum and refining sectors requested additional fuel oil burning flexibility in this final rule and stated that work practice standards are more appropriate for fuel oil burning at refineries and other remote locations without access to natural gas.

Commenters also submitted technical issues justifying the creation of a non-continental or remote location subcategory. One commenter stated that most oil combustion in the petroleum sector is in locations that are islands or in more remote parts of the United States. Island and remote facilities cannot physically access natural gas pipelines, making burning liquid fuels unavoidable. The option of crude oil shipments would be impractical because the ships are limited by size and what is manageable by load/discharge ports. The commenter also claims that in the time it would take a crude ship to arrive, the refinery would have produced the amount of crude in the shipment. Further, while some units at a facility are designed to burn refinery fuel gas, the fuel gas produced at a refinery is less than the energy required to operate the refinery. These non-continental facilities are also limited to the fuel quality provided by their nearby crude slate used in the refining process. That commenter goes on to say that these refineries produce their fuel, the HAP metals content of the fuel used (particularly residual fuel oil) is a direct result of the crude slate used on site. The commenter submitted trace metals from various crudes to show that the content varies substantially between crude oils being used on site.

Another commenter provided the following distinctions for non-continental units: A striking example of fuel system differences for non-continental units is daily variation in fuel gas production due to ambient temperature fluctuations between night and mid-day or resulting from tropical rainfall events, coupled with fin fan cooling systems that are used because of the lack of fresh water available in an island without freshwater lakes or streams. The fuel system experiences a large daily variation in refinery fuel gas due to changes in ambient air temperature. These changes occur as a day-night swing in the refinery or any time there is a significant rain storm. As the ambient air temperature decreases, the amount of propane, butane and heavier molecules in the fuel gas decreases, as those compounds condense out. This results in a change in volume and composition (energy content) of the refinery fuel gas produced which, in the case of rainfall events, occurs very quickly and unpredictably. This temperature variation occurs more frequently than at a mainland refinery because: The method of cooling on gas compressors and distillation column overheads systems is ambient air fin fan coolers (water with cooling towers is not used like a stateside refinery because fresh water is not available other than by desalination); the refinery fuel gas system contains miles of aboveground piping (long lines are affected by rain and weather conditions); refinery fuel gas contains more propane and butane than would natural gas from a pipeline (which condense at closer to ambient temperatures than methane or ethane); the make-up fuel system for the refinery is not a natural gas pipeline as at a stateside refinery. A natural gas pipeline can handle changes in refinery fuel gas produced because natural gas delivery systems are usually large enough to handle changes. A temperature change of 10 to 15 degrees or a rain storm that quickly wets the air fin fans/piping will change the volume and composition (energy content) of the refinery fuel gas produced and also impacts CO emissions.

In addition to the technical limitations described above, one commenter cited other EPA air regulations that have provided separate standards or subcategories for non-continental units. For example, 40 CFR part 60 subparts Db and KKKK include separate standards for "non-continental" units and the 2010 CISWI proposal had a subcategory for smaller remote facilities because of inherent design and operating constraints.

Another commenter mentions that the inability to obtain natural gas removes the option of being able to burn only gaseous fuels as a compliance strategy and burning fuel oil as a supplemental fuel makes complying with this proposed MACT unfairly onerous.

*Response:* EPA agrees that the unique considerations faced by non-continental refineries warrant a separate subcategory for these units. However, data were only provided for CO and Hg, and, in the absence of data for the other pollutants, EPA is adopting the same limits that were developed for liquid units, because liquid units are the most similar units for which data are available. EPA assumed that while the commenter focused on changes in refinery gas, that the commenters concern was with liquid fuel-fired units whose performance is impacted by the co-firing of refinery gas. Regardless, it is clear that the unique design of this type of unit warrants a separate subcategory because design constraints would not enable the sources to meet the same standards, particularly for CO, as stateside units.

4. Combination Fuel Units

*Comment:* Several industries and industry representatives in addition to some State and local governments argued that combination fuel units are significantly different from units in single fuel subcategories. These commenters focused on three types of combination fuel units. The first, which the majority of comments focused on, was biomass and coal co-fired units. Commenters stated that classifying units that burned 90 percent biomass in the coal subcategory if it fired at least 10 percent heat input coal penalizes and discourages the use of biomass. One commenter claimed that they were unaware of any available control technology with the capability of reducing emissions from its biomass-fired boilers from their current levels to the level proposed for the coal stoker subcategory. Commenters stated that in order to meet the organic HAP limits for coal, they would have to switch from biomass to more coal or abandon co-firing projects. According to the commenter this result was contrary to state Renewable Portfolio Standards and general national renewable energy policy.

The second type of combination unit commenters discussed was units that co-fire gas and liquid fuels. Many commenters argued that combination oil and gas fired units are of a completely different design than EPA contemplated in setting its standards and cannot be fairly included in the same subcategory with other dedicated gas or oil fired units. Commenters elaborated that the main design difference was due to combustion techniques which require the heater/boiler firebox configuration to compromise between the needs of oil fuel and gas fuel, making it impossible to maximize combustion efficiency or minimize $NO_X$ emissions. Commenters also noted that these units were not considered in development of the MACT standards, and claimed that they are well known in the burner industry and referenced in standard literature.

The third type of combination unit, one commenter mentioned, was a subcategory for units co-firing biomass with any solid fuel. Commenters claimed that by failing to recognize the wide verity of fuel inputs and thus the variation in fuel quality (i.e., BTU and

moisture content) and emissions, EPA was penalizing facilities that use multiple fuel streams. The commenter went on to request that EPA establish emission limits that reflect the variation in fuels and fuel quality in these combination units.

Several commenters disagreed with the EPA statement that boilers are designed to burn only one fuel and that unit will encounter operational problems if another fuel type is fired at more than 10 percent heat input. Commenters stated that some boilers are specifically designed to burn a combination of fuels, and to burn them in varying quantities. Commenters elaborated that such boilers are not able to reach full load on any single fuel and that EPA has incorrectly presumed that all boilers are designed based on a primary fuel. Some commenters identified that many of the boilers used as the basis of the proposed MACT floor emission limits co-fire different fuel types. One commenter stated that if most units are designed to burn a primary fuel and will encounter problems if the 10 percent threshold is exceeded, then EPA has proposed MACT standards that will apply to boilers that by their nature are "encountering problems" due to their fuel mix. The commenter requested that EPA addresses this inconsistency.

Many commenters noted that emissions profiles vary with the fuel which made it very difficult to establish a typical emissions profile. Commenters also explained that combination fuel boilers must often adapt to process steam demands and thus experience frequent load swings and fuel input adjustments that cause significant variation in CO emission levels. Commenters also mentioned that control compatibility should be considered for multi-fuel boilers because they have inherently different control needs depending on the fuels being fired. Commenters went on to say that current limits are based on control equipment that is optimized for one HAP or fuel but the affect of other HAP and fuels or even another control would result in unknown performance and compatibility with other fuel types.

Several commenters also had concerns regarding enforcement and compliance of combination fuel units. One commenter requested that EPA more specifically address the "enforceability" of the "designed to burn" classification and more clearly consider the implications of the multi-fuel boiler operation on testing considerations. Another commenter stated that expressing limits as applicable to units "designed to burn" certain fuels was problematic and should be changed to "permitted to burn" because a State permit could limit the type of fuels combusted at a unit that may have originally been designed to burn other fuel types. Other commenters claimed that the fuel subcategory should be determined by the actual quantity of fuel burned not what the unit is designed to burn. Some questions that commenters requested clarification on were: If compliance tests would be required under different fuel firing conditions, can units with CEMS switch limits depending on what fuel is being combusted, if "designed to combust" is not maintained would actual fuel burned or fuel the unit is permitted to burn determine the subcategory, what would the annual performance test be if in the middle of the year a unit goes from having burned only one type of fuel to only another type the rest of the year.

Several solutions were suggested for addressing combination boilers. Some commenters requested that combination boilers have their own subcategory. Several other industry commenters suggested that EPA modify the subcategory definitions and applicability so that combination fuel units burning more than 10 percent coal with biomass would be regulated under the coal subcategory for fuel-based HAP and units burning more than 10 percent biomass with coal would be regulated under the biomass subcategory for combustion-based HAP. A more general solution proposed, for all types of combination fuel units, was that if a facility combusts more than one fuel type, it must meet the lowest applicable emission limit for all of the fuel types actually burned. Some commenters also requested the development of a formula based approach similar to that of the boiler NSPS $SO_2$ limits that considers the mix of fuel fired rather than assuming one fuel dictates the emission limitations.

Some commenters were concerned that determination of MACT floor limits should be based only on data obtained while firing 100 percent of the affected fuel category and recommended that EPA either exclude all test runs where a unit was co-firing or adjust the data accordingly to remove the co-firing bias.

*Response:* In response to the variety of comments regarding combination fuel boilers, EPA has revised the subcategories in order to simplify implementation, improve the flexibility of units in establishing and changing fuel mixtures, promote combustion of cleaner fuels, and provide MACT standards that are enforceable and consistent with the requirements of section 112. For the combination liquid and gas-fired units, while the commenters provided some insights on these units, the data available to EPA regarding any distinctions between these units and units designed to burn liquid only were insufficient to provide a justification for changing the approach for these units. For combined fuel units that combust solid fuels, due to the many potential combinations and percentages of solid fuels that are or can be combusted, for the fuel-based pollutants, EPA selected the option of combining the subcategories for solid fuels into a single solid fuel subcategory. For the fuel-based pollutants, this alleviates the concerns regarding changes in fuel mixtures, promotion of combustion of dirtier fuels, and the implementation and compliance concerns. For combustion-based pollutants (CO and dioxin/furan), we maintained the proposed subcategories and added a few additional subcategories, as discussed elsewhere in this preamble, based on public comment. One change we are finalizing is that to determine the appropriate subcategory, instead of considering whether the unit is designed to combust at least 10 percent coal as the first step (as proposed), the first step in determining the appropriate subcategory is to consider the percentage of biomass that is combusted in the unit.

The subcategories for the combustion-based pollutants are now determined in the following manner. If your new or existing boiler or process heater burns at least 10 percent biomass on an annual average heat input basis, the unit is in one of the biomass subcategories. If your new or existing boiler or process heater burns at least 10 percent coal and less than 10 percent biomass, on an annual average heat input basis, the unit is in one of the coal subcategories. If your facility is located in the continental United States and your new or existing boiler or process heater burns at least 10 percent liquid fuel (such as distillate oil, residual oil) and less than 10 percent coal and less than 10 percent biomass, on an annual average heat input basis, your unit is in the liquid subcategory. If your non-continental new or existing boiler or process heater burns at least 10 percent liquid fuel (such as distillate oil, residual oil) and less than 10 percent coal and less than 10 percent biomass, on an annual average heat input basis, your unit is in the non-continental liquid subcategory. Finally, for the combustion-based pollutants, if your unit combusts gaseous fuel that does not

qualify as a "Gas 1" fuel, your unit is in the Gas 2 subcategory.

*D. Work Practices*

1. Gas 1 Work Practices

*Comment:* Several industry and industry trade group commenters expressed general support for the adoption of work practice standards for natural gas and refinery gas (Gas 1) fired boilers and process heaters. Many of these commenters stated that work practice standards will minimize HAP emissions in a cost effective manner.

Commenters, including industry representatives and one government agency, submitted several technical justifications that supported the proposed work practice standards for natural gas and refinery gas units. Many of these commenters stated that Gas 1 units contribute a negligible amount of the total emissions from the source category. One commenter stated that based on a review of air permits issued for natural gas-fired units over the last 10 years no HAP emissions were identified at rates which required the State to set emission limits. Further, many commenters indicated that no currently-available control technology or technique has been indentified to achieve numeric limits for natural gas units. Others went on to argue that tune-ups actually represent the only "floor" technology currently in use at boilers and process heaters in the Gas 1 subcategory. One commenter stated that design characteristics of these units, and hence the emissions-reduction potentials of annual tune-ups, vary widely and no single emission rate or even percentage of emission reduction could be translated into a numerical limit.

Several commenters argued that work practice standards were justified based on the technical infeasibility of emissions testing and the accuracy of testing results from gas units. These commenters stated that most of the emission test data were close to detection limits or in some cases indistinguishable from ambient air near the lowest detect levels, thus preventing the limits from being enforced or reliably measured. Others argued that the application of EPA test methods to measure emissions from natural gas units results in unreliable data given that the emissions are low and below what the test methods can detect, causing repeat tests or significantly lengthening the periods for the tests, which in turn increase the cost of testing.

On the contrary, one of the environmental advocacy group commenters stated that EPA exempted natural gas-fired units from CO limits without any discussion or analysis. This commenter argued that nothing in the rulemaking docket showed that measurement would be technically infeasible and identified CO emission test results from over 160 natural gas-fired units in the NACAA database. Further, the commenter suggested that federal, State and local authorities have routinely required CO to be measured at gas fired units since CO is a criteria pollutant under the CAA.

In addition to technical reasoning, many industry and industry representative commenters also supported the adoption of work practice standards on the basis of legal precedent and authority under the CAA. Commenters stated that EPA derives its authority to use work practices in lieu of numeric emission limitations from two different statutory provisions: The narrowly construed provisions of 112(h) and the broad authority under 112(d) as defined in section 302(k). Additionally, one commenter stated that work practice standards for Gas 1 units are consistent with the D.C. Circuit's opinion in *Sierra Club* v. *EPA* on the Brick MACT standard, which provided guidance on the criteria EPA must meet to justify the application of section 112(h) work practices, only if measuring emission levels is technologically or economically impracticable.

Many commenters also cited economic justifications supporting the proposed work practices for Gas 1 units. These comments included claims that work practice standards avoid economic harm to the manufacturing sector, and they added that the cost to control each unit would be extremely burdensome with minimal benefits to the environment. These commenters suggested that any type of control beyond a tune-up would be a beyond-the-floor option and the complex controls needed to achieve such low emission levels would fail the cost-benefit determination needed to justify a beyond-the-floor option.

On the contrary, two environmental advocacy groups submitted comments opposing EPA's rationale for exempting Gas 1 units from CO limits on the basis of cost. The commenters argued that the only economic defense of work practice standards that would be justified was if economic limitations rendered the measurement of emissions "impracticable." Further, the commenters suggested that many of these Gas 1 units would require more than a tune-up to achieve comparable reductions to those estimated if a numeric MACT floor standard was required.

Another commenter representing the coal industry also disagreed with EPA's use of a public policy rationale to justify a work practice for Gas 1 units instead of demonstrating that a work practice meets the requirements under section 112(h). The commenter argued that cost considerations were not relevant in a MACT floor analysis and they noted that the per unit costs of complying with MACT standards for gas units are lower than the cost for coal units.

Many commenters from industry, industry trade groups, universities, and State agencies agreed that emission limits would provide a disincentive to operate or switch to natural gas and refinery gas fired units. Commenters claimed that if limits for Gas 1 were adopted, units would switch from natural gas to electric systems powered by coal. Commenters stated that EPA correctly concluded that imposing emission limitations on gas-fired boilers would create a disincentive for switching to gas from oil, coal, or biomass as a control technique and would create an incentive for facilities to switch away from gas to other fuels.

A commenter from a private coal company indicated that EPA's concerns that establishing a MACT floor limit for Gas 1 units would incentivize fuel switching to coal or other fuels contradict EPA's rejection of fuel switching as a MACT floor alternative. The commenter added that if EPA rejected fuel switching because of its costliness and lack of a net emissions benefit, EPA should want to discourage coal units from converting to natural gas rather than promoting fuel switching to natural gas. This commenter also claimed that establishing a work practice standard for only Gas 1 units discriminated in favor of the use of natural gas and against the use of coal. The commenter argued that such a policy rationale invokes considerations that are not relevant in setting MACT floor standards and suggested that such a rationale is in violation of both CAA and the Equal Protection Clause of the Constitution. This commenter added that the only relevant statutory factor under 112(h) to help EPA determine where to apply a work practice standard was whether the hazardous air pollutant cannot be emitted through a conveyance designed and constructed to emit or capture that pollutant, whether the use of such a conveyance would be inconsistent with law, or whether the application of measurement methodology is not practicable due to technological and economic limitations.

*Response:* EPA has determined that it is not feasible to prescribe numerical emissions standards for Gas 1 units because the application of measurement methodology is not practicable due to technological and economic limitations. Therefore, EPA is finalizing the work practice standards for Gas 1 units. The commenters correctly point out that the measured emissions from these units are routinely below the detection limits of EPA test methods, and, as such, EPA considers it impracticable to reliably measure emissions from these units. Even CO, which commenters correctly point out was tested at many natural gas and refinery gas-fired units, was below the level EPA considers to be a reliable measurement for more than 80 percent of the test runs that were conducted on Gas 1 units. The case for other pollutants is even more compelling as the majority of measurements are so low as to cast doubt on the true levels of emissions that were measured during the tests. Of the 48 test runs for HCl, 98 percent were below three times the maximum reported measurement detection level; similarly, 100 percent of the Hg runs, and 45 percent of the PM data were below three times the maximum reported measurement detection level. It is unusual to see numbers near the detection limit for PM since the "detection" involves a comparatively simple (compared to other test methods) weighing procedure, and the overall result indicates that the emissions are very close to zero. All of the dioxin tests had multiple non-detect isomers. Overall, the available test methods are greatly challenged, to the point of providing results that are questionable for all of the pollutants, when testing natural gas units. Because of these technological limitations that render it impracticable to measure emissions from Gas 1 units, EPA is also unable to establish the actual performance of the best performers as well as sources outside of the top performing 12 percent. The inability to accurately measure emissions from Gas 1 units and the related economic impracticability associated with measuring levels that are so low that even carefully conducted tests do not accurately measure emissions warrant setting a work practice standard under CAA section 112(h). EPA is establishing a requirement to implement a tune-up program as described in Section III.D of this preamble. As noted by many commenters, the tune-up program is an effective HAP emissions limitation technology. The requirement of an annual tune-up will allow these units to continue to combust the cleanest fuels available for boilers while minimizing emissions to the same degree that is consistent with the operating practices of the best performing units in the subcategory.

2. Combining Gas 1 and Gas 2 Subcategories

*Comment:* Several commenters requested consolidation of the Gas 1 and Gas 2 subcategories into a single gas-fired subcategory. The majority of commenters supported this concept by suggesting that there is very little difference between emissions from the top performing sources in each of the two gas subcategories. One commenter specifically argued that in most cases the mean emission levels for Gas 2 fuels are within range and confidence intervals for individual Gas 1 fuels and that the differences in fuel characteristics do not have a first order impact on HAP emissions. The commenter reported on communications with a facility in the database firing a heavy recycle liquid and natural gas fuel combination, which indicated that this unit is a liquid fuel boiler and they provided an analysis of the dataset without this heavy recycle data where the confidence intervals for the remaining landfill gas, biogas/natural gas, and coke oven gas all overlap that for Gas 1 fuels. The commenter also claimed that if 12 outliers from two process gas facilities are eliminated, the remaining 232 of 244 CO data points within Gas 2 fuel group compare favorably with, even lower than, CO levels from Gas 1 fuels. Another commenter stated that pilot scale and field data studies have concluded that emissions of organic HAP from gaseous fuels are not significantly affected by fuel type.

In lieu of a single gas subcategory, several of the commenters requested that the Gas 1 subcategory be expanded to include gases similar to natural gas and refinery gas. These commenters argued, much like the commenters advocating for a single gas-fired subcategory, that units fired with process gases generated in chemical plants, pulp and paper plants, iron and steel plants, and similar operations should be included in the Gas 1 subcategory because the emissions data show very little difference in performance. One commenter stated that most of the Gas 2 fuels, including all 9 of the data points used in the proposed floor calculations, are from chemical plants. The commenter added that at a minimum, chemical plant process gas should be grouped with refinery gas in Gas 1 and a new floor made for Gas 2. One commenter noted that EPA did not gather information on composition or heating value in the Phase 1 ICR survey to justify placing chemical process gases in a separate subcategory from natural gas and refinery gas. Another commenter submitted combustion properties of refinery gas and petrochemical gas in order to argue that they are very similar in composition and should be categorized with natural gas in the Gas 1 category.

In order to accomplish this expansion of the Gas 1 subcategory, many commenters also addressed the definition of natural gas and refinery gas. One commenter simply stated that all gases derived from hydrocarbon sources should be classified under the Gas 1 subcategory. Another commenter suggested the definition of refinery gas in 40 CFR part 63 subpart CC for the Petroleum Refineries NESHAP should be used in this final rule. The commenter went on to say that such gases from petrochemical processes have similar compositions to those stated in the Subpart CC definition (e.g. methane, hydrogen, light hydrocarbons, and other components) that are used as fuel in boilers and process heaters and thus should be subcategorized as Gas 1. One commenter stated that the definition of natural gas should be consistent across federal air regulations and suggested that the definition of natural gas should be edited to be consistent with the definition provided in 40 CFR Part 60 Subpart Db. Another commenter requested that the definition of Gas 1 include any boiler or process heater burning at least 90 percent natural gas, refinery gas, or process off-gases with metals and sulfur content equal or less than those in natural gas.

Many other commenters argued that in general the definition of natural gas needs to be broadened to account for non-geological origins of natural gas such as landfill gas, biogas, and synthetic gas in order to promote the use of these renewable fuels. This commenter went on to state that the Gas 1 subcategory excludes biogas and process off gases that have no metals and very comparable combustion characteristics to that of natural gas or refinery gas. One commenter argued that landfill gas (LFG) should be included in Gas 1 with the work practice approach because placing it in the Gas 2 subcategory conflicts with EPA Landfill Methane Outreach Program goals. The commenter goes on to say that there is no assurance that all limits can be achieved with control technologies and installation of controls will be prohibitively expensive and thus LFG projects will be stopped or replaced

with natural gas. A few commenters suggested that EPA did not have enough data on combustion of anaerobic digester gas to differentiate it from natural gas. One commenter requested confirmation that biogas under the proposed rule would be subject to Gas 2 emission limits. Another commenter requested that EPA separate and clearly define gaseous fuels derived from biomass and noted that depending on the source these fuels can contain chlorine or Hg and constituents that lead to the formation of dioxins and furans. With respect to syngas, one commenter suggested that EPA adopt a definition similar to that used in the 40 CFR part 60 subpart YYYY standards for stationary combustion turbines. The commenter noted that if the purity of syngas was a concern, a solution would be to require the syngas to meet minimum specifications in part 261 of the hazardous waste regulations. Another commenter requested that Integrated Gas Combined Cycle units that use a gasifier to convert coal to gas and remove impurities before combustion be classified under the Gas 1 subcategory.

Three commenters specifically argued for the inclusion of propane fired boilers within the Gas 1 subcategory. One commenter stated that if propane meets the specifications of ASTM D1835–03a or other specification types like the Gas Processors Association Standard 2140–92 it should be included within the Gas 1 definition. Another commenter requested clarification that boilers firing liquefied petroleum gas (LPG) or propane-derived synthetic natural gas (SNG) as a backup fuel are still classified as Gas 1 boilers. The commenter argued that propane or LPG is mixed with air to make SNG and should be considered natural gas for the purposes of this final rule.

Several commenters specifically requested that hydrogen plant tail gas or similar process gases that are derived from natural gas be included in the Gas 1 subcategory. Commenters argued that hydrogen fuels do not contain HAP and subcategorizing the fuel as Gas 2 subjects the units to limits that would achieve no further reduction of HAP but require extensive performance testing, recordkeeping, fuel analysis and monitoring requirements. One commenter submitted historical facility data from a unit firing byproduct hydrogen and the commenter claimed that the fuel is cleaner burning than natural gas. One commenter suggested an 8 percent by volume minimum hydrogen content in hydrogen-fueled process gases as a criterion for consideration as a Gas 1 fuel. The commenter mentioned that this percentage is based on a 1998 EPA document that established a minimum hydrogen content by volume for non-assisted flare combustion efficiency.

If a separate Gas 2 subcategory remains in the rule, many other commenters requested that work practices be extended to the Gas 2 subcategory based on the claim that gas-fired units, relative to units firing other fuels, have the lowest emissions and pose the lowest risk of all the subcategories. Thus, the use of gas should be encouraged rather than discouraged. Some commenters argued that as a consequence of establishing limits for Gas 2 fuels, some plant sites currently designed to use Gas 2 streams for energy efficient operations will be forced to dispose of process off-gases in other types of combustion sources such as flares. The commenters added that such disposal would result in essentially the same emissions from combustion of the Gas 2 stream using a flare (as opposed to combusting the fuel in a boiler) and additional emissions from consumption of natural gas that would be used in lieu of the Gas 2 fuel. Overall, the standard as proposed for Gas 2 units would result in increased emissions of all pollutants and lower fuel efficiency.

*Response:* EPA has determined that to the extent that process gases are comparable to natural gas and refinery gas, combustion of those gases in boilers and process heaters should be subject to the same standards as combustion of natural gas and refinery gas. Boilers that combust other gaseous fuels that have comparable emissions levels to Gas 1 units are similar in class and type to Gas 1 units because they share common design, operation, and emissions characteristics. Therefore, we are providing a mechanism by which units that combust gaseous fuels other than natural gas and refinery gas can demonstrate that they are similar to Gas 1 units and will therefore be subject to the standards for Gas 1 units. EPA originally examined the possibility of basing such a demonstration on levels of mercury and chlorine content in the gases, but no information was available regarding the chlorine content of natural gas or refinery gas, and no proven test methods were identified to quantify chlorine content of natural gas. Therefore, EPA is requiring a demonstration that other gases have levels of $H_2S$ and Hg that are no higher than those found in Gas 1 units. Natural gas purity is commonly defined considering the sulfur content of the gas, in the form of $H_2S$. Sweet natural gas, which is considered pipeline quality gas, contains no more than 4 ppmv $H_2S$. Information on Hg levels typical of natural gas was available through literature, and domestic natural gas Hg concentrations range up to about 40 micrograms per cubic meter. Using $H_2S$ and Hg concentration as parameters for establishing equivalent contamination levels to natural gas, EPA is providing a fuel specification that can be used by facilities to qualify Gas 2 units for the Gas 1 standards. The fuel specification would also allow facilities to perform pre-combustion gas cleanup in order to qualify Gas 2 units for the Gas 1 standards. Boilers using process gases that do not meet the fuel specification and are not processed to meet the contaminant levels must meet the emissions limits for Gas 2 units.

3. Dioxin/Furan Emission Limits or Work Practices

*Comment:* Many commenters disagreed with the proposed dioxin/furan emission limits. Some commenters noted that a large majority of the dioxin/furan test data are non-detect values. As such, under section 112(h)(2)(b) of the CAA, the commenters noted that EPA has the authority to establish work practice standards when "the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations." Other commenters stated that dioxin/furan formation in industrial boilers is not well understood and it would not be possible to duplicate the emissions from the facilities tested during the Phase II ICR that were used as the basis of the limit. One commenter indicated they will undergo preliminary research on the dioxin/furan removal efficiency of ESP and scrubbers, but much additional research is needed. Several commenters also added that there are no demonstrated technologies that would allow the units to reduce their emissions below the limit. Furthermore, control device vendors commented that they would not be able to guarantee their equipment will be able to control dioxin/furan for the affected boilers and process heaters due to lack of practical experience on boilers and process heaters. They also noted that most industry experience in controlling dioxin/furan is for waste-to-energy plants where concentrations of these pollutants are much higher than the reported Phase II ICR testing results.

Many commenters believe EPA is not authorized to regulate the entire dioxin/furan class as is currently proposed. They noted that in the section 112 HAP list only two compounds are specifically named, dibenzofuran and 1,3,7,8 TCDD,

and the MACT floor must be limited to those two and not all 17 congeners. Furthermore, some commenters stated that neither the initial EPA source category list (EPA–450/3–91–030) or the 2004 Boiler MACT rule identified dioxin/furan as a pollutant to be regulated.

Some commenters stated that regulating dioxin/furan emissions from these boilers and process heaters is not necessary because they are not a significant source of emissions. They noted that dioxin/furan emissions are significantly higher in units that burn chlorinated wastes and only those applicable rules (*e.g.* CISWI and Municipal Waste Combustors) should focus on regulating dioxin/furan. Having a limit in this Boiler MACT would only cause undue burden with minimal environmental impact. Given the uncertainties surrounding dioxin/furan emissions, a few commenters suggested EPA should do a thorough review prior to finalizing limits for this final rule to determine how this source category affects public health. It is suggested that EPA review the following questions: What portions of the annual total dioxin/furan emissions are contributed by this source category; what are the other major sources of dioxin/furan throughout the country; what are the current conditions for dioxin/furan exposure throughout the U.S.; have levels been going down or changing and if so by how much; and, could reductions be achieved more effectively by examining other sources of dioxin/furan?

In lieu of a specific dioxin/furan limit, many commenters suggested that CO should be used as a surrogate and meeting the CO limit would reduce dioxin/furan. While EPA stated in the preamble to the proposed rule that it is not appropriate to use CO as a surrogate, these commenters stated that the precursors to dioxin/furan formation are produced by incomplete combustion and thus dioxin/furan formation itself is indirectly related to the combustion process similar to the other organic HAP CO is currently used as a surrogate for. Another commenter suggested that control of other HAP such as Hg will provide adequate incidental control and reduction of dioxin/furan and the cost of separately monitoring dioxin/furan is not warranted taking into consideration the cost of achieving such emission reductions, energy requirements, and environmental impacts as required by Section 112(d)(2) of the CAA.

On the contrary, another commenter suggested that EPA correctly recognized that dioxin/furan can be formed outside of the combustion unit, not as part of the combustion process, and so sets separate standards for these carcinogens.

Several commenters provided specific comments on a lack of data available for boilers burning bagasse in a combined suspension and grate firing design.

As an alternative to the limits, many commenters offered suggestions for a work practice standard to minimize dioxin/furan emissions. These comments focused on creating boiler-specific plans for implementing good combustion practices along with an operations and maintenance plan. Additionally, boiler operators could maintain a minimum temperature at the outlet of PM control devices to minimize dioxin/furan formation.

*Response:* In response to the comments that EPA is not authorized to regulate the dioxin/furan class as proposed, the commenters are incorrect. While dibenzofuran and 2,3,7,8 TCDD are two of the HAP listed in section 112, all dioxin and furan compounds are considered to be POM and, as such, EPA has the authority to regulate these compounds under section 112. The risk-related questions suggested by commenters are not applicable to establishment of the MACT floor standards under section 112(d), which are to be based on the average emissions performance of the best performing units for which the Administrator has emissions information. EPA received a number of comments on dioxin and furan emission limits regarding the ability of the test method to measure the typically low levels of emissions that are emitted from boilers and process heaters.

Commenters stated that the emissions were so low that they could not be measured, and therefore work practice standards, rather than emission limits, should be finalized for dioxin/furan for all subcategories. EPA disagrees. While emissions were below detectable levels in many tests for a large portion of the dioxin/furan isomers, virtually every test detected some level of dioxin/furan. Furthermore, some of the emission tests detected most or all isomers at some level. Dioxin/furan emissions can be precisely measured for at least some units in each subcategory except for Gas 1. Therefore, except for the Gas 1 subcategory, which is addressed elsewhere in this preamble, the statutory test for establishment of work practice standards—i.e., that measurement of emissions is impracticable due to technological and economic limitations—is not met.

In order to make sure that the emission limits are set at a level that can be measured, EPA used the "three times MDL" approach (discussed elsewhere in this preamble) as a minimum level at which a dioxin/furan emission limit is set. Rather than finalizing work practice standards, but recognizing that emissions tend to be very low compared to more significant sources of dioxin such as incinerators, EPA's approach to dioxin requires an initial compliance test to demonstrate that the units meet the dioxin/furan standard, and no additional compliance testing. Following a test demonstrating compliance with the emission limit, provided that the unit's design is not modified in a manner inconsistent with good combustion practices, the oxygen level must be monitored, and the 12-hour block average must be maintained at or above 90 percent of the level established during the initial compliance test in order to provide an assurance of good combustion. Another important point to mention is that the dioxin/furan test method, EPA Method 23, requires that for compliance purposes, non-detect values should be counted as zero. Therefore, for purposes of compliance, the concern about not being able to meet the standards because of the contribution of non-detect values is moot.

4. Work Practices for Small Units

Comment: Many commenters stated EPA should treat new small units in the same manner as existing small units; for boilers and process heaters with a design capacity less than 10 MMBtu/hr, a work practice standard should be implemented instead of numerical limits. These commenters stated that the same technical and economic conditions under section 112(h) for existing units still held true for new units. New small boilers and process heaters (less than 10 mmBtu/hr) are typically designed like comparable existing units with small diameter stacks, or wall vents and no stack. These vents and small stacks do not allow for accurate application of standard EPA test methods required to demonstrate compliance with emission limits, and larger stacks would decrease the efficiencies of the units. They continued that while there are some savings in adding the controls and monitoring equipment during original construction, those savings were minor in comparison to the cost of the control and monitoring equipment itself. One commenter noted that the annual performance tests are over three times the cost of the boiler. In addition, other commenters stated that the D.C. Circuit has upheld EPA's discretion to have insignificant emission sources exempt from regulations, and small units meet this condition.

Several of the commenters who supported work practice standards for small units also believed the size threshold should change. A few commenters suggested the size should be lowered to 5 MMBtu/hr, while most contended that the size threshold should be raised to 20, 25, or 30 MMBtu/hr. Those commenters who wanted the threshold raised noted that even boilers as large as 30 MMBtu/hr experience the same economic implications on their facilities. Some commenters also noted that 40 CFR part 60 subpart Dc New Source Performance Standards have work practice standards for units less than 30 MMBtu/hr. One State agency commented that the proposed rule established stringent emission limits for new small units. The commenter argued that a tiered approach should be used which required higher emission limits for new small units.

Conversely, some commenters agreed with EPA's proposed method of making the limits applicable to new small units. They noted that new boilers can be built with stacks appropriate for testing, or can have temporary stack extensions built for testing. One commenter added that it is not uncommon for new small boilers to vent exhaust into existing larger stacks that would allow for testing.

*Response:* We agree that the design of new and existing small units precludes the use of the suite of test methods required by this final rule. As pointed out by commenters, new small boilers and process heaters (less than 10 mmBtu/hr) are typically designed like comparable existing units with small diameter stacks, or wall vents and no stack. These vents and small stacks do not allow for accurate measurement of emissions using the standard EPA test methods required to demonstrate compliance with emission limits, and larger stacks would decrease the efficiencies of the units. Changes in stack diameters or addition of stacks in lieu of wall vents can impact efficiencies of boilers and can require significant redesign of boiler systems, which imposes significant economic limitations. Therefore, EPA has concluded that work practice standards are appropriate for new and existing small units because the measurement of emissions is impracticable due to technological and economic limitations.

*E. New Data/Technical Corrections to Old Data*

*Comment:* Many commenters identified shortcomings in EPA's emissions database, and multiple corrections were submitted to EPA both through the public comment process and through e-mail communication with the ICR Combustion Survey team. Commenters also submitted new data directly to the ICR Combustion Survey Team and through the public comment process.

*Response:* EPA has incorporated all technical corrections and new data submitted since proposal. The corrections and new data are described in detail in a memorandum in the docket entitled "Handling and Processing of Corrections and New Data in the EPA ICR Databases."

*F. Startup, Shutdown, and Malfunction Requirements*

*Comment:* Numerous commenters raised concerns that insufficient data are currently available to establish emission standards for SSM events. Due to inherent limitations with measurement methods/technologies, which often require steady state conditions, emissions testing data and CEMS provide limited insight into SSM events, therefore combustor variability during these periods has been underestimated.

To address these data limitations, several commenters suggested that EPA should collect additional data that represent SSM events within each subcategory. One commenter had specific ideas for data collection including collecting SSM data from CEMS installed at the facilities previously included in the ICR survey and using portable analyzers to evaluate SSM emissions during future compliance testing. Many other commenters suggested that it would be infeasible to collect additional data given the test method limitations and suggested that a compliance work practice alternative be provided during periods of SSM. Commenters suggested that work practices should be site-specific, not be overly prescriptive, with the goal of minimizing the emissions during SSM periods. Other commenters suggested that EPA adopt an alternative to regulating emissions during SSM events and cited 40 CFR part 63 subpart ZZZZ, which states that startup time must be minimized.

Several commenters expressed separate concerns for EPA's treatment of malfunction events. Many commenters suggested that malfunction events should be excluded from emission limits and many submitted alternatives to including these periods. One commenter supported a limited allowance for malfunction periods where EPA defines the term "malfunction" and precisely identifies events requiring an immediate and complete shutdown. Another commenter suggested EPA should require facilities to develop and implement work practice standards to reduce malfunctions and minimize pollutants emitted during these periods. A third commenter asked that EPA replicate California permits which include a specific provision for malfunction.

Many industry commenters recognized that the proposal preamble included a statement indicating that EPA promised to address periods of equipment malfunction by considering other information before enforcing exceedance of operating limits. However, the commenters suggested that this promise does not prevent EPA, a State, or a plaintiff in a citizen suit from determining that an exceedance during a malfunction constitutes a violation. These commenters preferred EPA to develop explicit compliance alternatives for malfunctions in the rule language.

Several commenters contended that EPA failed to recognize the inherent limitations in the technology and operating conditions used to reduce emissions during SSM. One commenter referenced a case *(Portland Cement Ass'n* v. *Ruckelshaus* (D.C. Cir. 1973)) where the court acknowledged that "startup" and "upset" conditions due to plant or emission device malfunction are an inescapable aspect of industrial life and that allowance must be accounted for in the standards. Aside from meeting emission limits, commenters provided examples of other operating parameters that are affected during SSM including: Elevated oxygen levels, air pollution control device operating parameters such as sorbent injection rates or ESP voltage, and fuel feed rates, among others. Commenters also raised concerns that applying limits during startups will require sources to decide between safety and environmental compliance by encouraging sources to try to shorten the startup period. For example, some commenters noted that decreasing the warm-up period could cause metallurgical and refractory stresses on the boiler. One commenter indicated that EPA's proposed rule had unnecessarily disregarded the special circumstance, an affirmative defense, of excess emissions allowed in a September 20, 1999, EPA policy memo about State Implementation Plans (SIP). The commenter added that affirmative defense provisions have recently been approved into several states SIP (e.g., Colorado [71 FR at 8959] and New Mexico [74 FR at 46912]). Both the Colorado SIP and the New Mexico SIP contain an affirmative defense for excess

emissions during periods of startup and shutdown.

*Response:* EPA has considered these comments and has revised this final rule to incorporate a work practice standard for periods of startup and shutdown. Information provided on the amount of time required for startup and shutdown of boilers and process heaters indicates that the application of measurement methodology for these sources using the required procedures, which would require more than 12 continuous hours in startup or shutdown mode to satisfy all of the sample volume requirements in the rule, is impracticable. Upon review of this information, EPA determined that it is not feasible to require stack testing—in particular, to complete the multiple required test runs—during periods of startup and shutdown due to physical limitations and the short duration of startup and shutdown periods. Operating in startup and shutdown mode for sufficient time to conduct the required test runs could result in higher emissions than would otherwise occur. Based on these specific facts for the boilers and process heater source category, EPA has developed a separate standard for these periods, and we are finalizing work practice standards to meet this requirement. The work practice standard requires sources to minimize periods of startup and shutdown following the manufacturer's recommended procedures, if available. If manufacturer's recommended procedures are not available, sources must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available.

Regarding comments on treatment of malfunctions, the discussion of EPA's position on malfunctions in the section of this preamble entitled "What are the requirements during periods of startup, shutdown, and malfunction" provides details related to this response. Essentially, EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

Finally, EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. (*See, e.g.*, State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983)). EPA is, therefore, adding to this final rule an affirmative defense, as requested by public comment, to civil penalties for exceedances of numerical emission limits that are caused by malfunctions.

*G. Health Based Compliance Alternatives*

*Comment:* In the proposed rule, EPA considered whether it was appropriate to exercise its discretionary authority to establish health-based emission limits (HBEL) under section 112(d)(4) for HCl and other acid gases and proposed not to adopt such limits, citing, among other things, information gaps regarding facility-specific emissions of acid gases, co-located sources of acid gases and their cumulative impacts, potential environmental impacts of acid gases, and the significant co-benefits expected from the adoption of the conventional MACT standard. Comments were received both supporting this position and refuting it. Several commenters suggested legal, regulatory and scientific reasons for why HBEL or health-based compliance alternatives (HBCA) for HCl and Mn might be appropriate for this MACT standard. With respect to legal concerns, industry commenters indicated that section 112(d)(4) of the CAA establishes a mechanism for EPA to exclude facilities from certain pollution control regulations and circumstances when these facilities can demonstrate that emissions do not pose a health risk. Commenters cited a Senate Report that influenced development of 112(d)(4), where Congress recognized that, "For some pollutants a MACT emissions limitation may be far more stringent than is necessary to protect public health and the environment." [Footnote: S. Rep. No. 101–128 (1990) at 171]. Commenters also cited regulatory precedence for addressing HCl as a threshold pollutant, including the Hazardous Waste Combustors and the Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills NESHAP. Commenters requested that EPA incorporate the flexibility afforded by 112(d)(4) and allow sources reasonable means for demonstrating that their respective emissions do not warrant further control. Industry commenters also cited the 2004 vacated Boiler MACT as precedence for HBCA for both HCl and Mn. The commenters contended that EPA failed to explain why the health based emissions limitations it established in the 2004 Boiler MACT and the justification provided for those limitations should now be reversed. The commenters also cited a 2006 court briefing where EPA vigorously defended the HBCA included in the 2004 rule when it was challenged in the D.C. Circuit [Final Brief For Respondent United States Environmental Protection Agency, D.C. Cir. Case No. 04–1385 (Dec. 4, 2006) at 59–65, 69.].

Citizen groups also commented that on August 6, 2010, EPA adopted a NESHAP for Portland Cement plants. In its final rule EPA specifically rejected adoption of risk-based exemptions for HCl and Mn. The commenter argues there are no differences sufficient to warrant a reversal of that decision in the Boiler MACT standard. Citizen groups also raised concerns that health risk information cited by EPA for HCl, hydrogen fluoride, hydrogen cyanide, and Mn does not establish "an ample margin of safety" and, therefore, no health threshold should be established. The commenters believe risk-based exemptions at levels less stringent than the MACT floor are prone to lawsuits that could potentially further delay implementation of the Boiler MACT.

Co-Located Source Issues

Many commenters responded to EPA comment solicitation on how it should "appropriately" simulate all reasonable facility/exposure situations. Commenters contended that boilers can be located among a wide variety of industrial facilities, which makes predicting and assessing all possible mixtures of HCl and other emitted air pollutants difficult. These simulations would require the consideration of emissions from nearby facilities for the almost 15,500 boilers affected by this final rule. Commenters also characterized defining of exposure situations as challenging, for example PM can serve as "carriers" to bring the adhered HAP deep within the lung, where the HAP can interact with the respiratory system directly or be leached

off of the particle surface and become available systemically. These commenters argue that the questions posed by the Agency in the preamble to the proposed rule illustrate why the MACT standard setting is and should be the default requirement in the 1990 Clean Air Act, rather than "health-based" standard-setting under section 112(d)(4).

Some commenters disagreed with using a hazard quotient (HQ) approach to establish a risk-based standard because the HQ would not account for potential toxicological interactions. The commenter noted that an HQ approach incorrectly assumes the different acid gases affect health through the same health endpoint, rather than assuming that the gases interact in an additive fashion. This commenter suggested that a hazard index approach, as described in EPA's "Guideline for the Health Risk Assessment of Chemical Mixtures" would be more appropriate.

Industry commenters dispute that emissions from other sources or source categories should be considered when developing an HBCA and they argued that Congress expected EPA to consider the effect of co-located facilities during the 112(f) residual risk program instead of under 112(d). Commenters added that there is no prior EPA precedent for considering co-located facilities from a different source category during the same 112 rulemaking. Commenters also provided examples where co-located sources and source categories are not a concern, such as small municipal utilities that do not operate co-located HAP sources within their fence line and are not located in heavily populated urban areas where other HAP sources are common due to zoning. Representatives of the small municipal utility industry suggested that concerns of co-located HAP sources should not be used to arbitrarily deny health-based relief already approved on a site-specific basis.

Co-Benefits of Controlling HCl and Mn

Several commenters disputed EPA's consideration of non-HAP collateral emissions reductions in setting MACT standards. They contended that EPA's sole support for its "collateral benefits" theory is legislative history—the Senate Report that accompanied Senate Bill 1630 in 1989 and noted that the D.C. Circuit rejected this use of this theory since the Senate Report referred to an earlier version of the statute that was ultimately not enacted. Instead commenters suggested that other components of the CAA, such as the National Ambient Air Quality Standards (NAAQS), are more appropriate avenues for mitigating emissions of criteria pollutants. Some commenters in the biomass industry noted that even if co-benefits of non-HAP were considered relevant to the analysis, the nominal co-benefits of reducing $SO_2$ emissions from biomass units would be limited due to the low inlet sulfur levels of this fuel.

Several other commenters suggested it is impossible to assess an established health threshold for HCl such that a 112(d)(4) standard could be set without evaluating the collateral benefits of a MACT standard. And, as described in the recently finalized cement kiln MACT rule, setting technology-based standards for HCl will result in significant reductions in the emissions of other pollutants, including $SO_2$, Hg, and PM. The commenter added that these reductions will provide enormous health and environmental benefits, which would not be experienced if section 112(d)(4) standards had been finalized. These commenters contended that HCl and other dangerous acid gases produced by commercial and industrial boilers pose substantial risks to industrial workers, as well as surrounding communities, and must be limited by the strict conventional MACT standards.

Cost Impacts of HBCA

Several commenters indicated that the current economic climate requires EPA to balance economic and environmental interests and they indicated that HBCA would help target investments into solving true health threats where limits are no more stringent or less stringent than needed to protect public health. Many commenters provided compliance cost savings if an HBCA is included in this final rule. For example, representatives of one industry estimated aggregated capital savings in excess of $100 million just for the small facilities in the pulp & paper sector. Some commenters stressed the importance of an HBCA options for small entities affected by the regulations. Several other commenters suggested that EPA should estimate the costs and environmental effects of the HBCA option compared to a conventional MACT standard in order to make an informed decision on the adoption of an HBCA.

*Response:* After considering the comments received, some of which supported adoption of an emissions standard under section 112(d)(4) and some of which opposed such a standard, EPA has decided not to adopt an emissions standard based on its authority under section 112(d)(4) in the final rule. EPA first notes that the Agency's authority under section 112(d)(4) is discretionary. That provision states that EPA "may" consider established health thresholds when setting emissions standards under section 112(d). By the use of the term "may," Congress clearly intended to allow EPA to decide not to consider a health threshold even for pollutants which have an established threshold. As explained in the preamble to the proposed rule, it is appropriate for EPA to consider relevant factors when deciding whether to exercise its discretion under section 112(d)4). EPA has considered the public comments received and is not adopting an emissions standard under section 112(d)(4) for the reasons explained below.

First, as explained in the preamble to the proposed rule, EPA continues to believe that the potential cumulative public health and environmental effects of acid gas emissions from boilers and other acid gas sources located near boilers supports the Agency's decision not to exercise its discretion under section 112(d)(4). EPA requested in the preamble to the proposed rule information regarding facility-specific emissions of acid gases from boilers as well as sources which may be co-located with boilers. In particular, information concerning the variation of acid gas emission rates that can be expected from the various subcategories of units was identified as a significant data gap. Additional data were not provided during the comment period, and the data already in hand regarding these emissions are not sufficient to support the development of emissions standards for any of the boilers subcategories under section 112(d) that take into account the health threshold for acid gases, particularly given that the Act requires EPA's consideration of health thresholds under section 112(d)(4) to protect public health with an ample margin of safety. In addition, the concerns expressed by EPA in the proposal regarding the potential environmental impacts and the cumulative impacts of acid gases on public health were not assuaged by the comments received.

EPA also received comments recommending not only that EPA establish emissions standards for acid gases pursuant to section 112(d)(4), but that it do so by excluding specific facilities from complying with emissions limits if the facility demonstrates that its emissions do not pose a health risk. EPA does not believe that a plain reading of the statute supports the establishment of such an approach. While section 112(d)(4) authorizes EPA to consider the level of

the health threshold for pollutants which have an established threshold, that threshold may be considered "when establishing emissions standards under [section 112(d).]" Therefore, EPA must still establish emissions standards under section 112(d) even if it chooses to exercise its discretion to consider an established health threshold.

As explained in the preamble to the proposed rule, EPA also considered the co-benefits of setting a conventional MACT standard for HCl. EPA considered the comments received on this issue and continues to believe that the co-benefits are significant and provide an additional basis for the Administrator to conclude that it is not appropriate to exercise her discretion under section 112(d)(4). EPA disagrees with the commenters who stated that it is not appropriate to consider non-HAP benefits in deciding whether to invoke section 112(d)(4). Although MACT standards may directly regulate only HAPs and not criteria pollutants, Congress did recognize, in the legislative history to section 112(d)(4), that MACT standards would have the collateral benefit of controlling criteria pollutants as well and viewed this as an important benefit of the air toxics program. *See* S. Rep. No. 101–228, 101st Cong. 1st sess. at 172. EPA consequently does not accept the argument that it cannot consider reductions of criteria pollutants, for example in determining whether to take or not take certain discretionary actions, such as whether to adopt a risk-based standard under section 112(d)(4). There appears to be no valid reason that, where EPA has discretion in what type of standard to adopt, EPA must ignore controls which further the health and environmental outcomes at which section 112(d) of the Act is fundamentally aimed because such controls not only reduce HAP emissions but emissions of other air pollutants as well.[7] Thus, the issue being addressed is not whether to regulate non-HAP under section 112(d) or whether to consider other air quality benefits in setting section 112(d)(2) standards—neither of which EPA is doing—but rather whether to make the discretionary choice to regulate certain HAP based on the MACT approach and whether EPA must put blinders on and ignore collateral environmental benefits when choosing whether or not to exercise that discretion. EPA knows of no principle in law or common sense that precludes it from doing so.

Finally, EPA is not adopting an HBEL for manganese, as some commenters recommended. EPA did not propose or solicit comment on the adoption of an HBEL for manganese emissions, and since the final rule regulates PM as a surrogate for HAP metals and therefore does not establish a specific emissions limit for manganese, there is no reason to consider whether it would be appropriate to exercise section 112(d)(4) authority for manganese.

*H. Biased Data Collection From Phase II Information Collection Request Testing*

*Comment:* Many commenters noted that in selecting units for the Phase II testing, EPA targeted only those units whose data EPA determined it would need to set the MACT floor. The commenters contended that the targeted units were generally better performing units so the proposed limits reflect performance of the best 12 percent of the best rather than performance of the best 12 percent of the entire population as Congress intended. Further, they added that this skewed dataset led to a set of proposed emission limits that are more stringent than would have resulted from a random sampling of all the regulated sources. Several commenters also provided input on how EPA should have designed its Phase II test plan in order to develop a representative dataset. They added that representativeness may be considered as the measure of the degree to which data accurately and precisely represent a characteristic of a population. The commenters identified EPA's approach for selecting Phase II testing sites as a form of judgmental sampling, which EPA defines as the "selection of sampling units on the basis of expert knowledge or professional judgment." These commenters then cited an EPA document (Data Quality Assessment: A Reviewer's Guide, EPA QA/G–9R, p. 11, U.S. EPA 2006) which outlines preferred sampling procedures for emission data. According to this document, probabilistic sampling (random selection) is preferable where EPA wishes to draw quantitative conclusions about the sampled population through statistical inferences. When using judgmental sampling, however, this document stated that "statistical analysis cannot be used to draw conclusions about the target population," and "quantitative statements about the level of confidence in an estimate (such as confidence intervals) cannot be made." Yet the commenters point out that EPA did use the Phase II data to perform statistical analyses and establish a MACT floor emission limit for each subcategory. The commenters added that generally, conclusions drawn from judgmental samples apply only to those individual samples while aggregation of data collected from judgmental samples may result in severe bias due to lack of representativeness and lead to highly erroneous conclusions. Many commenters also suggested methods to mitigate the bias in the Phase II testing. Some commenters suggested that instead of taking the top 12 percent of units with stack test data available, EPA should determine how many units comprise the top 12 percent of a given subcategory and then use data from that many units to compute the floor. The commenters suggested that this approach is warranted because the Phase I ICR data allowed EPA to reliably select the top performers in each subcategory for purposes of collecting the Phase II information. Other commenters suggested that EPA supplement its ICR survey and testing data with other data sources such as fuel records, production records and associated emission factors from AP–42, commercial warranties and guarantees, or other EPA databases such as the National Emission Inventory or Toxics Release Inventory. Other commenters requested that EPA incorporate data from the ICR Phase II testing as long as these data are from a unit that has similar fuel and control device characteristics to the units identified in the top 12 percent.

*Response:* Section 112 specifies that MACT floors must be based on sources for which emissions information is available to the Administrator. While EPA's Phase II data collection did target units with particular control configurations, these units were identified to fill data gaps, including providing additional information on the effectiveness of the various control technologies that are used to control emissions from boilers and process heaters. EPA disagrees with commenters who recommended that EPA should use data from the number of units that comprise 12 percent of a subcategory to calculate the floor, even where the Agency lacks information for all sources in the subcategory. That approach would be inconsistent with the language of section 112(d)(3), which clearly states that, for existing sources, the MACT floor cannot be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information)[.]" This is precisely what EPA has done in today's final rule. The commenters' recommended approach would instead base the floors on the average emission limitation achieved by

[7] EPA notes the support of commenter 2898 in this regard.

all the sources for which EPA has emissions information, rather than that achieved by the best-performing 12 percent, if emissions information is only available for 12 percent of sources. This outcome would contradict the language of the statutory MACT floor provision.

EPA also notes that sources had ample opportunity to perform testing on other units and submit the data to EPA for consideration. EPA informed various industry groups that additional test data would be welcomed, and to the extent that additional data were provided, such data were used in the floor-setting process. Furthermore, the large majority of the proposed emission limits were based on data from both phases of the ICR, with most of the data coming from the phase I ICR, in which EPA requested any existing emissions data, and commenters do not allege any bias associated with the phase I data. The only emission limits that were based primarily on phase II ICR data were the dioxin/furan limits, and for those pollutants, the units were not selected based on any assumptions about their dioxin/furan emissions or the effectiveness of add-on controls. Instead, the units were selected to ensure that data would be available to set floors for the subcategories that EPA was considering at the time of the Phase I ICR.

*I. Issues Related to Carbon Monoxide Emission Limits*

*Comment:* Numerous commenters disagreed with EPA's statement that CO emissions do not vary significantly over the operating range of a unit, 75 FR 32029. These commenters provided limited data across the operating range of boilers showing significant variation in CO emissions; the data also support the contention that CO emissions are higher at low load. In addition, commenters note that the degree of variability in emissions is dependent upon a specific unit and its design and operation characteristics, as well as other factors. With the premise that boilers do have variable CO emissions, in order to meet the applicable emission limit, commenters stated that stable boiler operation would be necessary, but that such boiler operation is not always possible. They contend that boiler loads vary constantly and rapidly and such load swings are a normal part of many processes and operations. Factors affecting the load include changes in fuel mix, fuel quantity, and fluctuations in load demand. Quick changes or large swings can also result in spikes which are substantially higher than average emissions. Commenters stated that in addition to daily fluctuations, CO emissions vary depending on broader issues such as business cycles or the time of year. Commenters claimed that even the top performers could not meet the limits due to load fluctuations.

Some commenters provided input from boiler manufacturers and the guarantees that are currently available on the market for CO emissions. These guarantees include provisions that void the guarantee at loads below 25 percent load. Burner and boiler manufacturers state that CO emissions do fluctuate with load and suggest that limits should not be lower than manufacturer guarantees.

Many commenters took issue with the use of stack test data to set the emission limit. Due to the highly variable nature of CO emissions, setting a standard that boilers must meet at all times based on stack test data does not properly characterize boiler emissions. Noting that stack tests are typically conducted at 90 percent of full load, commenters contended that this represents a small and unrepresentative snapshot in time captured during the best operating conditions. Some commenters compared stack test averages to CEMS values showing extreme differences (CEMS data could be >10 times higher), and stated that stack tests do not come close to capturing the long-term variability of CO emissions. Furthermore, commenters stated that some boilers frequently operate at low-fire conditions and that stack tests are not conducted at "representative operation conditions". A few commenters cited the DC Circuit [*Sierra Club* v. *EPA*, 167 F.3d 658, 665 (D.C. Cir. 1999)] and pointed out that stack tests do not capture the level of performance a unit will achieve "under the most adverse circumstances which can reasonably be expected to recur." The commenters claimed that this condition must be considered in setting MACT floors.

While EPA did present a comparison of data from units that had both stack test and hourly CO CEMS data available, commenters stated that the data are not representative. EPA presented only three units which have CEMS data and stack test data, and these units do not have data over a wide load range that could be considered to represent typical operating conditions. Commenters also noted that no CEMS data for liquid units were available. Many commenters suggested that EPA acquire and incorporate more CEMS data when setting the limits to show a more accurate picture of variability. A few commenters also pointed out that CEMS data is needed to characterize intra-unit operating variability due to load changes, because the 99 percent UPL only characterizes inter-unit, steady-state operation. Looking at the CEMS data provided, some commenters used the "start anew" method to calculate a 30-day rolling average, and claimed that the unit would exceed the CO limit for several days, showing that the proposed limits are too low and the CEMS data are not appropriately considered.

Some commenters noted the discrepancy between using stack test data to set the limits, and then having to comply by using CEMS. They suggested that whichever method is used to set the limits, the same method should be used for compliance. Several commenters pointed out that although the vacated Boiler MACT included a requirement for CO CEMS, it did not require CO CEMS data obtained at less than 50 percent of maximum load to be included in the 30-day CO average. Commenters recommended that these data exclusions be incorporated in the compliance provisions of this final rule. In addition, a few commenters cited a ruling by the U.S. Court of Appeals for the D.C. Circuit that "a significant difference between techniques used by the Agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises serious questions about the validity of the standard." (*Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 396 (DC Cir. 1973)). These commenters stated that the primary difference between these two methods is that the variability experienced during normal operations will not be captured during the stack test but will become apparent as the facility operates a CEMS over time.

Finally, many commenters stated that the low proposed CO limits will cause additional challenges to boilers that are subject to $NO_X$ limits. These commenters presented graphs and data to demonstrate the inverse relationship between CO and $NO_X$ emissions and noted that changing the boiler operation to reduce CO to such low levels would result in an increase in $NO_X$ emissions. Commenters added that this result would be particularly challenging, and perhaps unproductive for boilers located in ozone non-attainment areas. In addition to increasing $NO_X$ emissions, commenters noted that driving emission levels down to extremely low CO levels would also require boiler operators to increase excess air, thereby reducing the efficiency of the boiler. This operational change would require additional fuel to be combusted, thus increasing emissions of other HAP. These commenters requested that CO limits be

balanced with $NO_X$ limits such that boiler efficiency is optimized and State efforts to comply with NAAQS are not hindered. In addition to concerns surrounding competing air quality standards, a few commenters stated that National Fire Protection Act (NFPA) requirements also affect CO emissions at low loads. The NFPA specifies a minimum airflow at which a boiler can operate regardless of load, in order to avoid boiler explosions. At low loads, this NFPA requirement can result in excess air which leads to increased CO emissions. Commenters added that in order to meet the limits as proposed, boilers may have to idle at a higher load, increasing fuel costs and other emissions ($NO_X$, carbon dioxide ($CO_2$), and HAP).

*Response:* In response to the many comments regarding the proposed CO emission limits, EPA performed a re-assessment of the available data. In addition, EPA analyzed additional data that were not used to develop the proposed limits, including data submitted prior to proposal but too late for consideration for purposes of the proposed rule, data submitted during the public comment period, and data submitted after the comment period closed. While many comments were received opposing EPA's proposal to set limits based on stack test data, EPA cannot set limits based on CEMs data because the available CEMS data are insufficient to set emission limits that are reflective of the best performing 12 percent of sources in the various subcategories. First, CEMS data are not available for all of the subcategories. Second, most of the subcategories have only a single CEM data set from one facility. In contrast, a large amount of CO stack test data are available. For these reasons, EPA concluded that it was appropriate to use the stack test data rather than the CEMS data for setting the MACT floors for CO. Industry commenters who recommended that the emission limits be based on CEMS had ample opportunity to conduct CEMS testing (on the units identified as "best performers" based on the 3-run stack tests or on additional units to provide a broader base of data), but very little CEMS data were submitted to EPA after the proposal, and significant data gaps still exist. EPA does agree that, based on the high degree of variability shown by the available data for CO from boilers and process heaters, CEM-based limits could accurately reflect the actual emissions. However, EPA would need sufficient CEMS data to accurately calculate emissions limits, and, therefore, another approach must be used. In this instance, the alternative that EPA selected was to base the limits on 3-run stack test data.

To develop emission limits based on 3-run stack tests, EPA first reviewed the emission test reports for the best performing sources in order to ensure that that data reflected the actual performance of the units during the testing periods. EPA also incorporated data corrections from facilities that submitted test data, and between these two quality assurance measures, EPA has ensured that accurate data were used to establish the emission limits. Second, EPA examined the operating load at which the stack tests were conducted and found that, as pointed out by multiple commenters, the stack test data are representative of conditions at or near full load. Third, EPA determined that the calibration range of the CO analyzer must be considered in determining the minimum value that can be supported technically during a CO stack test. This assessment of calibration range resulted in some low CO levels being adjusted upward, as explained in more detail in the docket memo entitled "Assessment of Minimum Levels of CO that Can Be Established Under Various Analyzer Calibration Ranges." EPA then ranked the data for each subcategory and developed stack test-based emission limits using the 99.9 percent UPL. The 99.9 percent level was selected to provide an additional allowance for variability in the CO emission limits, since the CEM data show that CO levels have a higher degree of variability than other pollutants (for which EPA continues to use the 99 percent UPL). This change from the proposed 99 percent UPL level resulted in about a 10 percent increase in each of the CO emission limits (from the 99 percent UPL using the same data). The CO emission limits in today's rule must be met through the use of a stack test during the initial and annual compliance tests, and parametric monitoring is required to demonstrate continuous compliance. As discussed elsewhere in the preamble, during periods of startup and shutdown, units that would otherwise be subject to a numeric emission limit are instead subject to a work practice standard.

*J. Cost Issues*

1. Inaccuracy of Basis of Costs

*Comment:* Numerous commenters disagreed with EPA's cost estimates. Many of them provided specific cost estimates for bringing their facilities into compliance with the proposed regulation to show that the costs were considerably higher than the EPA estimate. The estimations given included vendor data, real project costs, Best Achievable Control Technology and Best Available Retrofit Technology analyses and industrial control cost studies.

Several commenters stated that the Office of Air Quality Planning and Standards (OAQPS) cost manual used to estimate costs was outdated and inaccurate. They noted costs that were missing from the estimates, such as additional man-hours for record-keeping, compliance plan development and implementation, and operating and maintenance expenses. Some costs were said to be underestimated, such as the estimates for catalysts and carbon injection.

*Response:* The OAQPS cost manual is the accepted basis of cost estimates for EPA regulations. EPA welcomed new information or methods for estimating costs and used the available data to adjust cost estimates where appropriate. EPA did not adjust catalyst costs since this information provided by commenters was based on proprietary cost estimates that could not be scaled to all boiler types. This catalyst also represented a regenerative oxidative catalyst which was a different technology than the CO oxidation catalyst used in initial estimates from EPA at proposal. The main concern about carbon injection costs was that the technology would be needed on far more units than estimated, because the assumption that fabric filters would be adequate to achieve the Hg emission limits was incorrect. EPA has adjusted the emission limits since proposal and notes that none of the units in the MACT floor calculations for solid fuels use activated carbon injection (ACI) control. Of the solid fuel units in the MACT floor calculations that are achieving the floor, only 2 units reported to have fabric filter and ACI installed and 132 units have only a fabric filter installed. The assumption that most units will meet the Hg floor using a fabric filter is reasonable and supported by the data on record. One commenter also questioned the inclusion of a factor for installing ACI equipment to an existing unit, saying that this important factor had been left out of the original calculation. A review of the ACI algorithm confirmed that the factor for installing the unit had been included originally, and no change was necessary.

*Comment:* One of the most frequently mentioned concerns was the difficulty of retrofitting existing units with add-on control devices, which could lead to the

replacement of existing units, at a greater cost that what was estimated in the EPA background documents. Also mentioned were the increased costs associated with non-continental units, for which retrofits could be 1.3 to 2.3 times higher than elsewhere.

*Response:* EPA does not have enough information to assess the possibility of units being replaced due to difficulty retrofitting existing units. However, regardless of any information on that topic, the emission standards must reflect the floor level of control. Costs and emission impacts estimated for the boiler MACT standard are intended to represent national impacts. Consequently, costs for a specific facility may be lower or higher than what was estimated but on a national basis, we believe that our estimates are reasonable. We would also note that the cost algorithms include a cost factor for retrofitting existing boilers.

*Comment:* One commenter also expressed concern that process heaters had costs estimated using algorithms based on boiler add-on control costs, giving grossly underestimated process heater control costs.

*Response:* The algorithms estimate costs based on exhaust gas flow rate volumes and pollutant inlet concentrations and not specific to boiler costs. Some of the algorithms were based on costs from the 2009 HMIWI rulemaking. EPA considers these estimates to be reasonable estimates for both boilers and process heaters and the commenters did not provide an alternative cost estimate specific to process heaters.

*Comment:* Several commenters stated that the number of affected sources was also underestimated, especially for gas or liquid-fired units, and one requested clarification with regards to the discrepancy between the number of units estimated in the vacated rule and the proposal.

*Response:* The current inventory gathered for this rulemaking included unit data from industry sources. The public was encouraged to send any updates or changes necessary to correct the source inventory. The current inventory overrides the inventory created previously for the 2004 rulemaking.

2. Unproven Controls

*Comment:* Many commenters stated that the suggested add-on controls have not been proven capable of simultaneously achieving the low emission limits proposed for the affected units. They expressed dismay at the high cost of adding numerous control devices without any reassurance that the emission limits could be achieved, or that human health would be better protected as a result. Some commenters included quotes from control device vendors stating that they were unable to guarantee the equipment could achieve the removal efficiency necessary to meet the proposed emission limits.

*Response:* EPA has adjusted emission limits and compliance mechanisms to address these concerns. These adjustments include creation of a consolidated solid fuel subcategory for fuel-based HAP and CO monitoring provisions.

3. Economic Hardship

*Comment:* Numerous commenters worried that the proposed rule would lead to plant shut-downs, job loss, discouraged use of renewable energy and other negative economic impacts not considered in the rule. The commenters stated that the proposed regulation fails to find balance between job preservation, economic growth and environmental protection and suggested that EPA use their discretionary authority under the CAA to craft a more appropriate rule. A few industry representatives worried that the cumulative impact of multiple EPA regulations was putting U.S. industry at a cost disadvantage compared to international companies, and another asked if costs to comply with other MACT standards were also being taken into account in the RIA. Other commenters stated that the cost of controls necessary for their units to comply with the proposed rule exceeded the cost of the boiler itself, and in many cases exceeded the costs of plant profits in recent years.

*Response:* EPA appreciates these concerns and, since proposal, has considered opportunities to reduce the costs of compliance with this final rule while continuing to achieve the public health objectives and meet the requirements of the CAA. In a number of cases in this final rule, EPA has adjusted emission limits, compliance mechanisms and subcategories that will make compliance less difficult and costly. In addition, EPA has added a discussion about the interaction of this rule with other rules to section 7.2 of the RIA.

4. Technical Concerns

*Comment:* In some cases, technical shortcomings of the cost estimates were addressed. For instance, one commenter pointed out that neither chlorine or Hg can be cost effectively removed from liquid fuels down to the proposed emission levels, so the cost of fuels will likely increase as suppliers blend different fuel sources to achieve fuel requirements.

*Response:* EPA does not have the information necessary to estimate the potential costs that could result from new fuel blends.

*Comment:* Several commenters had concerns about the use of packed bed scrubbers as a suggested control device. They pointed out that these scrubbers can only be used with relatively small units having an exhaust flow rate no greater than 75,000 standard cubic feet per minute (scfm).

Response: EPA cost estimates took the flow rate capabilities of packed bed scrubbers into account by estimating additional scrubbers for units with flow rates beyond 75,000 scfm.

*Comment:* Other commenters mentioned that some facilities, most often rural plants in the wood products sector, do not have and cannot obtain a wastewater discharge permit, so they cannot use wet scrubbers and would need to install more costly dry scrubbers to meet the HCl emission limits.

*Response:* EPA added estimated costs for a Dry Injection/Fabric Filter control alternative for units unable to install wet scrubbers to meet HCl limits.

*Comment:* Several commenters stated that the proposed CO emission limits would not be achievable at all operating conditions while also meeting $NO_X$ limits, unless controls are added. Several pointed out that tune-ups and combustion modifications such as a linkageless boiler management system (LBMS) and replacement burners would offer inadequate control in most cases.

*Response:* EPA incorporated additional CO data variability data received during the comment period, adjusted subcategories, and revised compliance mechanisms to address the issues discussed in these comments.

*Comment:* One commenter pointed out that no documentation was found of a successful LBMS retrofit to existing biomass-to-energy facilities using stoker or fuel cell oven combustion. This commenter cited conversations with several stoker burner manufacturers, and the commenter could find no stoker units that have been retrofitted with an LBMS. They added that manufacturers stated that a successful retrofit to meet the proposed standards was doubtful based on the inherent leakage of air in these types of facilities.

*Response:* EPA adjusted subcategories and compliance mechanisms and analyzed new CO test data in order to make the CO limits more reasonable. EPA estimates the cost of an LBMS as a placeholder for other combustion

improvements that are expected to achieve the CO limits.

*Comment:* Some wrote to suggest that the number of units requiring activated carbon injection is grossly underestimated, because fabric filters alone would be frequently inadequate to meet the proposed Hg limits. Other commenters suggested that the use of activated carbon would lead to increased fabric filter use and additional costs for disposing of the resulting waste stream.

*Response:* EPA adjusted Hg emission limits and incorporated a new solid fuel subcategory to address this concern. Further, many of the units in the MACT floor calculations demonstrate that they have achieved the Hg limit without installing activated carbon injection.

*Comment:* The commenters suggested that far more facilities would need to add fabric filters, rather than the less expensive electrostatic precipitators that had been included in the cost estimates.

*Response:* EPA is now basing the costs primarily on fabric filter installation, although owners/operators will choose a technology, that can meet the limits, that is best-suited to their process.

*Comment:* Several times, commenters expressed concern about required add-on controls conflicting with current controls and each other. For instance, one commenter explained small amounts of sulfur trioxide ($SO_3$) are generated as part of the combustion process for sulfur-containing fuels. The commenter noted that a CO oxidation catalyst or Selective Catalytic Reduction $NO_X$ reduction catalyst, will convert an additional percentage of the $SO_2$to $SO_3$, which will inhibit Hg removal efficiency of activated carbon injection. $SO_3$ occupies the active sites on the carbon, taking away those sites from the Hg. Additionally, some of these commenters also pointed out that some of the suggested control combinations have not been used with the affected boilers, so their use is unproven and the retrofit costs unknown.

*Response:* EPA recognizes the potential interaction of different control devices and has adjusted the subcategories and incorporated additional emission data into the emission limit calculations. The revised limits and subcategories incorporated in this final rule mitigate these concerns. However, specifically addressing the commenters concerns would require an extensive study of emissions and controls, and the time or resources to conduct such a study are not available. EPA used the available data to set standards as required under section 112.

*Comment:* Some commenters questioned the assumption that facilities will not incur costs to comply with the dioxin/furan standards because they will test for dioxin/furan and be below detection levels. They said this logic does not make sense because EPA has not outlined in the proposed rule any procedures for handling non-detects when performing compliance testing and there are boilers in the EPA emissions database with dioxin/furan emissions that are non-detect but actually measured emissions higher than the proposed limit.

*Response:* EPA adjusted the dioxin/furan emission limits based on data corrections and corrected procedures for handling non-detect and detection level limited values, making the need for add-on controls to achieve compliance even less likely. For matters of compliance, it should be noted that EPA Method 23 indicates that for compliance demonstrations, a value of zero should be used in place of a value below the detection limit for each non-detect isomer. Adherence to this procedure will ensure that non-detect values do not cause units to violate the emission limits.

*Comment:* Other commenters disagreed with the EPA assumption that an ESP would be installed to meet the PM emissions limit unless a unit already had a fabric filter installed because sorbent injection will be required to control acid gas, Hg, and dioxin/furan. When sorbent injection is required, the commenters suggested that fabric filters will likely be chosen for units without existing ESPs in order to maximize the performance of the sorbents and minimize the amount of sorbent used.

*Response:* EPA considers the original approach to be reasonable, and even more realistic, given the adjustments made to the emission limits.

5. Tune-up Costs

*Comment:* Some commenters questioned the inclusion of a tune-up in the proposed rule and suggested that many sites already perform regular tune-ups. Some commenters also disagreed with annualizing the cost of the tune-up and energy audit over a five year period. The commenters contended that since a tune-up is a service, it must be paid in year 1 to the individual or company performing the work.

*Response:* EPA agrees that some sites already perform regular tune-ups, which means the requirement will not increase costs for those facilities. EPA considers it appropriate to annualize the cost of a tune-up because the initial tune-up involves more costly steps that make subsequent tune-ups less costly.

6. Testing and Monitoring Costs

*Comment:* Numerous commenters stated that there will be a significant burden associated with performance testing and that EPA has underestimated these costs. EPA used an estimate of $55,000 plus $6,500 for labor per test, while the commenters provided both estimated and actual testing costs ranging from $60,000 to $90,000. A few commenters also noted when testing for HCl and Hg the testing costs should be doubled, because to meet the 'worst-case' condition stipulation the boilers will have to maximize emissions for two different operating parameters. Additionally, when testing HCl and Hg it is required that units also test for CO, PM, and dioxin/furan which increases costs and complexity of tests. As a result of this paired testing, the number of liquid units estimated to need controls for Hg and HCl and which, therefore, must conduct a performance test is also low. A few commenters contended that if a unit uses CO CEMS a reduction of $3,000 instead of $7,000 from the test estimate is more accurate. These commenters also noted that additional fuel sampling costs for sources firing gas or solids are necessary given the requirements for sources firing more than one type of fuel. Commenters suggested that additional costs for adding ports or scaffolding to stacks; additional space and runs to conduct the sophisticated tests; modifications to the permitting or compliance system; man-hours to enter data into the ERT; increased overtime; lost production, unit downtime, and additional engineering effort to adjust operations; and an increased cost to contract stack testers due to high demand should be factored into the estimated overall testing costs.

*Response:* EPA's revised cost estimates include two tests for Hg and HCl for each unit in the solid fuel subcategory, in order to account for potential worst case conditions that may be necessary to satisfy this final rule's requirements. In addition, EPA is maintaining the reduced testing option for units that demonstrate emissions a specified percentage below the limits for three years. We have clarified and modified this option to state that performance testing for a given pollutant may be performed every 3 years, instead of annually, if measured emissions during 2 consecutive annual performance tests are less than 75 percent of the applicable emission limit.

*Comment:* To reduce the testing burden commenters provided input to

modify the rule. The proposed rule requires annual stack testing with the opportunity to qualify for testing every 3 years after 3 consecutive successful compliance demonstrations showing emissions, but many commenters suggested that a one-time test or one test every 5 years, coupled with parameter monitoring, is more appropriate

*Response:* In order to reduce the cost of the testing requirements, EPA adjusted a couple of requirements based on the public comments. First, at proposal, EPA specified that to qualify for testing once every 3 years, sources must meet a level at or below 75 percent of the emission limit for each pollutant for 3 consecutive years. We have modified this option so that performance testing for a given pollutant may be performed every 3 years, instead of annually, if measured emissions during 2 consecutive annual performance tests are less than 75 percent of the applicable emission limit. In addition, for dioxin/furan, we are changing the testing requirement to an initial test demonstrating compliance with the limit and no additional testing, provided that the unit's design is not modified in a manner inconsistent with good combustion practices. In addition, the oxygen level must be maintained at or above 90 percent of the level during the initial compliance test in order to provide an assurance of good combustion. The rationale behind the adjusted dioxin compliance demonstration is that the measured emissions from a limited number of tests indicate that dioxin emissions from boilers and process heaters are very low, and while it is required that sources meet the MACT floor levels, a one-time test and the required parameter monitoring are sufficient to ensure that combustion conditions are maintained and that the dioxin emissions remain low while also minimizing costs.

*Comment:* Similarly, many commenters contended that costs associated with CO and PM CEMS are underestimated as well. For the installations of CEMS, one commenter provided a cost estimate which was 3 times higher than the EPA estimate, while another said that costs for planning and engineering could be as much as 40 times higher with annual operating costs 3 times higher than EPA estimates. Also, in addition to the capital cost for the instrument itself, expensive certification costs are necessary; one commenter stated that this would be an additional $30,000 to $50,000 for each CEMS. Commenters noted that even for units where CEMS has already been installed, new equipment may be necessary in order to comply with proposed requirements for certifying and calibrating the CEMS. Commenters stated that a data acquisition system would be necessary to manage the data, which can cost more than $10,000. Many commenters also discussed the necessity of adding a stack platform, access, and additional utilities which can exceed $100,000 per stack.

*Response:* EPA has removed CO CEMS requirements from this final rule. The costs detailed in Appendix J–2 of the memorandum "Methodology for Estimating Control Costs for Industrial, Commercial, Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Major Source (2010)" include planning, installations, RATA certifications, performance specifications and QA/QC checks. For PM CEMS, EPA's estimates of installed capital costs include planning, selecting equipment, support facilities, installation, performance specifications tests and QA/QC and is consistent with estimates provided in the 2009 HMIWI rulemaking. EPA does not have information on which facilities would need to install a stack platform or utilities. Given that PM CEMS are required on only the largest units, EPA considers its assumption that most larger facilities have platform and utility access reasonable.

*K. Non-hazardous Secondary Materials*

*Comment:* Commenters from several environmental non-governmental organizations were concerned that if EPA moves forward with the proposal to define non-hazardous solid waste to exclude a majority of secondary materials burned for energy recovery, EPA will effectively exempt many boilers from any regulation. These commenters suggested that boilers burning secondary materials are not included in the regulatory definition of solid waste will not be regulated under § 129 because EPA will have labeled the secondary materials burned as a non-waste. Further, they suggested that these non-waste secondary materials are not covered under the boiler rules under § 112. These commenters suggested that while some boilers burning secondary materials will be included in EPA's categories for coal, oil, or biomass fired units, a large group of units will remain unregulated, including units burning only solid secondary materials or only secondary materials and gaseous fuels. One commenter stated that EPA must set section 112 standards for these units to meet its obligations under section 112 and the order in *Sierra Club* v. *EPA,* No 01—1537 (D.D.C.) requiring EPA to "promulgate emission standards assuring that sources accounting for not less than 90 percent of the aggregate emissions of each of the hazardous air pollutants enumerated in Section 112(c)(6) are subject to emission standards under section 112(d)(2) or (d)(4) no later than December 16, 2010." These commenters were concerned that exempting units that burn secondary material from any emission standards will have adverse impacts on the communities that are exposed to the uncontrolled pollutants.

*Response:* EPA has amended the definitions in this final rule to cover boilers burning non-hazardous secondary materials.

## VI. Impacts of This Final Rule

*A. What are the air impacts?*

Table 2 of this preamble illustrates, for each basic fuel subcategory, the emissions reductions achieved by this final rule (*i.e.,* the difference in emissions between a boiler or process heater controlled to the floor level of control and boilers or process heaters at the current baseline) for new and existing sources. Nationwide emissions of selected HAP (*i.e.,* HCl, HF, Hg, metals, and volative organic compounds) will be reduced by 40,000 tons per year for existing units and 60 tons per year for new units. Emissions of HCl will be reduced by 30,000 tons per year for existing units and 29 tons per year for new units. Emissions of Hg will be reduced by 1.4 tons per year for existing units and 10.8 pounds per year for new units. Emissions of filterable PM will be reduced by 47,400 tons per year for existing units and 85 tons per year for new units. Emissions of non-Hg metals (*i.e.,* antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, Mn, nickel, and selenium) will be reduced by 2,700 tons per year for existing units and will be reduced by 1.5 tons per year for new units. In addition, emissions of SO2 are estimated to be reduced by 442,000 tons per year for existing sources and 400 tons per year for new sources. Emissions of dioxin/furan, will be reduced by 23 grams of TCDD-equivalents per year for existing units and 0.01 gram per year of TCDD-equivalents for new units. A discussion of the methodology used to estimate emissions and emissions reductions is presented in "Revised Methodology for Estimating Cost and Emissions Impacts for Industrial, Commercial, Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Major Source (2011)" in the docket.

TABLE 2—SUMMARY OF EMISSIONS REDUCTIONS FOR EXISTING AND NEW SOURCES

(Tons/Yr)

| Source | Subcategory | HCl | PM | Non mercury metals [a] | Mercury | VOC |
|---|---|---|---|---|---|---|
| Existing Units | Solid units | 27,592 | 33,299 | 314 | 0.6 | 5,046 |
| | Liquid units | 1,936 | 13,269 | 2,229 | 0.7 | 1,881 |
| | Non-Continental Liquid units. | 89 | 726 | 115 | 0.06 | 0.01 |
| | Gas 1 (NG/RG) units | 23 | 139 | 0.3 | 0.009 | 82 |
| | Gas 1 Metallurgical Furnaces. | 0.4 | 2 | 0.02 | 0.001 | 30 |
| | Gas 2 (other) units | 0.4 | 0.1 | 0.0009 | 4.5E–05 | 111 |
| New Units | Solid units | 0 | 0 | 0 | 0 | 0 |
| | Liquid units | 29 | 85 | 1.5 | 0.005 | 27 |
| | Gas 1 units | 0.02 | 0.1 | 0.0003 | 7.9E–06 | 0.03 |
| | Gas 2 (other) units | 0 | 0 | 0 | 0 | 0 |

[a] Includes antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, Mn, nickel, and selenium.

*B. What are the water and solid waste impacts?*

EPA estimated the additional water usage that would result from installing wet scrubbers to meet the emission limits for HCl would be 700 million gallons per year for existing sources and 242,000 gallons per year for new sources. In addition to the increased water usage, an additional 266 million gallons per year of wastewater would be produced for existing sources and 194,000 gallons per year for new sources. The annual costs of treating the additional wastewater are $1.4 million for existing sources and $1,055 for new sources. These costs are accounted for in the control costs estimates.

EPA estimated the additional solid waste that would result from the MACT floor level of control to be 100,450 tons per year for existing sources and 580 tons per year for new sources. Solid waste is generated from flyash and dust captured in PM and Hg controls as well as from spent carbon and spent sorbent that is injected into exhaust streams or used to filter gas streams. The costs of handling the additional solid waste generated are $4.2 million for existing sources and $25,000 for new sources. These costs are also accounted for in the control costs estimates.

A discussion of the methodology used to estimate impacts is presented in "Revised Methodology for Estimating Cost and Emissions Impacts for Industrial, Commercial, Institutional Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Major Source (2011)".

*C. What are the energy impacts?*

EPA expects an increase of approximately 1.442 billion kilowatt hours (kWh) in national annual energy usage as a result of this final rule. Of this amount, 1.436 billion kWh would be from existing sources and 6.2 million kWh are estimated from new sources. The increase results from the electricity required to operate control devices, such as wet scrubbers, electrostatic precipitators, and fabric filters which are expected to be installed to meet this final rule. Additionally, EPA expects work practice standards such as boilers tune-ups and combustion controls will improve the efficiency of boilers, resulting in an estimated fuel savings of 53 TBtu each year from existing sources and an additional 11 billion BTU each year from new sources. This fuel savings estimate includes only those fuel savings resulting from gas, liquid, and coal fuels and it is based on the assumption that the work practice standards will achieve 1 percent improvement in efficiency.

*D. What are the cost impacts?*

To estimate the national cost impacts of this final rule for existing sources, we developed average baseline emission factors for each fuel type/control device combination based on the emission data obtained and contained in the Boiler MACT emission database. If a unit reported emission data, we assigned its unit-specific emission data as its baseline emissions. If a unit did not report emission data but similar units at the facility with the same fuel and combustor design reported data, the average of all similar units at a given facility was assigned as its baseline emissions. If no unit-specific or similar units from the same facility had data available, a baseline average emission factor was assigned to the unit. Units that reported non-detect emission data for a pollutant that did not have a standardized numeric detection limit were assigned to the average of all non-detect emission data for that pollutant. For the remaining units that did not report emission data, we assigned the appropriate emission factors to each existing unit in the inventory database, based on the average emission factors for boilers with similar fuel, design, and control devices. We then compared each unit's baseline emission factors to the final MACT floor emission limit to determine if control devices were needed to meet the emission limits. The control analysis considered fabric filters and activated carbon injection to be the primary control devices for Hg control, ESP for units meeting Hg limits but requiring additional control to meet the PM limits, wet scrubbers, dry injection/fabric filters, or increased caustic rates to meet the HCl limits, depending on whether or not the facility was assumed to have a wastewater discharge permit, tune-ups, replacement burners, and combustion controls for CO and organic HAP control, and carbon injection for dioxin/furan control. We identified where one control device could achieve reductions in multiple pollutants, for example a fabric filter was expected to achieve both PM and Hg control in order to avoid overestimating the costs. We also included costs for testing and monitoring requirements contained in this final rule. The resulting total national cost impact of this final rule is 5.1 billion dollars in capital expenditures and 1.8 billion dollars per year in total annual costs. Considering estimated fuel savings resulting from work practice standards and combustion controls, the total annualized costs are reduced to 1.4 billion dollars. The total capital and annual costs include costs for control devices, work practices, testing and monitoring. Table 3 of this preamble shows the capital and annual cost impacts for each subcategory. Costs include testing and monitoring costs, but not recordkeeping and reporting costs.

TABLE 3—SUMMARY OF CAPITAL AND ANNUAL COSTS FOR NEW AND EXISTING SOURCES

| Source | Subcategory | Estimated/projected number of affected units | Capital costs ($10^6$ $) | Testing and monitoring annualized costs ($10^6$ $/yr) | Annualized cost ($10^6$ $/yr) (considering fuel savings) |
|---|---|---|---|---|---|
| Existing Units | Solid units | 1,014 | 2,183 | 108 | 846 |
| | Liquid units | 713 | 2,656 | 19.8 | 828 |
| | Non-Continental Liquid units | 27 | 86 | 0.7 | 21 |
| | Gas 1 units | 10,797 | 70 | 0.3 | (325) |
| | Gas 1 Metallurgical Furnaces | 694 | 4.5 | 0 | (6) |
| | Gas 2 (other) units | 118 | 79 | 6.3 | 37 |
| | Limited Use | 477 | 3.1 | 0 | (25) |
| Energy Assessment | ALL | | | | 27 |
| New Units | Solid units | 0 | 0 | 0 | 0 |
| | Liquid units | 13 | 21 | 0.3 | 6.1 |
| | Gas (NG/RG) units | 34 | 0.2 | 0 | (0.02) |
| | Gas (other) units | 0 | 0 | 0 | 0 |

Using Department of Energy projections on fuel expenditures, the number of additional boilers that could be potentially constructed was estimated. The resulting total national cost impact of this final rule in the 3rd year is 21 million dollars in capital expenditures and 6.1 million dollars per year in total annual costs, when considering a 1 percent fuel savings.

Potential control device cost savings and increased recordkeeping and reporting costs associated with the emissions averaging provisions and reduced testing allowance in this final rule are not accounted for in either the capital or annualized cost estimates.

A discussion of the methodology used to estimate cost impacts is presented in "Revised Methodology for Estimating the Control Costs for Industrial, Commercial, and Institutional Boiler and Process Heater NESHAP (2011)" and "Revised Methodology for Estimating Cost and Emission Impacts for Industrial, Commercial, and Industrial Boilers and Process Heaters National Emission Standards for Hazardous Air Pollutants—Major Source (2011)" in the Docket.

*E. What are the economic impacts?*

Under this final rule, EPA's economic model suggests the average national market-level variables (prices, production-levels, consumption, international trade) will not change significantly (*e.g.,* are less than 0.01 percent). EPA performed a screening analysis for impacts on small entities by comparing compliance costs to sales/revenues (*e.g.,* sales and revenue tests). EPA's analysis found the tests were above 3 percent for 8 of the 50 small entities included in the screening analysis.

In addition to estimating this rule's social costs and benefits, EPA has estimated the employment impacts of the final rule. We expect that the rule's direct impact on employment will be small. We have not quantified the rule's indirect or induced impacts. For further explanation and discussion of our analysis, see Chapter 4 of the RIA.

*F. What are the benefits of this final rule?*

The benefit categories associated with the emission reduction anticipated for this rule can be broadly categorized as those benefits attributable to reduced exposure to hazardous air pollutants (HAPs) and those attributable to exposure to other pollutants. Because we were unable to monetize the benefits associated with reducing HAPs, all monetized benefits reflect improvements in ambient $PM_{2.5}$ and ozone concentrations. This results in an underestimate of the total monetized benefits. We estimated the total monetized benefits of this final regulatory action to be $22 billion to $54 billion (2008$, 3 percent discount rate) in the implementation year (2014). The monetized benefits at a 7 percent discount rate are $20 billion to $49 billion (2008$). Using alternate relationships between fine particulate matter ($PM_{2.5}$) and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.[8] A summary of the monetized benefits estimates at discount rates of 3 percent and 7 percent is provided in Table 4 of this preamble. A summary of the avoided health incidences is provided in Table 5 of this preamble.

TABLE 4—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE FINAL BOILER MACT

[Millions of 2008$] [1]

| Pollutant | Emissions reductions (tons) | Total monetized benefits (at 3% discount rate) | Total monetized benefits (at 7% discount rate) |
|---|---|---|---|
| **$PM_{2.5}$-related benefits** | | | |
| Direct $PM_{2.5}$ | 29,007 | $2,100 to $5,100 | $1,900 to $4,600. |
| $SO_2$ | 439,901 | $20,000 to $49,000 | $18,000 to $45,000. |
| **Ozone-related benefits** | | | |
| VOCs | 6,537 | $3.6 to $15 | $3.6 to $15. |

[8] Roman *et al*, 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268–2274.

TABLE 4—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE FINAL BOILER MACT—Continued

[Millions of 2008$] [1]

| Pollutant | Emissions reductions (tons) | Total monetized benefits (at 3% discount rate) | Total monetized benefits (at 7% discount rate) |
|---|---|---|---|
| Total | | $22,000 to $54,000 | $20,000 to $49,000. |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures so numbers may not sum across rows. All fine particles are assumed to have equivalent health effects. Benefits from reducing hazardous air pollutants (HAP) are not included. These estimates do not include energy disbenefits valued at $22 million. These benefits reflect existing boilers and 47 new boilers anticipated to come online by 2014.

TABLE 5—SUMMARY OF THE AVOIDED HEALTH INCIDENCES FOR THE FINAL BOILER MACT [1]

| | Avoided health incidences |
|---|---|
| Avoided Premature Mortality | 2,500 to 6,500. |
| Avoided Morbidity | |
| Chronic Bronchitis | 1,600. |
| Acute Myocardial Infarction | 4,000. |
| Hospital Admissions, Respiratory | 610. |
| Hospital Admissions, Cardiovascular | 1,300. |
| Emergency Room Visits, Respiratory | 2,400. |
| Acute Bronchitis | 3,700. |
| Work Loss Days | 310,000. |
| Asthma Exacerbation | 41,000. |
| Minor Restricted Activity Days | 1,900,000. |
| Lower Respiratory Symptoms | 44,000. |
| Upper Respiratory Symptoms | 34,000. |
| School Loss Days | 810. |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures. All fine particles are assumed to have equivalent health effects. Benefits from reducing HAP are not included. These benefits reflect existing boilers and 47 new boilers anticipated to come online by 2014.

These quantified benefits estimates represent the human health benefits associated with reducing exposure to $PM_{2.5}$ and ozone. The PM and ozone reductions are the result of emission limits on PM as well as emission limits on other pollutants, including HAP. To estimate the human health benefits, we used the environmental Benefits Mapping and Analysis Program (BenMAP) model to quantify the changes in $PM_{2.5}$- and ozone-related health impacts and monetized benefits based on changes in air quality. This approach is consistent with the recently proposed Transport Rule RIA.[9]

For this final rule, we have expanded and updated the analysis since the proposal in several important ways. Using the Comprehensive Air Quality Model with extensions (CAMx) model, we are able to provide boiler sector-specific air quality impacts attributable to the emission reductions anticipated from this final rule. We believe that this modeling provides estimates that are more appropriate for characterizing the health impacts and monetized benefits from boilers than the generic benefit-per-ton estimates used for the proposal analysis.

To generate the boiler sector-specific benefit-per-ton estimates, we used CAMx to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and BenMAP to estimate the changes in human health associated with that change in air quality. Finally, the monetized $PM_{2.5}$ health benefits were divided by the emission reductions to create the boiler sector-specific benefit-per-ton estimates. These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. Directly emitted $PM_{2.5}$ and $SO_2$ are the dominant $PM_{2.5}$ precursors affected by this final rule. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. For example, $SO_2$ has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not directly transform into $PM_{2.5}$, and because sulfate particles formed from $SO_2$ emissions can transport many miles, including over areas with low populations. Direct $PM_{2.5}$ emissions convert directly into ambient $PM_{2.5}$, thus, to the extent that emissions occur in population areas, exposures to direct $PM_{2.5}$ will tend to be higher, and monetized health benefits will be higher than for $SO_2$ emissions.

In addition, we estimated the ozone benefits for this final rule. Volatile organic compounds (VOC) are the primary ozone precursor affected by this final rule. We used CAMx to convert emissions of VOC into changes in ambient ozone levels and BenMAP to estimate the changes in human health associated with that change in air quality.

Furthermore, CAMx modeling allows us to model the reduced Hg deposition that would occur as a result of the estimated reductions of Hg emissions. Although we are unable to model Hg methylation and human consumption of Hg-contaminated fish, the Hg deposition maps provide an improved qualitative characterization of the Hg benefits associated with this final rulemaking.

For context, it is important to note that the magnitude of the PM benefits is largely driven by the concentration response function for premature mortality. Experts have advised EPA to consider a variety of assumptions, including estimates based on both empirical (epidemiological) studies and

[9] U.S. Environmental Protection Agency, 2010. RIA for the Proposed Federal Transport Rule. Prepared by Office of Air and Radiation. June. Available on the Internet at *http://www.epa.gov/ttn/ecas/regdata/RIAs/proposaltrria_final.pdf.*

judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this final rule, we cite two key empirical studies, one based on the American Cancer Society cohort study [10] and the extended Six Cities cohort study.[11] In the RIA for this final rule, which is available in the docket, we also include benefits estimates derived from expert judgments and other assumptions.

EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature and recent scientific advice, we have determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this recent advice, we are replacing the previous threshold sensitivity analysis with a new "lowest measured level (LML)" assessment. While an LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related benefits in this final rule would accrue to populations exposed to higher levels of $PM_{2.5}$. Using the Pope, *et al.*, (2002) study, 79 percent of the population is exposed at or above the LML of 7.5 microgram per cubic meter ($\mu g/m^3$). Using the Laden, *et al.*, (2006) study, 34 percent of the population is exposed above the LML of 10 $\mu g/m^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because as we estimate PM-related mortality among populations exposed to levels of $PM_{2.5}$ that are successively lower, our confidence in the results diminishes. However, our analysis shows that the great majority of the impacts occur at higher exposures.

It should be emphasized that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including reducing other air pollutants, ecosystem effects, and visibility impairment. The benefits from reducing other pollutants have not been monetized in this analysis, including reducing 167,000 tons of CO, 30,000 tons of hydrochloric acid, 820 tons of HF, 23 grams of dioxins/furans, 2,900 pounds of Hg, and 22,700 tons of other metals each year. Specifically, we were unable to estimate the benefits associated with HAPs that would be reduced as a result of this rule due to data, resource, and methodology limitations. Challenges in quantifying the HAP benefits include a lack of exposure-response functions, uncertainties in emissions inventories and background levels, the difficulty of extrapolating risk estimates to low doses, and the challenges of tracking health progress for diseases with long latency periods. Although we do not have sufficient information or modeling available to provide monetized estimates for this rulemaking, we include a qualitative assessment of the health effects of these air pollutants in the RIA for this final rule, which is available in the docket. In addition, we provide maps of reduced mercury deposition anticipated from these rules in the RIA for this final rule.

In addition, the monetized benefits estimates provided in Table 4 do not reflect the disbenefits associated with increased electricity usage from operation of the control devices. We estimate that the increases in emissions of $CO_2$ would have disbenefits valued at $22 million at a 3 percent discount rate (average). $CO_2$-related disbenefits were calculated using the social cost of carbon, which is discussed further in the RIA. However, these disbenefits do not change the rounded total monetized benefits. In the RIA, we also provide the monetized $CO_2$ disbenefits using discount rates of 5 percent (average), 2.5 percent (average), and 3 percent (95th percentile).

This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA or 2008 Ozone NAAQS RIA. However, the benefits analyses in these RIA provide an indication of the sensitivity of our results to various assumptions, including the use of alternative concentration-response functions and the fraction of the population exposed to low $PM_{2.5}$ levels.

For more information on the benefits analysis, please refer to the RIA for this final rule that is available in the docket.

*G. What are the secondary air impacts?*

For units adding controls to meet the proposed emission limits, we anticipate very minor secondary air impacts. The combustion of fuel needed to generate additional electricity would yield slight increases in emissions, including $NO_X$, CO, PM and $SO_2$ and an increase in $CO_2$ emissions. Since $NO_X$ and $SO_2$ are covered by capped emissions trading programs, and methodological limitations prevent us from quantifying the change in CO and PM, we do not estimate an increase in secondary air impacts for this final rule from additional electricity demand. We do estimate greenhouse gas impacts, which result from increased electricity consumption, to be 954,000 tons per year from existing units and 4,100 tons per year from new units.

## VII. Relationship of This Final Action to Section 112(c)(6) of the CAA

Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA Section 112(d)(2) or 112(d)(4). EPA has identified "Industrial Coal Combustion," "Industrial Oil Combustion," "Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" as source categories that emit two of the seven CAA Section 112(c)(6) pollutants: POM and Hg. (The POM emitted is composed of 16 polyaromatic hydrocarbons and extractable organic matter.) In the **Federal Register** notice *Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements,* 63 FR 17838, 17849, Table 2 (1998), EPA identified "Industrial Coal Combustion," "Industrial Oil Combustion," "Industrial Wood/Wood Residue Combustion," "Commercial Coal Combustion," "Commercial Oil Combustion," and "Commercial Wood/Wood Residue Combustion" as source categories "subject to regulation" for purposes of CAA Section 112(c)(6) with respect to the CAA Section 112(c)(6) pollutants that these units emit.

Specifically, as byproducts of combustion, the formation of POM is effectively reduced by the combustion and post-combustion practices required to comply with the CAA Section 112 standards. Any POM that do form during combustion are further controlled by the various post-

[10] Pope *et al*, 2002."Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution." Journal of the American Medical Association 287:1132–1141.

[11] Laden *et al*, 2006. "Reduction in Fine Particulate Air Pollution and Mortality." *American Journal of Respiratory and Critical Care Medicine.* 173: 667–672.

combustion controls. The add-on PM control systems (either fabric filter or wet scrubber) and activated carbon injection in the fabric filter-based systems further reduce emissions of these organic pollutants, and also reduce Hg emissions, as is evidenced by performance data. Specifically, the emission tests obtained at currently operating units show that the proposed MACT regulations will reduce Hg emissions by about 77 percent. It is, therefore, reasonable to conclude that POM emissions will be substantially controlled. Thus, while this final rule does not identify specific numerical emission limits for POM, emissions of POM are, for the reasons noted below, nonetheless "subject to regulation" for purposes of Section 112(c)(6) of the CAA.

In lieu of establishing numerical emissions limits for pollutants such as POM, we regulate surrogate substances. While we have not identified specific numerical limits for POM, CO serves as an effective surrogate for this HAP, because CO, like POM, is formed as a byproduct of combustion, and both would increase with an increase in the level of incomplete combustion.

Consequently, we have concluded that the emissions limits for CO function as a surrogate for control of POM, such that it is not necessary to require numerical emissions limits for POM with respect to boilers and process heaters to satisfy CAA Section 112(c)(6).

To further address POM and Hg emissions, this final rule also includes an energy assessment provision that encourage modifications to the facility to reduce energy demand that lead to these emissions.

## VIII. Statutory and Executive Order Reviews

### *A. Executive Orders 12866 and 13563: Regulatory Planning and Review*

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 and any changes in response to OMB recommendations have been documented in the docket for this action. For more information on the costs and benefits for this rule see the following table.

SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE BOILER MACT IN 2014

[Millions of 2008$]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| **Selected** | | |
| Total Monetized Benefits [2] | $22,000 to $54,000 | $20,000 to $49,000 |
| Total Social Costs [3] | $1,500 | $1,500 |
| Net Benefits | $20,500 to $52,500 | $18,500 to $47,500 |
| Non-Monetized Benefits | 112,000 tons of CO.<br>30,000 tons of HCl.<br>820 tons of HF.<br>2,800 pounds of Hg.<br>2,700 tons of other metals.<br>23 grams of dioxins/furans (TEQ).<br>Health effects from $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |
| **Alternative** | | |
| Total Monetized Benefits [2] | $18,000 to $43,000 | $16,000 to $39,000 |
| Total Social Costs [3] | $1,900 | $1,900 |
| Net Benefits | $16,100 to $41,100 | $14,100 to $37,100 |
| Non-Monetized Benefits | 112,000 tons of CO.<br>22,000 tons of HCl.<br>620 tons of HF.<br>2,400 pounds of Hg.<br>2,600 tons of other metals.<br>23 grams of dioxins/furans (TEQ).<br>Health effects from $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |

[1] All estimates are for the implementation year (2014), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[2] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $SO_2$, as well as reducing exposure to ozone through reductions of VOCs. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope *et al.* (2002) to Laden *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at $23 million for the selected option and $35 million for the alternative option. Ozone benefits are valued at $3.6 to $15 million for both options.

[3] The methodology used to estimate social costs for one year in the multimarket model using surplus changes results in the same social costs for both discount rates.

*B. Paperwork Reduction Act*

The information collection requirements in this final rule will be submitted for approval to the OMB under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* An ICR document has been prepared by EPA (ICR No. 2028.06). The information collection requirements are not enforceable until OMB approves them.

The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart B.

This final rule would require maintenance inspections of the control devices but would not require any notifications or reports beyond those required by the General Provisions aside from the notification of alternative fuel use for those units that are in the Gas 1 subcategory but burn liquid fuels for periodic testing, or during periods of gas curtailment or gas supply emergencies. The recordkeeping requirements require only the specific information needed to determine compliance.

When a malfunction occurs, sources must report them according to the applicable reporting requirements of this Subpart DDDDD. An affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions is available to a source if it can demonstrate that certain criteria and requirements are satisfied. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and or careless operation) and where the source took necessary actions to minimize emissions. In addition, the source must meet certain notification and reporting requirements. For example, the source must prepare a written root cause analysis and submit a written report to the Administrator documenting that it has met the conditions and requirements for assertion of the affirmative defense.

To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, EPA provides an administrative adjustment to this ICR that shows what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. EPA's estimate for the required notification, reports and records, including the root cause analysis, totals $3,141 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused an exceedance of an emission limit. The estimate also includes time to produce and retain the record and reports for submission to EPA. EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

The annual monitoring, reporting, and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) is estimated to be $95.9 million. This includes 280,459 labor hours per year at a total labor cost of $26.5 million per year, and total non-labor capital costs of $69.3 million per year. This estimate includes initial and annual performance test, conducting an documenting an energy assessment, conducting fuel specifications for Gas 1 units, repeat testing under worst-case conditions for solid fuel units, conducting and documenting a tune-up, semiannual excess emission reports, maintenance inspections, developing a monitoring plan, notifications, and recordkeeping. Monitoring, testing, tune-up and energy assessment costs and cost were also included in the cost estimates presented in the control costs impacts estimates in section IV.D of this preamble. The total burden for the Federal government (averaged over the first 3 years after the effective date of the standard) is estimated to be 97,563 hours per year at a total labor cost of $5.2 million per year.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and use 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, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.*

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business according to Small Business Administration (SBA) size standards by the North American Industry Classification System category of the owning entity. The range of small business size standards for the affected industries ranges from 500 to 1,000 employees, except for petroleum refining and electric utilities. In these latter two industries, the size standard is 1,500 employees and a mass throughput of 75,000 barrels/day or less, and 4 million kilowatt-hours of production or less, respectively; (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.

Pursuant to section 603 of the RFA, EPA prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule and convened a Small Business Advocacy Review Panel to

obtain advice and recommendations of representatives of the regulated small entities. A detailed discussion of the Panel's advice and recommendations is found in the final Panel Report (Docket ID No. EPA–HQ–OAR–2002–0058–0797). A summary of the Panel's recommendations is also presented in the preamble to the proposed rule at 75 FR 32044–32045 (June 4, 2010). In the proposed rule, EPA included provisions consistent with four of the Panel's recommendations.

As required by section 604 of the RFA, we also prepared a final regulatory flexibility analysis (FRFA) for today's final rule. The FRFA addresses the issues raised by public comments on the IRFA, which was part of the proposal of this rule. The FRFA, which is included as a section in the RIA, is available for review in the docket and is summarized below.

Section II.A of this preamble describes the reasons that EPA is finalizing this action. The rule is intended to reduce emissions of HAP as required under section 112 of the CAA. Many significant issues were raised during the public comment period, and EPA's responses to those comments are presented in section V of this preamble or in the response to comments document contained in the docket. Significant changes to the rule that resulted from the public comments are described in section IV of this preamble.

The primary comments on the IRFA were provided by SBA, with the remainder of the comments generally supporting SBA's comments. Those comments included the following: EPA should have adopted a health-based compliance alternative (HBCA) which provides alternative emission limits for threshold chemicals; EPA should have adopted additional subcategories, including the following: Subcategories based on fuel type (including coal rank, bagasse, biomass by type, and oil by type), unit design type (*e.g.,* process heater, fluidized bed, stoker, fuel cell, suspension burner), duty cycle, geographic location, boiler size, burner type (with and without low-$NO_X$ burners), and hours of use (limited use); EPA should have minimized facility monitoring and reporting requirements; EPA should not have proposed the energy audit requirement; EPA's proposed emissions standards are too stringent; and, EPA should provide more flexibility for emissions averaging.

In response to the comments on the IRFA and other public comments, EPA made the following changes to the final rule. EPA adopted additional subcategories, including a limited-use subcategory for units that operate less than 10 percent of the operating hours in a year, a non-continental liquid unit subcategory for units with the unique challenges faced by remote island locations, and a combination suspension/grate boiler subcategory. EPA also consolidated the subcategories for units combusting various types of solid fuels, which will simplify compliance and will allow units to combust varying percentages of different solid fuels without triggering subcategory changes. EPA also decreased monitoring and testing costs by eliminating the CO CEMS requirement for units greater than 100 mmBtu/hr and changing the dioxin testing requirement to a one-time test. The final rule also includes work practice standards for additional subcategories, including limited-use units, new small units, and units combusting gaseous fuels that are demonstrated to have similar contaminant levels to natural gas. Finally, EPA is finalizing emission limits that are less stringent than the proposed limits for most of the subcategory/pollutant combinations. The emission limit changes are largely due to the changes in subcategories, data corrections, and incorporation of new data into the floor calculations. Additional details on the changes discussed in this paragraph are included in sections IV and V of this preamble.

While EPA did make significant changes based on public comment, EPA did not finalize a HBCA or HBELs and is maintaining, but clarifying, the energy assessment requirement. The discussion of the HBCA decision is included in section V of this preamble. Some changes to the energy assessment requirement that will reduce costs for small entities include a the following provisions: The energy assessment for facilities with affected boilers and process heaters using less than 0.3 trillion Btu per year heat input will be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a one-day energy assessment; and the energy assessment for facilities with affected boilers and process heaters using 0.3 to 1.0 trillion Btu per year will be 3 days in length maximum. The boiler system and any energy use system accounting for at least 33 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a 3-day energy assessment. In addition, energy assessments that have been conducted after January 1, 2008 are considered adequate as long as they meet or are amended to meet the requirements of the energy assessment.

While EPA did not make major adjustments to the emissions averaging provisions, the change to a solid fuel subcategory will enable all solid fuel-fired units at a facility to use the emissions averaging provision for Hg, PM, and HCl.

The rule applies to a many different types of small entities. The table below describes the small entities identified in the Combustion Facility Survey.

CLASSES OF SMALL ENTITIES

| NAICS | NAICS description | Total number of facilities | Total number of small entities |
|---|---|---|---|
| 111 | Crop Production | 1 | 0 |
| 113 | Forestry and Logging | 1 | 0 |
| 115 | Support Activities for Agriculture and Forestry | 1 | 0 |
| 211 | Oil and Gas Extraction | 24 | 3 |
| 212 | Mining (Except Oil and Gas) | 14 | 1 |
| 221 | Utilities | 183 | 23 |
| 311 | Food Manufacturing | 110 | 7 |
| 312 | Beverage and Tobacco Product Manufacturing | 5 | 0 |
| 313 | Textile Mills | 14 | 1 |
| 314 | Textile Product Mills | 1 | 0 |
| 316 | Leather and Allied Product Manufacturing | 3 | 1 |
| 321 | Wood Product Manufacturing | 183 | 18 |
| 322 | Paper Manufacturing | 186 | 14 |

CLASSES OF SMALL ENTITIES—Continued

| NAICS | NAICS description | Total number of facilities | Total number of small entities |
|---|---|---|---|
| 323 | Printing and Related Support Activities | 33 | 5 |
| 324 | Petroleum and Coal Products Manufacturing | 84 | 8 |
| 325 | Chemical Manufacturing | 220 | 17 |
| 326 | Plastics and Rubber Products Manufacturing | 89 | 11 |
| 327 | Nonmetallic Mineral Product Manufacturing | 41 | 2 |
| 331 | Primary Metal Manufacturing | 57 | 6 |
| 332 | Fabricated Metal Product Manufacturing | 46 | 8 |
| 333 | Machinery Manufacturing | 13 | 0 |
| 334 | Computer and Electronic Product Manufacturing | 2 | 0 |
| 335 | Electrical Equipment, Appliance, and Component Manufacturing | 12 | 0 |
| 336 | Transportation Equipment Manufacturing | 100 | 7 |
| 337 | Furniture and Related Product Manufacturing | 45 | 8 |
| 339 | Miscellaneous Manufacturing | 15 | 1 |
| 423 | Durable Goods Merchant Wholesalers | 1 | 1 |
| 424 | Nondurable Goods Merchant Wholesalers | 1 | 0 |
| 441 | Motor Vehicle and Parts Dealers | 1 | 0 |
| 481 | Air Transportation | 7 | 0 |
| 482 | Rail Transportation | 1 | 0 |
| 486 | Pipeline Transportation | 60 | 0 |
| 488 | Support Activities for Transportation | 3 | 0 |
| 493 | Warehousing and Storage | 5 | 1 |
| 531 | Real Estate | 1 | 0 |
| 541 | Professional, Scientific, and Technical Services | 8 | 0 |
| 561 | Administrative and Support Services | 1 | 0 |
| 562 | Waste Management and Remediation Services | 7 | 2 |
| 611 | Educational Services | 29 | 2 |
| 622 | Hospitals | 4 | 0 |
| 623 | Nursing and Residential Care Facilities | 1 | 0 |
| 811 | Repair and Maintenance | 1 | 0 |
| 921 | Executive, Legislative, and Other General Government Support | 2 | 0 |
| 928 | National Security and International Affairs | 23 | 0 |

We compared the estimated costs to the sales for these entities. The results are found in the following table.

SALES TESTS USING SMALL COMPANIES IDENTIFIED IN THE COMBUSTION SURVEY

| Sample statistic | Proposal | Selected option | Alternative option |
|---|---|---|---|
| Mean | 4.9% | 4.0% | 3.8% |
| Median | 0.4% | 0.2% | 0.4% |
| Maximum | 72.9% | 59.8% | 31.4% |
| Minimum | <0.01% | <0.01% | <0.01% |
| Ultimate parent company observations | 50 | 50 | 50 |
| Ultimate parent companies with sale tests exceeding 3% | 14 | 8 | 13 |

For more detail please see the RIA.

The information collection activities in this ICR include initial and annual stack tests, fuel analyses, operating parameter monitoring, continuous O2 monitoring for all units greater than 10 mmBtu/hr, continuous emission monitoring for PM at units greater than 250 mmBtu/hr, certified energy audits, annual or biennial tune-ups (depending on the size of the combustion equipment), preparation of a site-specific monitoring plan and a site-specific fuel monitoring plan, one-time and periodic reports, and the maintenance of records. Based on the distribution of major source facilities with affected boilers or process heaters reported in the 2008 survey entitled "Information Collection Effort for Facilities with Combustion Units (ICR No. 2286.01)," there are 1,639 existing facilities with affected boilers or process heaters. Of these, 94 percent are located in the private sector and the remaining 6 percent are located in the public sector. A table included in the FRFA summarizes the types and number of each type of small entities expected to be affected by the major source rule.

The Agency expects that persons with knowledge of .pdf software, spreadsheet and relational database programs will be necessary in order to prepare the report or record. Based on experience with previous emission stack testing, we expect most facilities to contract out preparation of the reports associated with emission stack testing, including creation of the Electronic Reporting Tool submittal which will minimize the need for in depth knowledge of databases or spreadsheet software at the source. We also expect affected sources will need to work with web-based applicability tools and flowcharts to determine the requirements applicable to them, knowledge of the heat input capacity and fuel use of the combustion

units at each facility will be necessary in order to develop the reports and determine initial applicability to the rule. Affected facilities will also need skills associated with vendor selection in order to identify service providers that can help them complete their compliance requirements, as necessary.

As required by section 212 of SBREFA, EPA also is preparing a Small Entity Compliance Guide to help small entities comply with this rule. Small entities will be able to obtain a copy of the Small Entity Compliance guide at the following Web site: *http://www.epa.gov/ttn/atw/boiler/boilerpg.html.* The guide should be available by May 20, 2011.

*D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, we 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 1 year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires us 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 us 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 we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must develop a small government agency plan under section 203 of the UMRA. 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 regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this final rule contains 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 1 year. Accordingly, we have prepared a written statement entitled "Unfunded Mandates Reform Act Analysis for the Proposed Industrial Boilers and Process Heaters NESHAP" under section 202 of the UMRA which is summarized below.

1. Statutory Authority

As discussed in section I of this preamble, the statutory authority for this final rulemaking is section 112 of the CAA. Title III of the CAA Amendments was enacted to reduce nationwide air toxic emissions. Section 112(b) of the CAA lists the 188 chemicals, compounds, or groups of chemicals deemed by Congress to be HAP. These toxic air pollutants are to be regulated by NESHAP.

Section 112(d) of the CAA directs us to develop NESHAP which require existing and new major sources to control emissions of HAP using MACT based standards. This NESHAP applies to all ICI boilers and process heaters located at major sources of HAP emissions.

In compliance with section 205(a) of the UMRA, we identified and considered a reasonable number of regulatory alternatives. Additional information on the costs and environmental impacts of these regulatory alternatives is presented in the docket.

The regulatory alternative upon which this final rule is based represents the MACT floor for industrial boilers and process heaters and, as a result, it is the least costly and least burdensome alternative.

2. Social Costs and Benefits

The regulatory impact analysis prepared for this final rule, including the Agency's assessment of costs and benefits, is detailed in the "Regulatory Impact Analysis for the Proposed Industrial Boilers and Process Heaters MACT" in the docket. Based on estimated compliance costs associated with this final rule and the predicted change in prices and production in the affected industries, the estimated social costs of this final rule are $1.5 billion (2008 dollars).

It is estimated that 3 years after implementation of this final rule, HAP would be reduced by thousands of tons, including reductions in hydrochloric acid, hydrogen fluoride, metallic HAP including Hg, and several other organic HAP from boilers and process heaters. Studies have determined a relationship between exposure to these HAP and the onset of cancer, however, the Agency is unable to provide a monetized estimate of the HAP benefits at this time. In addition, there are significant reductions in $PM_{2.5}$ and in $SO_2$ that would occur, including 28 thousand tons of $PM_{2.5}$ and 443 thousand tons of $SO_2$. These reductions occur within 3 years after the implementation of the proposed regulation and are expected to continue throughout the life of the affected sources. The major health effect associated with reducing $PM_{2.5}$ and $PM_{2.5}$ precursors (such as $SO_2$) is a reduction in premature mortality. Other health effects associated with $PM_{2.5}$ emission reductions include avoiding cases of chronic bronchitis, heart attacks, asthma attacks, and work-lost days (*i.e.,* days when employees are unable to work). While we are unable to monetize the benefits associated with the HAP emissions reductions, we are able to monetize the benefits associated with the $PM_{2.5}$ and $SO_2$ emissions reductions. For $SO_2$ and $PM_{2.5}$, we estimated the benefits associated with health effects of PM but were unable to quantify all categories of benefits (particularly those associated with ecosystem and visibility effects). Our estimates of the monetized benefits in 2014 associated with the implementation of the proposed alternative is range from $22 billion (2008 dollars) to $54 billion (2008 dollars) when using a 3 percent discount rate (or from $20 billion (2008 dollars) to $49 billion (2008 dollars) when using a 7 percent discount rate). This estimate, at a 3 percent discount rate, is about $20.5 billion (2008 dollars) to $52.5 billion (2008 dollars) higher than the estimated social costs shown earlier in this section. The general approach used to value benefits is discussed in more detail earlier in this preamble. For more detailed information on the benefits estimated for the rulemaking, refer to the RIA in the docket.

3. Future and Disproportionate Costs

The UMRA requires that we estimate, where accurate estimation is reasonably feasible, future compliance costs imposed by this final rule and any disproportionate budgetary effects. Our estimates of the future compliance costs of the rule are discussed previously in this preamble.

We do not believe that there will be any disproportionate budgetary effects of this final rule on any particular areas of the country, State or local governments, types of communities (e.g., urban, rural), or particular industry

segments. See the results of the "Economic Impact Analysis of the Proposed Industrial Boilers and Process Heaters NESHAP," the results of which are discussed previously in this preamble.

4. Effects on the National Economy

The Unfunded Mandates Act requires that we estimate the effect of this final rule on the national economy. To the extent feasible, we must estimate the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of the U.S. goods and services, if we determine that accurate estimates are reasonably feasible and that such effect is relevant and material.

The nationwide economic impact of this final rule is presented in the "Economic Impact Analysis for the Industrial Boilers and Process Heaters MACT" in the docket. This analysis provides estimates of the effect of this rule on some of the categories mentioned above. The results of the economic impact analysis are summarized previously in this preamble. The results show that there will be a small impact on prices and output, and little impact on communities that may be affected by this final rule. In addition, there should be little impact on energy markets (in this case, coal, natural gas, petroleum products, and electricity). Hence, the potential impacts on the categories mentioned above should be small.

5. Consultation With Government Officials

The Unfunded Mandates Act requires that we describe the extent of the Agency's prior consultation with affected State, local, and tribal officials, summarize the officials' comments or concerns, and summarize our response to those comments or concerns. In addition, section 203 of the UMRA requires that we develop a plan for informing and advising small governments that may be significantly or uniquely impacted by a proposal. We have consulted with State and local air pollution control officials. We have also held meetings on this final rule with many of the stakeholders from numerous individual companies, institutions, environmental groups, consultants and vendors, labor unions, and other interested parties. We have added materials to the Air Docket to document these meetings.

In addition, we have determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. While some small governments may have some sources affected by this final rule, the impacts are not expected to be significant. Therefore, this final rule is not subject to the requirements of section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132 (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. Thus, Executive Order 13132 does not apply to this final rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on this proposed rule from State and local officials.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. Executive Order 13175 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."

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This rule would impose requirements on owners and operators of major industrial boilers. We are only aware of a few installations of industrial, commercial, or institutional boilers owned or operated by Indian tribal governments. We conducted outreach to tribal environmental staff on this rule through the Tribal Air Newsletter, discussions at the National Tribal Forum and the monthly conference call with the National Tribal Air Association, we also hosted a webinar on the proposed rule in which tribal environmental staff participated.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Orders 12866 and 13563, 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 this planned rule on children, and explain why this planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. The reason for this determination is that this final rule is based solely on technology performance.

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

Executive Order 13211, (66 FR 28355, May 22, 2001), provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, a Statement of Energy Effects for certain actions identified as significant energy actions. Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Orders 12866, 13563, or any successor order, and (ii) is likely to have

a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action." This final rule is not a "significant regulatory action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The basis for the determination is as follows.

We estimate a 0.05 percent price increase for the energy sector and a −0.02 percent percentage change in production. We estimate a 0.09 percent increase in energy imports. For more information on the estimated energy effects, please refer to the economic impact analysis for this final rule. The analysis is available in the public docket.

Therefore, we conclude that this final rule when implemented is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

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

This rulemaking involves technical standards. EPA cites the following standards in the final rule: EPA Methods 1, 2, 2F, 2G, 3A, 3B, 4, 5, 5D, 17, 19, 23, 26, 26A, 29 of 40 CFR part 60. Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified for EPA Methods 2F, 2G, 5D, and 19. The search and review results have been documented and are placed in the docket for the proposed rule.

The three voluntary consensus standards described below were identified as acceptable alternatives to EPA test methods for the purposes of the final rule.

The voluntary consensus standard American Society of Mechanical Engineers (ASME) PTC 19–10–1981–Part 10, "Flue and Exhaust Gas Analyses," is cited in the proposed rule for its manual method for measuring the oxygen, $CO_2$, and CO content of exhaust gas. This part of ASME PTC 19–10–1981–Part 10 is an acceptable alternative to Method 3B.

The voluntary consensus standard ASTM D6522–00, "Standard Test Method for the Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas-Fired Reciprocating Engines, Combustion Turbines, Boilers and Process Heaters Using Portable Analyzers" is an acceptable alternative to EPA Method 3A for identifying CO and oxygen concentrations for this final rule when the fuel is natural gas.

The voluntary consensus standard ASTM Z65907, "Standard Method for Both Speciated and Elemental Mercury Determination," is an acceptable alternative to EPA Method 29 (portion for Hg only) for the purpose of this final rule. This standard can be used in the final rule to determine the Hg concentration in stack gases for boilers with rated heat input capacities of greater than 250 MMBtu/hr.

In addition to the voluntary consensus standards EPA used in the proposed rule, the search for emissions measurement procedures identified 15 other voluntary consensus standards. EPA determined that 13 of these 15 standards identified for measuring emissions of the HAP or surrogates subject to emission standards in the proposed rule were impractical alternatives to EPA test methods for the purposes of this final rule. Therefore, EPA does not intend to adopt these standards for this purpose. The reasons for this determination for the 13 methods are discussed below.

The voluntary consensus standard ASTM D3154–00, "Standard Method for Average Velocity in a Duct (Pitot Tube Method)," is impractical as an alternative to EPA Methods 1, 2, 3B, and 4 for the purposes of the proposed rulemaking since the standard appears to lack in quality control and quality assurance requirements. Specifically, ASTM D3154–00 does not include the following: (1) Proof that openings of standard pitot tube have not plugged during the test; (2) if differential pressure gauges other than inclined manometers (*e.g.,* magnehelic gauges) are used, their calibration must be checked after each test series; and (3) the frequency and validity range for calibration of the temperature sensors.

The voluntary consensus standard ASTM D3464–96 (2001), "Standard Test Method Average Velocity in a Duct Using a Thermal Anemometer," is impractical as an alternative to EPA Method 2 for the purposes of the proposed rule primarily because applicability specifications are not clearly defined, *e.g.,* range of gas composition, temperature limits. Also, the lack of supporting quality assurance data for the calibration procedures and specifications, and certain variability issues that are not adequately addressed by the standard limit EPA's ability to make a definitive comparison of the method in these areas.

The voluntary consensus standard ISO 10780:1994, "Stationary Source Emissions—Measurement of Velocity and Volume Flowrate of Gas Streams in Ducts," is impractical as an alternative to EPA Method 2 in the proposed rule. The standard recommends the use of an L-shaped pitot, which historically has not been recommended by EPA. EPA specifies the S-type design which has large openings that are less likely to plug up with dust.

The voluntary consensus standard, CAN/CSA Z223.2–M86 (1999), "Method for the Continuous Measurement of Oxygen, Carbon Dioxide, Carbon Monoxide, Sulphur Dioxide, and Oxides of Nitrogen in Enclosed Combustion Flue Gas Streams," is unacceptable as a substitute for EPA Method 3A since it does not include quantitative specifications for measurement system performance, most notably the calibration procedures and instrument performance characteristics. The instrument performance characteristics that are provided are nonmandatory and also do not provide the same level of quality assurance as the EPA methods. For example, the zero and span/calibration drift is only checked weekly, whereas the EPA methods require drift checks after each run.

Two very similar voluntary consensus standards, ASTM D5835–95 (2001), "Standard Practice for Sampling Stationary Source Emissions for Automated Determination of Gas Concentration," and ISO 10396:1993, "Stationary Source Emissions: Sampling for the Automated Determination of Gas Concentrations," are impractical alternatives to EPA Method 3A for the purposes of this final rule because they lack in detail and quality assurance/quality control requirements. Specifically, these two standards do not include the following: (1) Sensitivity of the method; (2) acceptable levels of analyzer calibration error; (3) acceptable levels of sampling system bias; (4) zero drift and calibration drift limits, time span, and required testing frequency; (5) a method to test the interference response of the analyzer; (6) procedures

to determine the minimum sampling time per run and minimum measurement time; and (7) specifications for data recorders, in terms of resolution (all types) and recording intervals (digital and analog recorders, only).

The voluntary consensus standard ISO 12039:2001, "Stationary Source Emissions—Determination of Carbon Monoxide, Carbon Dioxide, and Oxygen—Automated Methods," is not acceptable as an alternative to EPA Method 3A. This ISO standard is similar to EPA Method 3A, but is missing some key features. In terms of sampling, the hardware required by ISO 12039:2001 does not include a 3-way calibration valve assembly or equivalent to block the sample gas flow while calibration gases are introduced. In its calibration procedures, ISO 12039:2001 only specifies a two-point calibration while EPA Method 3A specifies a three-point calibration. Also, ISO 12039:2001 does not specify performance criteria for calibration error, calibration drift, or sampling system bias tests as in the EPA method, although checks of these quality control features are required by the ISO standard.

The voluntary consensus standard ASME PTC–38–80 R85 (1985), "Determination of the Concentration of Particulate Matter in Gas Streams," is not acceptable as an alternative for EPA Method 5 because ASTM PTC–38–80 is not specific about equipment requirements, and instead presents the options available and the pro's and con's of each option. The key specific differences between ASME PTC–38–80 and the EPA methods are that the ASME standard: (1) Allows in-stack filter placement as compared to the out-of-stack filter placement in EPA Methods 5 and 17; (2) allows many different types of nozzles, pitots, and filtering equipment; (3) does not specify a filter weighing protocol or a minimum allowable filter weight fluctuation as in the EPA methods; and (4) allows filter paper to be only 99 percent efficient, as compared to the 99.95 percent efficiency required by the EPA methods.

The voluntary consensus standard ASTM D3685/D3685M–98, "Test Methods for Sampling and Determination of Particulate Matter in Stack Gases," is similar to EPA Methods 5 and 17, but is lacking in the following areas that are needed to produce quality, representative particulate data: (1) Requirement that the filter holder temperature should be between 120° C and 134° C, and not just "above the acid dew-point;" (2) detailed specifications for measuring and monitoring the filter holder temperature during sampling; (3) procedures similar to EPA Methods 1, 2, 3, and 4, that are required by EPA Method 5; (4) technical guidance for performing the Method 5 sampling procedures, *e.g.,* maintaining and monitoring sampling train operating temperatures, specific leak check guidelines and procedures, and use of reagent blanks for determining and subtracting background contamination; and (5) detailed equipment and/or operational requirements, *e.g.,* component exchange leak checks, use of glass cyclones for heavy particulate loading and/or water droplets, operating under a negative stack pressure, exchanging particulate loaded filters, sampling preparation and implementation guidance, sample recovery guidance, data reduction guidance, and particulate sample calculations input.

The voluntary consensus standard ISO 9096:1992, "Determination of Concentration and Mass Flow Rate of Particulate Matter in Gas Carrying Ducts—Manual Gravimetric Method," is not acceptable as an alternative for EPA Method 5. Although sections of ISO 9096 incorporate EPA Methods 1, 2, and 5 to some degree, this ISO standard is not equivalent to EPA Method 5 for collection of particulate matter. The standard ISO 9096 does not provide applicable technical guidance for performing many of the integral procedures specified in Methods 1, 2, and 5. Major performance and operational details are lacking or nonexistent, and detailed quality assurance/quality control guidance for the sampling operations required to produce quality, representative particulate data (*e.g.,* guidance for maintaining and monitoring train operating temperatures, specific leak check guidelines and procedures, and sample preparation and recovery procedures) are not provided by the standard, as in EPA Method 5. Also, details of equipment and/or operational requirements, such as those specified in EPA Method 5, are not included in the ISO standard, *e.g.,* stack gas moisture measurements, data reduction guidance, and particulate sample calculations.

The voluntary consensus standard CAN/CSA Z223.1–M1977, "Method for the Determination of Particulate Mass Flows in Enclosed Gas Streams," is not acceptable as an alternative for EPA Method 5. Detailed technical procedures and quality control measures that are required in EPA Methods 1, 2, 3, and 4 are not included in CAN/CSA Z223.1. Second, CAN/CSA Z223.1 does not include the EPA Method 5 filter weighing requirement to repeat weighing every 6 hours until a constant weight is achieved. Third, EPA Method 5 requires the filter weight to be reported to the nearest 0.1 milligram (mg), while CAN/CSA Z223.1 requires only to the nearest 0.5 mg. Also, CAN/CSA Z223.1 allows the use of a standard pitot for velocity measurement when plugging of the tube opening is not expected to be a problem. Whereas, EPA Method 5 requires an S-shaped pitot.

The voluntary consensus standard EN 1911–1,2,3 (1998), "Stationary Source Emissions-Manual Method of Determination of HCl-Part 1: Sampling of Gases Ratified European Text-Part 2: Gaseous Compounds Absorption Ratified European Text-Part 3: Adsorption Solutions Analysis and Calculation Ratified European Text," is impractical as an alternative to EPA Methods 26 and 26A. Part 3 of this standard cannot be considered equivalent to EPA Method 26 or 26A because the sample absorbing solution (water) would be expected to capture both HCl and chlorine gas, if present, without the ability to distinguish between the two. The EPA Methods 26 and 26A use an acidified absorbing solution to first separate HCl and chlorine gas so that they can be selectively absorbed, analyzed, and reported separately. In addition, in EN 1911 the absorption efficiency for chlorine gas would be expected to vary as the pH of the water changed during sampling.

The voluntary consensus standard EN 13211 (1998), is not acceptable as an alternative to the Hg portion of EPA Method 29 primarily because it is not validated for use with impingers, as in the EPA method, although the method describes procedures for the use of impingers. This European standard is validated for the use of fritted bubblers only and requires the use of a side (split) stream arrangement for isokinetic sampling because of the low sampling rate of the bubblers (up to 3 liters per minute, maximum). Also, only two bubblers (or impingers) are required by EN 13211, whereas EPA Method 29 require the use of six impingers. In addition, EN 13211 does not include many of the quality control procedures of EPA Method 29, especially for the use and calibration of temperature sensors and controllers, sampling train assembly and disassembly, and filter weighing.

Two of the 15 voluntary consensus standards identified in this search were not available at the time the review was conducted for the purposes of the proposed rule because they are under development by a voluntary consensus body: ASME/BSR MFC 13M, "Flow Measurement by Velocity Traverse," for EPA Method 2 (and possibly 1); and

ASME/BSR MFC 12M, "Flow in Closed Conduits Using Multiport Averaging Pitot Primary Flowmeters," for EPA Method 2.

Section 63.7520 and Tables 4A through 4D to subpart DDDDD, 40 CFR part 63, list the EPA testing methods included in the proposed rule. Under § 63.7(f) and § 63.8(f) of subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any of the EPA testing methods, performance specifications, or procedures.

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

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

This final action establishes national emission standards for new and existing industrial, commercial, institutional boilers and process heaters that combust non-waste materials (*i.e.* natural gas, process gas, fuel oil, biomass, and coal) and that are located at a major source. EPA estimates that there are approximately 13,840 units located at 1,639 facilities covered by this final rule.

This final rule will reduce emissions of all the listed HAP that come from boilers and process heaters. This includes metals (Hg, arsenic, beryllium, cadmium, chromium, lead, Mn, nickel, and selenium), organics (POM, acetaldehyde, acrolein, benzene, dioxin/furan, ethylene dichloride, formaldehyde, and polychlorinated biphenyls), hydrochloric acid, and hydrofluoric acid. Adverse health effects from these pollutants include cancer, irritation of the lungs, skin, and mucus membranes; effects on the central nervous system, damage to the kidneys, and other acute health disorders. This final rule will also result in substantial reductions of criteria pollutants such as CO, $NO_X$, PM, and $SO_2$. $SO_2$ and nitrogen dioxide are precursors for the formation of $PM_{2.5}$ and ozone. Reducing these emissions will reduce ozone and $PM_{2.5}$ formation and associated health effects, such as adult premature mortality, chronic and acute bronchitis, asthma, and other respiratory and cardiovascular diseases. (Please refer to the RIA contained in the docket for this rulemaking.)

Based on the fact that this final rule does not allow emission increases, EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority, low-income, or Tribal populations. To address Executive Order 12898, EPA has conducted analyses to determine the aggregate demographic makeup of the communities near affected sources. EPA's demographic analysis of populations within the three-mile radius showed that major source boilers are located in areas where minorities are overrepresented when compared to the national average. For these same areas, there is also an overrepresentation of population below the poverty line as compared to the national average. The results of the demographic analysis are presented in "Review of Environmental Justice Impacts", April 2010, a copy of which is available in the docket. However, to the extent that any minority, low income, or Tribal subpopulation is disproportionately impacted by the current emissions as a result of the proximity of their homes to these sources, that subpopulation also stands to see increased environmental and health benefit from the emissions reductions called for by this rule.

EPA defines "Environmental Justice" to include meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and polices. To promote meaningful involvement, EPA has developed a communication and outreach strategy to ensure that interested communities have access to this final rule and are aware of its content. EPA also ensured that interested communities had an opportunity to comment during the comment period. During the comment period that followed the June 2010 proposal, EPA publicized the rulemaking via EJ newsletters, Tribal newsletters, EJ listservs, and the internet, including the Office of Policy's (OP) Rulemaking Gateway Web site (*http://yosemite.epa.gov/opei/RuleGate.nsf/*). EPA will also provide general rulemaking fact sheets (*e.g.,* why is this important for my community) for EJ community groups and conduct conference calls with interested communities. In addition, State and federal permitting requirements will provide State and local governments and members of affected communities the opportunity to provide comments on the permit conditions associated with permitting the sources affected by this rulemaking.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this final 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 a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective May 20, 2011.

**List of Subjects in 40 CFR part 63**

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 21, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of the Federal Regulations is amended 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.*

■ 2. Section 63.14 is amended by:

■ a. Revising paragraphs (b)(27), (b)(35), (b)(39) through (44), (b)(47) through (52), (b)(57), (b)(61), (b)(64), and (i)(1).

■ b. Removing and reserving paragraphs (b)(45), (b)(46), (b)(55), (b)(56), (b)(58) through (60), and (b)(62).

■ c. Adding paragraphs (b)(66) through (68).

■ d. Adding paragraphs (p) and (q).

**§ 63.14 Incorporations by reference.**

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(b) * * *

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(27) ASTM D6522–00, Standard Test Method for Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from

Natural Gas Fired Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters Using Portable Analyzers, IBR approved for § 63.9307(c)(2).

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(35) ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008, IBR approved for table 1 to subpart DDDDD of this part, table 2 to subpart DDDDD of this part, table 5 to subpart DDDDD of this part, table 12 to subpart DDDDD of this part, and table 4 to subpart JJJJJJ of this part.

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(39) ASTM D388–05 Standard Classification of Coals by Rank, approved September 15, 2005, IBR approved for § 63.7575 and § 63.11237.

(40) ASTM D396–10 Standard Specification for Fuel Oils, approved October 1, 2010, IBR approved for § 63.7575.

(41) ASTM D1835–05 Standard Specification for Liquefied Petroleum (LP) Gases, approved April 1, 2005, IBR approved for § 63.7575 and § 63.11237.

(42) ASTM D2013/D2013M–09 Standard Practice for Preparing Coal Samples for Analysis, approved November 1, 2009, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(43) ASTM D2234/D2234M–10 Standard Practice for Collection of a Gross Sample of Coal, approved January 1, 2010, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(44) ASTM D3173–03 (Reapproved 2008) Standard Test Method for Moisture in the Analysis Sample of Coal and Coke, approved February 1, 2008, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

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(47) ASTM D5198–09 Standard Practice for Nitric Acid Digestion of Solid Waste, approved February 1, 2009, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(48) ASTM D5865–10a Standard Test Method for Gross Calorific Value of Coal and Coke, approved May 1, 2010, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(49) ASTM D6323–98 (Reapproved 2003) Standard Guide for Laboratory Subsampling of Media Related to Waste Management Activities, approved August 10, 2003, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(50) ASTM E711–87 (Reapproved 2004) Standard Test Method for Gross Calorific Value of Refuse-Derived Fuel by the Bomb Calorimeter, approved August 28, 1987, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(51) ASTM E776–87 (Reapproved 2009) Standard Test Method for Forms of Chlorine in Refuse-Derived Fuel, approved July 1, 2009, IBR approved for table 6 to subpart DDDDD of this part.

(52) ASTM E871–82 (Reapproved 2006) Standard Test Method for Moisture Analysis of Particulate Wood Fuels, approved November 1, 2006, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

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(57) ASTM D6721–01 (Reapproved 2006) Standard Test Method for Determination of Chlorine in Coal by Oxidative Hydrolysis Microcoulometry, approved April 1, 2006, IBR approved for table 6 to subpart DDDDD of this part.

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(61) ASTM D6722–01 (Reapproved 2006) Standard Test Method for Total Mercury in Coal and Coal Combustion Residues by the Direct Combustion Analysis, approved April 1, 2006, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

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(64) ASTM D6522–00 (Reapproved 2005), Standard Test Method for Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Natural Gas Fired Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters Using Portable Analyzers, approved October 1, 2005, IBR approved for table 4 to subpart ZZZZ of this part, table 5 to subpart DDDDD of this part, and table 4 to subpart JJJJJJ of this part.

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(66) ASTM D4084–07 Standard Test Method for Analysis of Hydrogen Sulfide in Gaseous Fuels (Lead Acetate Reaction Rate Method), approved June 1, 2007, IBR approved for table 6 to subpart DDDDD of this part.

(67) ASTM D5954–98 (Reapproved 2006), Standard Test Method for Mercury Sampling and Measurement in Natural Gas by Atomic Absorption Spectroscopy, approved December 1, 2006, IBR approved for table 6 to subpart DDDDD of this part.

(68) ASTM D6350–98 (Reapproved 2003) Standard Test Method for Mercury Sampling and Analysis in Natural Gas by Atomic Fluorescence Spectroscopy, approved May 10, 2003, IBR approved for table 6 to subpart DDDDD of this part.

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(i) * * *

(1) ANSI/ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]," IBR approved for §§ 63.309(k)(1)(iii), 63.865(b), 63.3166(a)(3), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), 63.11148(e)(3)(iii), 63.11155(e)(3), 63.11162(f)(3)(iii) and (f)(4), 63.11163(g)(1)(iii) and (g)(2), 63.11410(j)(1)(iii), 63.11551(a)(2)(i)(C), table 5 to subpart DDDDD of this part, table 1 to subpart ZZZZZ of this part, and table 4 to subpart JJJJJJ of this part.

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(p) The following material is available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov*.

(1) National Emission Standards for Hazardous Air Pollutants (NESHAP) for Integrated Iron and Steel Plants—Background Information for Proposed Standards, Final Report, EPA–453/R–01–005, January 2001, IBR approved for § 63.7491(g).

(2) Office Of Air Quality Planning And Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, IBR approved for § 63.7525(j)(2) and § 63.11224(f)(2).

(3) SW–846–3020A, Acid Digestion of Aqueous Samples And Extracts For Total Metals For Analysis By GFAA Spectroscopy, Revision 1, July 1992, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(4) SW–846–3050B, Acid Digestion of Sediments, Sludges, And Soils, Revision 2, December 1996, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(5) SW–846–7470A, Mercury In Liquid Waste (Manual Cold-Vapor Technique), Revision 1, September 1994, in EPA Publication No. SW–846,

Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(6) SW–846–7471B, Mercury In Solid Or Semisolid Waste (Manual Cold-Vapor Technique), Revision 2, February 2007, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part and table 5 to subpart JJJJJJ of this part.

(7) SW–846–9250, Chloride (Colorimetric, Automated Ferricyanide AAI), Revision 0, September 1986, in EPA Publication No. SW–846, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Third Edition, IBR approved for table 6 to subpart DDDDD of this part.

(q) The following material is available for purchase from the International Standards Organization (ISO), 1, ch. de la Voie-Creuse, Case postale 56, CH–1211 Geneva 20, Switzerland, +41 22 749 01 11, *http://www.iso.org/iso/home.htm*.

(1) ISO 6978–1:2003(E), Natural Gas—Determination of Mercury—Part 1: Sampling of Mercury by Chemisorption on Iodine, First edition, October 15, 2003, IBR approved for table 6 to subpart DDDDD of this part.

(2) ISO 6978–2:2003(E), Natural gas—Determination of Mercury—Part 2: Sampling of Mercury by Amalgamation on Gold/Platinum Alloy, First edition, October 15, 2003, IBR approved for table 6 to subpart DDDDD of this part.

■ 3. Part 63 is amended by revising subpart DDDDD to read as follows:

## Subpart DDDDD—National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters

Sec.

**What This Subpart Covers**

63.7480 What is the purpose of this subpart?
63.7485 Am I subject to this subpart?
63.7490 What is the affected source of this subpart?
63.7491 Are any boilers or process heaters not subject to this subpart?
63.7495 When do I have to comply with this subpart?

**Emission Limitations and Work Practice Standards**

63.7499 What are the subcategories of boilers and process heaters?
63.7500 What emission limitations, work practice standards, and operating limits must I meet?
63.7501 How can I assert an affirmative defense if I exceed an emission limitations during a malfunction?

**General Compliance Requirements**

63.7505 What are my general requirements for complying with this subpart?

**Testing, Fuel Analyses, and Initial Compliance Requirements**

63.7510 What are my initial compliance requirements and by what date must I conduct them?
63.7515 When must I conduct subsequent performance tests, fuel analyses, or tune-ups?
63.7520 What stack tests and procedures must I use?
63.7521 What fuel analyses, fuel specification, and procedures must I use?
63.7522 Can I use emissions averaging to comply with this subpart?
63.7525 What are my monitoring, installation, operation, and maintenance requirements?
63.7530 How do I demonstrate initial compliance with the emission limitations, fuel specifications and work practice standards?
63.7533 Can I use emission credits earned from implementation of energy conservation measures to comply with this subpart?

**Continuous Compliance Requirements**

63.7535 How do I monitor and collect data to demonstrate continuous compliance?
63.7540 How do I demonstrate continuous compliance with the emission limitations, fuel specifications and work practice standards?
63.7541 How do I demonstrate continuous compliance under the emissions averaging provision?

**Notification, Reports, and Records**

63.7545 What notifications must I submit and when?
63.7550 What reports must I submit and when?
63.7555 What records must I keep?
63.7560 In what form and how long must I keep my records?

**Other Requirements and Information**

63.7565 What parts of the General Provisions apply to me?
63.7570 Who implements and enforces this subpart?
63.7575 What definitions apply to this subpart?

**Tables to Subpart DDDDD of Part 63**

Table 1 to Subpart DDDDD of Part 63—Emission Limits for New or Reconstructed Boilers and Process Heaters
Table 2 to Subpart DDDDD of Part 63—Emission Limits for Existing Boilers and Process Heaters (Units with heat input capacity of 10 million Btu per hour or greater)
Table 3 to Subpart DDDDD of Part 63—Work Practice Standards
Table 4 to Subpart DDDDD of Part 63—Operating Limits for Boilers and Process Heaters
Table 5 to Subpart DDDDD of Part 63—Performance Testing Requirements
Table 6 to Subpart DDDDD of Part 63—Fuel Analysis Requirements
Table 7 to Subpart DDDDD of Part 63—Establishing Operating Limits
Table 8 to Subpart DDDDD of Part 63—Demonstrating Continuous Compliance
Table 9 to Subpart DDDDD of Part 63—Reporting Requirements
Table 10 to Subpart DDDDD of Part 63—Applicability of General Provisions to Subpart DDDDD
Table 11 to Subpart DDDDD of Part 63—Toxic Equivalency Factors for Dioxins/Furans
Table 12 to Subpart DDDDD of Part 63—Alternative Emission Limits for New or Reconstructed Boilers and Process Heaters That Commenced Construction or Reconstruction After June 4, 2010, and Before May 20, 2011

### What This Subpart Covers

#### § 63.7480 What is the purpose of this subpart?

This subpart establishes national emission limitations and work practice standards for hazardous air pollutants (HAP) emitted from industrial, commercial, and institutional boilers and process heaters located at major sources of HAP. This subpart also establishes requirements to demonstrate initial and continuous compliance with the emission limitations and work practice standards.

#### § 63.7485 Am I subject to this subpart?

You are subject to this subpart if you own or operate an industrial, commercial, or institutional boiler or process heater as defined in § 63.7575 that is located at, or is part of, a major source of HAP, except as specified in § 63.7491. For purposes of this subpart, a major source of HAP is as defined in § 63.2, except that for oil and natural gas production facilities, a major source of HAP is as defined in § 63.761 (subpart HH of this part, National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities).

#### § 63.7490 What is the affected source of this subpart?

(a) This subpart applies to new, reconstructed, and existing affected sources as described in paragraphs (a)(1) and (2) of this section.

(1) The affected source of this subpart is the collection at a major source of all existing industrial, commercial, and institutional boilers and process heaters within a subcategory as defined in § 63.7575.

(2) The affected source of this subpart is each new or reconstructed industrial, commercial, or institutional boiler or

process heater, as defined in § 63.7575, located at a major source.

(b) A boiler or process heater is new if you commence construction of the boiler or process heater after June 4, 2010, and you meet the applicability criteria at the time you commence construction.

(c) A boiler or process heater is reconstructed if you meet the reconstruction criteria as defined in § 63.2, you commence reconstruction after June 4, 2010, and you meet the applicability criteria at the time you commence reconstruction.

(d) A boiler or process heater is existing if it is not new or reconstructed.

**§ 63.7491 Are any boilers or process heaters not subject to this subpart?**

The types of boilers and process heaters listed in paragraphs (a) through (m) of this section are not subject to this subpart.

(a) An electric utility steam generating unit.

(b) A recovery boiler or furnace covered by subpart MM of this part.

(c) A boiler or process heater that is used specifically for research and development. This does not include units that provide heat or steam to a process at a research and development facility.

(d) A hot water heater as defined in this subpart.

(e) A refining kettle covered by subpart X of this part.

(f) An ethylene cracking furnace covered by subpart YY of this part.

(g) Blast furnace stoves as described in EPA–453/R–01–005 (incorporated by reference, see § 63.14).

(h) Any boiler or process heater that is part of the affected source subject to another subpart of this part (i.e., another National Emission Standards for Hazardous Air Pollutants in 40 CFR part 63).

(i) Any boiler or process heater that is used as a control device to comply with another subpart of this part, provided that at least 50 percent of the heat input to the boiler is provided by the gas stream that is regulated under another subpart.

(j) Temporary boilers as defined in this subpart.

(k) Blast furnace gas fuel-fired boilers and process heaters as defined in this subpart.

(l) Any boiler specifically listed as an affected source in any standard(s) established under section 129 of the Clean Air Act.

(m) A boiler required to have a permit under section 3005 of the Solid Waste Disposal Act or covered by subpart EEE of this part (e.g., hazardous waste boilers).

**§ 63.7495 When do I have to comply with this subpart?**

(a) If you have a new or reconstructed boiler or process heater, you must comply with this subpart by May 20, 2011 or upon startup of your boiler or process heater, whichever is later.

(b) If you have an existing boiler or process heater, you must comply with this subpart no later than March 21, 2014.

(c) If you have an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP, paragraphs (c)(1) and (2) of this section apply to you.

(1) Any new or reconstructed boiler or process heater at the existing source must be in compliance with this subpart upon startup.

(2) Any existing boiler or process heater at the existing source must be in compliance with this subpart within 3 years after the source becomes a major source.

(d) You must meet the notification requirements in § 63.7545 according to the schedule in § 63.7545 and in subpart A of this part. Some of the notifications must be submitted before you are required to comply with the emission limits and work practice standards in this subpart.

(e) If you own or operate an industrial, commercial, or institutional boiler or process heater and would be subject to this subpart except for the exemption in § 63.7491(l) for commercial and industrial solid waste incineration units covered by part 60, subpart CCCC or subpart DDDD, and you cease combusting solid waste, you must be in compliance with this subpart on the effective date of the switch from waste to fuel.

## Emission Limitations and Work Practice Standards

**§ 63.7499 What are the subcategories of boilers and process heaters?**

The subcategories of boilers and process heaters, as defined in § 63.7575 are:

(a) Pulverized coal/solid fossil fuel units.

(b) Stokers designed to burn coal/solid fossil fuel.

(c) Fluidized bed units designed to burn coal/solid fossil fuel.

(d) Stokers designed to burn biomass/bio-based solid.

(e) Fluidized bed units designed to burn biomass/bio-based solid.

(f) Suspension burners/Dutch Ovens designed to burn biomass/bio-based solid.

(g) Fuel Cells designed to burn biomass/bio-based solid.

(h) Hybrid suspension/grate burners designed to burn biomass/bio-based solid.

(i) Units designed to burn solid fuel.

(j) Units designed to burn liquid fuel.

(k) Units designed to burn liquid fuel in non-continental States or territories.

(l) Units designed to burn natural gas, refinery gas or other gas 1 fuels.

(m) Units designed to burn gas 2 (other) gases.

(n) Metal process furnaces.

(o) Limited-use boilers and process heaters.

**§ 63.7500 What emission limitations, work practice standards, and operating limits must I meet?**

(a) You must meet the requirements in paragraphs (a)(1) through (3) of this section, except as provided in paragraphs (b) and (c) of this section. You must meet these requirements at all times.

(1) You must meet each emission limit and work practice standard in Tables 1 through 3, and 12 to this subpart that applies to your boiler or process heater, for each boiler or process heater at your source, except as provided under § 63.7522. If your affected source is a new or reconstructed affected source that commenced construction or reconstruction after June 4, 2010, and before May 20, 2011, you may comply with the emission limits in Table 1 or 12 to this subpart until March 21, 2014. On and after March 21, 2014, you must comply with the emission limits in Table 1 to this subpart.

(2) You must meet each operating limit in Table 4 to this subpart that applies to your boiler or process heater. If you use a control device or combination of control devices not covered in Table 4 to this subpart, or you wish to establish and monitor an alternative operating limit and alternative monitoring parameters, you must apply to the EPA Administrator for approval of alternative monitoring under § 63.8(f).

(3) At all times, you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator that may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(b) As provided in § 63.6(g), EPA may approve use of an alternative to the work practice standards in this section.

(c) Limited-use boilers and process heaters must complete a biennial tune-up as specified in § 63.7540. They are not subject to the emission limits in Tables 1 and 2 to this subpart, the annual tune-up requirement in Table 3 to this subpart, or the operating limits in Table 4 to this subpart. Major sources that have limited-use boilers and process heaters must complete an energy assessment as specified in Table 3 to this subpart if the source has other existing boilers subject to this subpart that are not limited-use boilers.

**§ 63.7501 How can I assert an affirmative defense if I exceed an emission limitations during a malfunction?**

In response to an action to enforce the emission limitations and operating limits set forth in § 63.7500 you may assert an affirmative defense to a claim for civil penalties for exceeding such standards that are caused by malfunction, as defined at § 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Notification.* The owner or operator of the facility experiencing an exceedance of its emission limitat(s) during a malfunction shall notify the Administrator by telephone or facsimile (fax) transmission as soon as possible, but no later than 2 business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial ocurrence of the exceedance of the standard in § 63.7500 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

## General Compliance Requirements

**§ 63.7505 What are my general requirements for complying with this subpart?**

(a) You must be in compliance with the emission limits and operating limits in this subpart. These limits apply to you at all times.

(b) [Reserved]

(c) You must demonstrate compliance with all applicable emission limits using performance testing, fuel analysis, or continuous monitoring systems (CMS), including a continuous emission monitoring system (CEMS) or continuous opacity monitoring system (COMS), where applicable. You may demonstrate compliance with the applicable emission limit for hydrogen chloride or mercury using fuel analysis if the emission rate calculated according to § 63.7530(c) is less than the applicable emission limit. Otherwise, you must demonstrate compliance for hydrogen chloride or mercury using performance testing, if subject to an applicable emission limit listed in Table 1, 2, or 12 to this subpart.

(d) If you demonstrate compliance with any applicable emission limit through performance testing and subsequent compliance with operating limits (including the use of continuous parameter monitoring system), or with a CEMS, or COMS, you must develop a site-specific monitoring plan according to the requirements in paragraphs (d)(1) through (4) of this section for the use of any CEMS, COMS, or continuous parameter monitoring system. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 63.8(f).

(1) For each CMS required in this section (including CEMS, COMS, or continuous parameter monitoring system), you must develop, and submit to the delegated authority for approval upon request, a site-specific monitoring plan that addresses paragraphs (d)(1)(i) through (iii) of this section. You must submit this site-specific monitoring plan, if requested, at least 60 days before your initial performance evaluation of your CMS. This requirement to develop and submit a site specific monitoring plan does not apply to affected sources with existing monitoring plans that apply to CEMS and COMS prepared under appendix B to part 60 of this chapter and that meet the requirements of § 63.7525.

(i) Installation of the CMS sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (e.g., on or downstream of the last control device);

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or

parametric signal analyzer, and the data collection and reduction systems; and

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(2) In your site-specific monitoring plan, you must also address paragraphs (d)(2)(i) through (iii) of this section.

(i) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1)(ii), (c)(3), and (c)(4)(ii);

(ii) Ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d); and

(iii) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 63.10(c) (as applicable in Table 10 to this subpart), (e)(1), and (e)(2)(i).

(3) You must conduct a performance evaluation of each CMS in accordance with your site-specific monitoring plan.

(4) You must operate and maintain the CMS in continuous operation according to the site-specific monitoring plan.

## Testing, Fuel Analyses, and Initial Compliance Requirements

### § 63.7510 What are my initial compliance requirements and by what date must I conduct them?

(a) For affected sources that elect to demonstrate compliance with any of the applicable emission limits in Tables 1 or 2 of this subpart through performance testing, your initial compliance requirements include conducting performance tests according to § 63.7520 and Table 5 to this subpart, conducting a fuel analysis for each type of fuel burned in your boiler or process heater according to § 63.7521 and Table 6 to this subpart, establishing operating limits according to § 63.7530 and Table 7 to this subpart, and conducting CMS performance evaluations according to § 63.7525. For affected sources that burn a single type of fuel, you are exempted from the compliance requirements of conducting a fuel analysis for each type of fuel burned in your boiler or process heater according to § 63.7521 and Table 6 to this subpart. For purposes of this subpart, units that use a supplemental fuel only for startup, unit shutdown, and transient flame stability purposes still qualify as affected sources that burn a single type of fuel, and the supplemental fuel is not subject to the fuel analysis requirements under § 63.7521 and Table 6 to this subpart.

(b) For affected sources that elect to demonstrate compliance with the applicable emission limits in Tables 1 or 2 of this subpart for hydrogen chloride or mercury through fuel analysis, your initial compliance requirement is to conduct a fuel analysis for each type of fuel burned in your boiler or process heater according to § 63.7521 and Table 6 to this subpart and establish operating limits according to § 63.7530 and Table 8 to this subpart.

(c) If your boiler or process heater is subject to a carbon monoxide limit, your initial compliance demonstration for carbon monoxide is to conduct a performance test for carbon monoxide according to Table 5 to this subpart. Your initial compliance demonstration for carbon monoxide also includes conducting a performance evaluation of your continuous oxygen monitor according to § 63.7525(a).

(d) If your boiler or process heater subject to a PM limit has a heat input capacity greater than 250 MMBtu per hour and combusts coal, biomass, or residual oil, your initial compliance demonstration for PM is to conduct a performance evaluation of your continuous emission monitoring system for PM according to § 63.7525(b). Boilers and process heaters that use a continuous emission monitoring system for PM are exempt from the performance testing and operating limit requirements specified in paragraph (a) of this section.

(e) For existing affected sources, you must demonstrate initial compliance, as specified in paragraphs (a) through (d) of this section, no later than 180 days after the compliance date that is specified for your source in § 63.7495 and according to the applicable provisions in § 63.7(a)(2) as cited in Table 10 to this subpart.

(f) If your new or reconstructed affected source commenced construction or reconstruction after June 4, 2010, you must demonstrate initial compliance with the emission limits no later than November 16, 2011 or within 180 days after startup of the source, whichever is later. If you are demonstrating compliance with an emission limit in Table 12 to this subpart that is less stringent than (that is, higher than) the applicable emission limit in Table 1 to this subpart, you must demonstrate compliance with the applicable emission limit in Table 1 no later than September 17, 2014.

(g) For affected sources that ceased burning solid waste consistent with § 63.7495(e) and for which your initial compliance date has passed, you must demonstrate compliance within 60 days of the effective date of the waste-to-fuel switch. If you have not conducted your compliance demonstration for this subpart within the previous 12 months, you must complete all compliance demonstrations for this subpart before you commence or recommence combustion of solid waste.

### § 63.7515 When must I conduct subsequent performance tests, fuel analyses, or tune-ups?

(a) You must conduct all applicable performance tests according to § 63.7520 on an annual basis, except those for dioxin/furan emissions, unless you follow the requirements listed in paragraphs (b) through (e) of this section. Annual performance tests must be completed no more than 13 months after the previous performance test, unless you follow the requirements listed in paragraphs (b) through (e) of this section. Annual performance testing for dioxin/furan emissions is not required after the initial compliance demonstration.

(b) You can conduct performance tests less often for a given pollutant if your performance tests for the pollutant for at least 2 consecutive years show that your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions. In this case, you do not have to conduct a performance test for that pollutant for the next 2 years. You must conduct a performance test during the third year and no more than 37 months after the previous performance test. If you elect to demonstrate compliance using emission averaging under § 63.7522, you must continue to conduct performance tests annually.

(c) If your boiler or process heater continues to meet the emission limit for the pollutant, you may choose to conduct performance tests for the pollutant every third year if your emissions are at or below 75 percent of the emission limit, and if there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions, but each such performance test must be conducted no more than 37 months after the previous performance test. If you elect to demonstrate compliance using emission averaging under § 63.7522, you must continue to conduct performance tests annually. The requirement to test at maximum chloride input level is waived unless the stack test is conducted for HCl. The requirement to test at maximum Hg input level is waived unless the stack test is conducted for Hg.

(d) If a performance test shows emissions exceeded 75 percent of the emission limit for a pollutant, you must conduct annual performance tests for that pollutant until all performance tests

over a consecutive 2-year period show compliance.

(e) If you are required to meet an applicable tune-up work practice standard, you must conduct an annual or biennial performance tune-up according to § 63.7540(a)(10) and (a)(11), respectively. Each annual tune-up specified in § 63.7540(a)(10) must be no more than 13 months after the previous tune-up. Each biennial tune-up specified in § 63.7540(a)(11) must be conducted no more than 25 months after the previous tune-up.

(f) If you demonstrate compliance with the mercury or hydrogen chloride based on fuel analysis, you must conduct a monthly fuel analysis according to § 63.7521 for each type of fuel burned that is subject to an emission limit in Table 1, 2, or 12 of this subpart. If you burn a new type of fuel, you must conduct a fuel analysis before burning the new type of fuel in your boiler or process heater. You must still meet all applicable continuous compliance requirements in § 63.7540. If 12 consecutive monthly fuel analyses demonstrate compliance, you may request decreased fuel analysis frequency by applying to the EPA Administrator for approval of alternative monitoring under § 63.8(f).

(g) You must report the results of performance tests and the associated initial fuel analyses within 90 days after the completion of the performance tests. This report must also verify that the operating limits for your affected source have not changed or provide documentation of revised operating parameters established according to § 63.7530 and Table 7 to this subpart, as applicable. The reports for all subsequent performance tests must include all applicable information required in § 63.7550.

**§ 63.7520 What stack tests and procedures must I use?**

(a) You must conduct all performance tests according to § 63.7(c), (d), (f), and (h). You must also develop a site-specific stack test plan according to the requirements in § 63.7(c). You shall conduct all performance tests under such conditions as the Administrator specifies to you based on representative performance of the affected source for the period being tested. Upon request, you shall make available to the Administrator such records as may be necessary to determine the conditions of the performance tests.

(b) You must conduct each performance test according to the requirements in Table 5 to this subpart.

(c) You must conduct each performance test under the specific conditions listed in Tables 5 and 7 to this subpart. You must conduct performance tests at representative operating load conditions while burning the type of fuel or mixture of fuels that has the highest content of chlorine and mercury, and you must demonstrate initial compliance and establish your operating limits based on these performance tests. These requirements could result in the need to conduct more than one performance test. Following each performance test and until the next performance test, you must comply with the operating limit for operating load conditions specified in Table 4 to this subpart.

(d) You must conduct three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must comply with the minimum applicable sampling times or volumes specified in Tables 1, 2, and 12 to this subpart.

(e) To determine compliance with the emission limits, you must use the F-Factor methodology and equations in sections 12.2 and 12.3 of EPA Method 19 at 40 CFR part 60, appendix A–7 of this chapter to convert the measured particulate matter concentrations, the measured hydrogen chloride concentrations, and the measured mercury concentrations that result from the initial performance test to pounds per million Btu heat input emission rates using F-factors.

**§ 63.7521 What fuel analyses, fuel specification, and procedures must I use?**

(a) For solid, liquid, and gas 2 (other) fuels, you must conduct fuel analyses for chloride and mercury according to the procedures in paragraphs (b) through (e) of this section and Table 6 to this subpart, as applicable. You are not required to conduct fuel analyses for fuels used for only startup, unit shutdown, and transient flame stability purposes. You are required to conduct fuel analyses only for fuels and units that are subject to emission limits for mercury and hydrogen chloride in Tables 1, 2, or 12 to this subpart. Gaseous and liquid fuels are exempt from requirements in paragraphs (c) and (d) of this section and Table 6 of this subpart.

(b) You must develop and submit a site-specific fuel monitoring plan to the EPA Administrator for review and approval according to the following procedures and requirements in paragraphs (b)(1) and (2) of this section.

(1) You must submit the fuel analysis plan no later than 60 days before the date that you intend to conduct an initial compliance demonstration.

(2) You must include the information contained in paragraphs (b)(2)(i) through (vi) of this section in your fuel analysis plan.

(i) The identification of all fuel types anticipated to be burned in each boiler or process heater.

(ii) For each fuel type, the notification of whether you or a fuel supplier will be conducting the fuel analysis.

(iii) For each fuel type, a detailed description of the sample location and specific procedures to be used for collecting and preparing the composite samples if your procedures are different from paragraph (c) or (d) of this section. Samples should be collected at a location that most accurately represents the fuel type, where possible, at a point prior to mixing with other dissimilar fuel types.

(iv) For each fuel type, the analytical methods from Table 6, with the expected minimum detection levels, to be used for the measurement of chlorine or mercury.

(v) If you request to use an alternative analytical method other than those required by Table 6 to this subpart, you must also include a detailed description of the methods and procedures that you are proposing to use. Methods in Table 6 shall be used until the requested alternative is approved.

(vi) If you will be using fuel analysis from a fuel supplier in lieu of site-specific sampling and analysis, the fuel supplier must use the analytical methods required by Table 6 to this subpart.

(c) At a minimum, you must obtain three composite fuel samples for each fuel type according to the procedures in paragraph (c)(1) or (2) of this section.

(1) If sampling from a belt (or screw) feeder, collect fuel samples according to paragraphs (c)(1)(i) and (ii) of this section.

(i) Stop the belt and withdraw a 6-inch wide sample from the full cross-section of the stopped belt to obtain a minimum two pounds of sample. You must collect all the material (fines and coarse) in the full cross-section. You must transfer the sample to a clean plastic bag.

(ii) Each composite sample will consist of a minimum of three samples collected at approximately equal 1-hour intervals during the testing period.

(2) If sampling from a fuel pile or truck, you must collect fuel samples according to paragraphs (c)(2)(i) through (iii) of this section.

(i) For each composite sample, you must select a minimum of five sampling locations uniformly spaced over the surface of the pile.

(ii) At each sampling site, you must dig into the pile to a depth of 18 inches. You must insert a clean flat square shovel into the hole and withdraw a sample, making sure that large pieces do not fall off during sampling.

(iii) You must transfer all samples to a clean plastic bag for further processing.

(d) You must prepare each composite sample according to the procedures in paragraphs (d)(1) through (7) of this section.

(1) You must thoroughly mix and pour the entire composite sample over a clean plastic sheet.

(2) You must break sample pieces larger than 3 inches into smaller sizes.

(3) You must make a pie shape with the entire composite sample and subdivide it into four equal parts.

(4) You must separate one of the quarter samples as the first subset.

(5) If this subset is too large for grinding, you must repeat the procedure in paragraph (d)(3) of this section with the quarter sample and obtain a one-quarter subset from this sample.

(6) You must grind the sample in a mill.

(7) You must use the procedure in paragraph (d)(3) of this section to obtain a one-quarter subsample for analysis. If the quarter sample is too large, subdivide it further using the same procedure.

(e) You must determine the concentration of pollutants in the fuel (mercury and/or chlorine) in units of pounds per million Btu of each composite sample for each fuel type according to the procedures in Table 6 to this subpart.

(f) To demonstrate that a gaseous fuel other than natural gas or refinery gas qualifies as an other gas 1 fuel, as defined in § 63.7575, you must conduct a fuel specification analyses for hydrogen sulfide and mercury according to the procedures in paragraphs (g) through (i) of this section and Table 6 to this subpart, as applicable. You are not required to conduct the fuel specification analyses in paragraphs (g) through (i) of this section for gaseous fuels other than natural gas or refinery gas that are complying with the limits for units designed to burn gas 2 (other) fuels.

(g) You must develop and submit a site-specific fuel analysis plan for other gas 1 fuels to the EPA Administrator for review and approval according to the following procedures and requirements in paragraphs (g)(1) and (2) of this section.

(1) You must submit the fuel analysis plan no later than 60 days before the date that you intend to conduct an initial compliance demonstration.

(2) You must include the information contained in paragraphs (g)(2)(i) through (vi) of this section in your fuel analysis plan.

(i) The identification of all gaseous fuel types other than natural gas or refinery gas anticipated to be burned in each boiler or process heater.

(ii) For each fuel type, the notification of whether you or a fuel supplier will be conducting the fuel specification analysis.

(iii) For each fuel type, a detailed description of the sample location and specific procedures to be used for collecting and preparing the samples if your procedures are different from the sampling methods contained in Table 6. Samples should be collected at a location that most accurately represents the fuel type, where possible, at a point prior to mixing with other dissimilar fuel types. If multiple boilers or process heaters are fueled by a common fuel stream it is permissible to conduct a single gas specification at the common point of gas distribution.

(iv) For each fuel type, the analytical methods from Table 6, with the expected minimum detection levels, to be used for the measurement of hydrogen sulfide and mercury.

(v) If you request to use an alternative analytical method other than those required by Table 6 to this subpart, you must also include a detailed description of the methods and procedures that you are proposing to use. Methods in Table 6 shall be used until the requested alternative is approved.

(vi) If you will be using fuel analysis from a fuel supplier in lieu of site-specific sampling and analysis, the fuel supplier must use the analytical methods required by Table 6 to this subpart.

(h) You must obtain a single fuel sample for each other gas 1 fuel type according to the sampling procedures listed in Table 6 for fuel specification of gaseous fuels.

(i) You must determine the concentration in the fuel of mercury, in units of microgram per cubic meter, and of hydrogen sulfide, in units of parts per million, by volume, dry basis, of each sample for each gas 1 fuel type according to the procedures in Table 6 to this subpart.

### § 63.7522 Can I use emissions averaging to comply with this subpart?

(a) As an alternative to meeting the requirements of § 63.7500 for particulate matter, hydrogen chloride, or mercury on a boiler or process heater-specific basis, if you have more than one existing boiler or process heater in any subcategory located at your facility, you may demonstrate compliance by emissions averaging, if your averaged emissions are not more than 90 percent of the applicable emission limit, according to the procedures in this section. You may not include new boilers or process heaters in an emissions average.

(b) For a group of two or more existing boilers or process heaters in the same subcategory that each vent to a separate stack, you may average particulate matter, hydrogen chloride, or mercury emissions among existing units to demonstrate compliance with the limits in Table 2 to this subpart if you satisfy the requirements in paragraphs (c), (d), (e), (f), and (g) of this section.

(c) For each existing boiler or process heater in the averaging group, the emission rate achieved during the initial compliance test for the HAP being averaged must not exceed the emission level that was being achieved on May 20, 2011 or the control technology employed during the initial compliance test must not be less effective for the HAP being averaged than the control technology employed on May 20, 2011.

(d) The averaged emissions rate from the existing boilers and process heaters participating in the emissions averaging option must be in compliance with the limits in Table 2 to this subpart at all times following the compliance date specified in § 63.7495.

(e) You must demonstrate initial compliance according to paragraph (e)(1) or (2) of this section using the maximum rated heat input capacity or maximum steam generation capacity of each unit and the results of the initial performance tests or fuel analysis.

(1) You must use Equation 1 of this section to demonstrate that the particulate matter, hydrogen chloride, or mercury emissions from all existing units participating in the emissions averaging option for that pollutant do not exceed the emission limits in Table 2 to this subpart.

$$AveWeightedEmissions = 1.1 \times \sum_{i=1}^{n} (Er \times Hm) \div \sum_{i=1}^{n} Hm \qquad \text{(Eq. 1)}$$

Where:

AveWeightedEmissions = Average weighted emissions for particulate matter, hydrogen chloride, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate (as determined during the initial compliance demonstration) of particulate matter, hydrogen chloride, or mercury from unit, i, in units of pounds per million Btu of heat input. Determine the emission rate for particulate matter, hydrogen chloride, or mercury by performance testing according to Table 5 to this subpart, or by fuel analysis for hydrogen chloride or mercury using the applicable equation in § 63.7530(c).

Hm = Maximum rated heat input capacity of unit, i, in units of million Btu per hour.

n = Number of units participating in the emissions averaging option.

1.1 = Required discount factor.

(2) If you are not capable of determining the maximum rated heat input capacity of one or more boilers that generate steam, you may use Equation 2 of this section as an alternative to using Equation 1 of this section to demonstrate that the particulate matter, hydrogen chloride, or mercury emissions from all existing units participating in the emissions averaging option do not exceed the emission limits for that pollutant in Table 2 to this subpart.

$$AveWeightedEmissions = 1.1 \times \sum_{i=1}^{n} (Er \times Sm \times Cfi) \div \sum_{i=1}^{n} (Sm \times Cfi) \qquad \text{(Eq. 2)}$$

Where:

AveWeightedEmissions = Average weighted emission level for PM, hydrogen chloride, or mercury, in units of pounds per million Btu of heat input.

Er = Emission rate (as determined during the most recent compliance demonstration) of particulate matter, hydrogen chloride, or mercury from unit, i, in units of pounds per million Btu of heat input. Determine the emission rate for particulate matter, hydrogen chloride, or mercury by performance testing according to Table 5 to this subpart, or by fuel analysis for hydrogen chloride or mercury using the applicable equation in § 63.7530(c).

Sm = Maximum steam generation capacity by unit, i, in units of pounds.

Cfi = Conversion factor, calculated from the most recent compliance test, in units of million Btu of heat input per pounds of steam generated for unit, i.

1.1 = Required discount factor.

(f) After the initial compliance demonstration described in paragraph (e) of this section, you must demonstrate compliance on a monthly basis determined at the end of every month (12 times per year) according to paragraphs (f)(1) through (3) of this section. The first monthly period begins on the compliance date specified in § 63.7495.

(1) For each calendar month, you must use Equation 3 of this section to calculate the average weighted emission rate for that month using the actual heat input for each existing unit participating in the emissions averaging option.

$$AveWeightedEmissions = 1.1 \times \sum_{i=1}^{n} (Er \times Hb) \div \sum_{i=1}^{n} Hb \qquad \text{(Eq. 3)}$$

Where:

AveWeightedEmissions = Average weighted emission level for particulate matter, hydrogen chloride, or mercury, in units of pounds per million Btu of heat input, for that calendar month.

Er = Emission rate (as determined during the most recent compliance demonstration) of particulate matter, hydrogen chloride, or mercury from unit, i, in units of pounds per million Btu of heat input. Determine the emission rate for particulate matter, hydrogen chloride, or mercury by performance testing according to Table 5 to this subpart, or by fuel analysis for hydrogen chloride or mercury using the applicable equation in § 63.7530(c).

Hb = The heat input for that calendar month to unit, i, in units of million Btu.

n = Number of units participating in the emissions averaging option.

1.1 = Required discount factor.

(2) If you are not capable of monitoring heat input, you may use Equation 4 of this section as an alternative to using Equation 3 of this section to calculate the average weighted emission rate using the actual steam generation from the boilers participating in the emissions averaging option.

$$AveWeightedEmissions = 1.1 \times \sum_{i=1}^{n} (Er \times Sa \times Cfi) \div \sum_{i=1}^{n} (Sa \times Cfi) \qquad \text{(Eq. 4)}$$

Where:

AveWeightedEmissions = average weighted emission level for PM, hydrogen chloride, or mercury, in units of pounds per million Btu of heat input for that calendar month.

Er = Emission rate (as determined during the most recent compliance demonstration of particulate matter, hydrogen chloride, or mercury from unit, i, in units of pounds per million Btu of heat input. Determine the emission rate for particulate matter, hydrogen chloride, or mercury by performance testing according to Table 5 to this subpart, or by fuel analysis for hydrogen chloride or mercury using the applicable equation in § 63.7530(c).

Sa = Actual steam generation for that calendar month by boiler, i, in units of pounds.

Cfi = Conversion factor, as calculated during the most recent compliance test, in units of million Btu of heat input per pounds of steam generated for boiler, i.

1.1 = Required discount factor.

(3) Until 12 monthly weighted average emission rates have been accumulated, calculate and report only the average weighted emission rate determined under paragraph (f)(1) or (2) of this section for each calendar month. After 12 monthly weighted average emission rates have been accumulated, for each subsequent calendar month, use Equation 5 of this section to calculate the 12-month rolling average of the monthly weighted average emission rates for the current calendar month and the previous 11 calendar months.

$$Eavg = \sum_{i=1}^{n} ERi \div 12 \qquad \text{(Eq. 5)}$$

Where:

Eavg = 12-month rolling average emission rate, (pounds per million Btu heat input)
ERi = Monthly weighted average, for calendar month "i" (pounds per million Btu heat input), as calculated by paragraph (f)(1) or (2) of this section.

(g) You must develop, and submit to the applicable delegated authority for review and approval, an implementation plan for emission averaging according to the following procedures and requirements in paragraphs (g)(1) through (4) of this section.

(1) You must submit the implementation plan no later than 180 days before the date that the facility intends to demonstrate compliance using the emission averaging option.

(2) You must include the information contained in paragraphs (g)(2)(i) through (vii) of this section in your implementation plan for all emission sources included in an emissions average:

(i) The identification of all existing boilers and process heaters in the averaging group, including for each either the applicable HAP emission level or the control technology installed as of May 20, 2011 and the date on which you are requesting emission averaging to commence;

(ii) The process parameter (heat input or steam generated) that will be monitored for each averaging group;

(iii) The specific control technology or pollution prevention measure to be used for each emission boiler or process heater in the averaging group and the date of its installation or application. If the pollution prevention measure reduces or eliminates emissions from multiple boilers or process heaters, the owner or operator must identify each boiler or process heater;

(iv) The test plan for the measurement of particulate matter, hydrogen chloride, or mercury emissions in accordance with the requirements in § 63.7520;

(v) The operating parameters to be monitored for each control system or device consistent with § 63.7500 and Table 4, and a description of how the operating limits will be determined;

(vi) If you request to monitor an alternative operating parameter pursuant to § 63.7525, you must also include:

(A) A description of the parameter(s) to be monitored and an explanation of the criteria used to select the parameter(s); and

(B) A description of the methods and procedures that will be used to demonstrate that the parameter indicates proper operation of the control device; the frequency and content of monitoring, reporting, and recordkeeping requirements; and a demonstration, to the satisfaction of the applicable delegated authority, that the proposed monitoring frequency is sufficient to represent control device operating conditions; and

(vii) A demonstration that compliance with each of the applicable emission limit(s) will be achieved under representative operating load conditions. Following each compliance demonstration and until the next compliance demonstration, you must comply with the operating limit for operating load conditions specified in Table 4 to this subpart.

(3) The delegated authority shall review and approve or disapprove the plan according to the following criteria:

(i) Whether the content of the plan includes all of the information specified in paragraph (g)(2) of this section; and

(ii) Whether the plan presents sufficient information to determine that compliance will be achieved and maintained.

(4) The applicable delegated authority shall not approve an emission averaging implementation plan containing any of the following provisions:

(i) Any averaging between emissions of differing pollutants or between differing sources; or

(ii) The inclusion of any emission source other than an existing unit in the same subcategory.

(h) For a group of two or more existing affected units, each of which vents through a single common stack, you may average particulate matter, hydrogen chloride, or mercury emissions to demonstrate compliance with the limits for that pollutant in Table 2 to this subpart if you satisfy the requirements in paragraph (i) or (j) of this section.

(i) For a group of two or more existing units in the same subcategory, each of which vents through a common emissions control system to a common stack, that does not receive emissions from units in other subcategories or categories, you may treat such averaging group as a single existing unit for purposes of this subpart and comply with the requirements of this subpart as if the group were a single unit.

(j) For all other groups of units subject to the common stack requirements of paragraph (h) of this section, including situations where the exhaust of affected units are each individually controlled and then sent to a common stack, the owner or operator may elect to:

(1) Conduct performance tests according to procedures specified in § 63.7520 in the common stack if affected units from other subcategories vent to the common stack. The emission limits that the group must comply with are determined by the use of Equation 6 of this section.

$$En = \sum_{i=1}^{n} (ELi \times Hi) \div \sum_{i=1}^{n} Hi \quad \text{(Eq. 6)}$$

Where:

En = HAP emission limit, pounds per million British thermal units (lb/MMBtu), parts per million (ppm), or nanograms per dry standard cubic meter (ng/dscm).
ELi = Appropriate emission limit from Table 2 to this subpart for unit i, in units of lb/MMBtu, ppm or ng/dscm.
Hi = Heat input from unit i, MMBtu.

(2) Conduct performance tests according to procedures specified in § 63.7520 in the common stack. If affected units and non-affected units vent to the common stack, the non-affected units must be shut down or vented to a different stack during the performance test unless the facility determines to demonstrate compliance with the non-affected units venting to the stack; and

(3) Meet the applicable operating limit specified in § 63.7540 and Table 8 to this subpart for each emissions control system (except that, if each unit venting to the common stack has an applicable opacity operating limit, then a single continuous opacity monitoring system may be located in the common stack instead of in each duct to the common stack).

(k) The common stack of a group of two or more existing boilers or process heaters in the same subcategory subject to paragraph (h) of this section may be treated as a separate stack for purposes of paragraph (b) of this section and included in an emissions averaging group subject to paragraph (b) of this section.

**§ 63.7525 What are my monitoring, installation, operation, and maintenance requirements?**

(a) If your boiler or process heater is subject to a carbon monoxide emission limit in Table 1, 2, or 12 to this subpart, you must install, operate, and maintain a continuous oxygen monitor according to the procedures in paragraphs (a)(1) through (6) of this section by the compliance date specified in § 63.7495. The oxygen level shall be monitored at the outlet of the boiler or process heater.

(1) Each CEMS for oxygen ($O_2$ CEMS) must be installed, operated, and maintained according to the applicable procedures under Performance Specification 3 at 40 CFR part 60, appendix B, and according to the site-specific monitoring plan developed according to § 63.7505(d).

(2) You must conduct a performance evaluation of each $O_2$ CEMS according

to the requirements in § 63.8(e) and according to Performance Specification 3 at 40 CFR part 60, appendix B.

(3) Each $O_2$ CEMS must complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(4) The $O_2$ CEMS data must be reduced as specified in § 63.8(g)(2).

(5) You must calculate and record 12-hour block average concentrations for each operating day.

(6) For purposes of calculating data averages, you must use all the data collected during all periods in assessing compliance, excluding data collected during periods when the monitoring system malfunctions or is out of control, during associated repairs, and during required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments). Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions. Any period for which the monitoring system malfunctions or is out of control and data are not available for a required calculation constitutes a deviation from the monitoring requirements. Periods when data are unavailable because of required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments) do not constitute monitoring deviations.

(b) If your boiler or process heater has a heat input capacity of greater than 250 MMBtu per hour and combusts coal, biomass, or residual oil, you must install, certify, maintain, and operate a CEMS measuring PM emissions discharged to the atmosphere and record the output of the system as specified in paragraphs (b)(1) through (5) of this section.

(1) Each CEMS shall be installed, certified, operated, and maintained according to the requirements in § 63.7540(a)(9).

(2) For a new unit, the initial performance evaluation shall be completed no later than November 16, 2011 or 180 days after the date of initial startup, whichever is later. For an existing unit, the initial performance evaluation shall be completed no later than September 17, 2014.

(3) Compliance with the applicable emissions limit shall be determined based on the 30-day rolling average of the hourly arithmetic average emissions concentrations using the continuous monitoring system outlet data. The 30-day rolling arithmetic average emission concentration shall be calculated using EPA Reference Method 19 at 40 CFR part 60, appendixA–7.

(4) Collect CEMS hourly averages for all operating hours on a 30-day rolling average basis. Collect at least four CMS data values representing the four 15-minute periods in an hour, or at least two 15-minute data values during an hour when CMS calibration, quality assurance, or maintenance activities are being performed.

(5) The 1-hour arithmetic averages required shall be expressed in lb/MMBtu and shall be used to calculate the boiler operating day daily arithmetic average emissions.

(c) If you have an applicable opacity operating limit in this rule, and are not otherwise required to install and operate a PM CEMS or a bag leak detection system, you must install, operate, certify and maintain each COMS according to the procedures in paragraphs (c)(1) through (7) of this section by the compliance date specified in § 63.7495.

(1) Each COMS must be installed, operated, and maintained according to Performance Specification 1 at appendix B to part 60 of this chapter.

(2) You must conduct a performance evaluation of each COMS according to the requirements in § 63.8(e) and according to Performance Specification 1 at appendix B to part 60 of this chapter.

(3) As specified in § 63.8(c)(4)(i), each COMS must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) The COMS data must be reduced as specified in § 63.8(g)(2).

(5) You must include in your site-specific monitoring plan procedures and acceptance criteria for operating and maintaining each COMS according to the requirements in § 63.8(d). At a minimum, the monitoring plan must include a daily calibration drift assessment, a quarterly performance audit, and an annual zero alignment audit of each COMS.

(6) You must operate and maintain each COMS according to the requirements in the monitoring plan and the requirements of § 63.8(e). You must identify periods the COMS is out of control including any periods that the COMS fails to pass a daily calibration drift assessment, a quarterly performance audit, or an annual zero alignment audit. Any 6-minute period for which the monitoring system is out of control and data are not available for a required calculation constitutes a deviation from the monitoring requirements.

(7) You must determine and record all the 6-minute averages (and daily block averages as applicable) collected for periods during which the COMS is not out of control.

(d) If you have an operating limit that requires the use of a CMS, you must install, operate, and maintain each continuous parameter monitoring system according to the procedures in paragraphs (d)(1) through (5) of this section by the compliance date specified in § 63.7495.

(1) The continuous parameter monitoring system must complete a minimum of one cycle of operation for each successive 15-minute period. You must have a minimum of four successive cycles of operation to have a valid hour of data.

(2) Except for monitoring malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), you must conduct all monitoring in continuous operation at all times that the unit is operating. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(3) For purposes of calculating data averages, you must not use data recorded during monitoring malfunctions, associated repairs, out of control periods, or required quality assurance or control activities. You must use all the data collected during all other periods in assessing compliance. Any 15-minute period for which the monitoring system is out-of-control and data are not available for a required calculation constitutes a deviation from the monitoring requirements.

(4) You must determine the 4-hour block average of all recorded readings, except as provided in paragraph (d)(3) of this section.

(5) You must record the results of each inspection, calibration, and validation check.

(e) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (d) and (e)(1) through (4) of this section.

(1) You must install the flow sensor and other necessary equipment in a position that provides a representative flow.

(2) You must use a flow sensor with a measurement sensitivity of no greater than 2 percent of the expected flow rate.

(3) You must minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(4) You must conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually. (f) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (d) and (f)(1) through (6) of this section.

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.*, PM scrubber pressure drop).

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(4) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.*, check for pressure tap pluggage daily).

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in you monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(g) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (d) and (g)(1) through (4) of this section.

(1) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day.

(4) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(h) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator (ESP) operated with a wet scrubber, you must meet the requirements in paragraphs (h)(1) and (2) of this section.

(1) Install sensors to measure (secondary) voltage and current to the precipitator collection plates.

(2) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(i) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (e.g., weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (d) and (i)(1) through (2) of this section.

(1) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate.

(2) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(j) If you are not required to use a PM CEMS and elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate the bag leak detection system as specified in paragraphs (j)(1) through (7) of this section.

(1) You must install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (*e.g.,* for a positive pressure fabric filter) of the fabric filter.

(2) Conduct a performance evaluation of the bag leak detection system in accordance with your monitoring plan and consistent with the guidance provided in EPA–454/R–98–015 (incorporated by reference, *see* § 63.14).

(3) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(4) Use a bag leak detection system equipped with a device to record continuously the output signal from the sensor.

(5) Use a bag leak detection system equipped with a system that will alert when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it can be easily heard or seen by plant operating personnel.

(7) Where multiple bag leak detectors are required, the system's instrumentation and alarm may be shared among detectors.

(k) For each unit that meets the definition of limited-use boiler or process heater, you must monitor and record the operating hours per year for that unit.

### § 63.7530 How do I demonstrate initial compliance with the emission limitations, fuel specifications and work practice standards?

(a) You must demonstrate initial compliance with each emission limit that applies to you by conducting initial performance tests and fuel analyses and establishing operating limits, as applicable, according to § 63.7520, paragraphs (b) and (c) of this section, and Tables 5 and 7 to this subpart. If applicable, you must also install, and operate, maintain all applicable CMS (including CEMS, COMS, and continuous parameter monitoring systems) according to § 63.7525.

(b) If you demonstrate compliance through performance testing, you must establish each site-specific operating limit in Table 4 to this subpart that applies to you according to the requirements in § 63.7520, Table 7 to this subpart, and paragraph (b)(3) of this section, as applicable. You must also conduct fuel analyses according to § 63.7521 and establish maximum fuel pollutant input levels according to paragraphs (b)(1) and (2) of this section, as applicable. As specified in § 63.7510(a), if your affected source burns a single type of fuel (excluding supplemental fuels used for unit startup, shutdown, or transient flame stabilization), you are not required to perform the initial fuel analysis for each type of fuel burned in your boiler or process heater. However, if you switch fuel(s) and cannot show that the new fuel(s) do (does) not increase the chlorine or mercury input into the unit through the results of fuel analysis, then you must repeat the performance test to demonstrate compliance while burning the new fuel(s).

(1) You must establish the maximum chlorine fuel input (Clinput) during the initial fuel analysis according to the procedures in paragraphs (b)(1)(i) through (iii) of this section.

(i) You must determine the fuel type or fuel mixture that you could burn in your boiler or process heater that has the highest content of chlorine.

(ii) During the fuel analysis for hydrogen chloride, you must determine the fraction of the total heat input for each fuel type burned (Qi) based on the fuel mixture that has the highest content of chlorine, and the average chlorine concentration of each fuel type burned (Ci).

(iii) You must establish a maximum chlorine input level using Equation 7 of this section.

$$Clinput = \sum_{i=1}^{n} (Ci \times Qi) \quad \text{(Eq. 7)}$$

Where:

Clinput = Maximum amount of chlorine entering the boiler or process heater through fuels burned in units of pounds per million Btu.

Ci = Arithmetic average concentration of chlorine in fuel type, i, analyzed according to § 63.7521, in units of pounds per million Btu.

Qi = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest content of chlorine. If you do not burn multiple fuel types during the performance testing, it is not necessary to determine the value of this term. Insert a value of "1" for Qi.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of chlorine.

(2) You must establish the maximum mercury fuel input level (Mercuryinput) during the initial fuel analysis using the procedures in paragraphs (b)(2)(i) through (iii) of this section.

(i) You must determine the fuel type or fuel mixture that you could burn in your boiler or process heater that has the highest content of mercury.

(ii) During the compliance demonstration for mercury, you must determine the fraction of total heat input for each fuel burned (Qi) based on the fuel mixture that has the highest content of mercury, and the average mercury concentration of each fuel type burned (HGi).

(iii) You must establish a maximum mercury input level using Equation 8 of this section.

$$Mercuryinput = \sum_{i=1}^{n} (HGi \times Qi) \quad \text{(Eq. 8)}$$

Where:

Mercuryinput = Maximum amount of mercury entering the boiler or process heater through fuels burned in units of pounds per million Btu.

HGi = Arithmetic average concentration of mercury in fuel type, i, analyzed according to § 63.7521, in units of pounds per million Btu.

Qi = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest mercury content. If you do not burn multiple fuel types during the performance test, it is not necessary to determine the value of this term. Insert a value of "1" for Qi.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of mercury.

(3) You must establish parameter operating limits according to paragraphs (b)(3)(i) through (iv) of this section.

(i) For a wet scrubber, you must establish the minimum scrubber effluent pH, liquid flowrate, and pressure drop as defined in § 63.7575, as your operating limits during the three-run performance test. If you use a wet scrubber and you conduct separate performance tests for particulate matter, hydrogen chloride, and mercury emissions, you must establish one set of minimum scrubber effluent pH, liquid flowrate, and pressure drop operating limits. The minimum scrubber effluent pH operating limit must be established during the hydrogen chloride performance test. If you conduct multiple performance tests, you must set the minimum liquid flowrate and pressure drop operating limits at the highest minimum values established during the performance tests.

(ii) For an electrostatic precipitator operated with a wet scrubber, you must establish the minimum voltage and secondary amperage (or total power input), as defined in § 63.7575, as your operating limits during the three-run performance test. (These operating limits do not apply to electrostatic precipitators that are operated as dry controls without a wet scrubber.)

(iii) For a dry scrubber, you must establish the minimum sorbent injection rate for each sorbent, as defined in § 63.7575, as your operating limit during the three-run performance test.

(iv) For activated carbon injection, you must establish the minimum activated carbon injection rate, as defined in § 63.7575, as your operating limit during the three-run performance test.

(v) The operating limit for boilers or process heaters with fabric filters that demonstrate continuous compliance through bag leak detection systems is that a bag leak detection system be installed according to the requirements in § 63.7525, and that each fabric filter must be operated such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period.

(c) If you elect to demonstrate compliance with an applicable emission limit through fuel analysis, you must conduct fuel analyses according to § 63.7521 and follow the procedures in paragraphs (c)(1) through (4) of this section.

(1) If you burn more than one fuel type, you must determine the fuel mixture you could burn in your boiler or process heater that would result in the maximum emission rates of the pollutants that you elect to demonstrate compliance through fuel analysis.

(2) You must determine the 90th percentile confidence level fuel pollutant concentration of the composite samples analyzed for each fuel type using the one-sided z-statistic test described in Equation 9 of this section.

$$P90 = mean + (SD \times t) \quad \text{(Eq. 9)}$$

Where:

P90 = 90th percentile confidence level pollutant concentration, in pounds per million Btu.

Mean = Arithmetic average of the fuel pollutant concentration in the fuel samples analyzed according to § 63.7521, in units of pounds per million Btu.

SD = Standard deviation of the pollutant concentration in the fuel samples analyzed according to § 63.7521, in units of pounds per million Btu.

T = t distribution critical value for 90th percentile (0.1) probability for the appropriate degrees of freedom (number of samples minus one) as obtained from a Distribution Critical Value Table.

(3) To demonstrate compliance with the applicable emission limit for hydrogen chloride, the hydrogen chloride emission rate that you calculate for your boiler or process heater using Equation 10 of this section must not exceed the applicable emission limit for hydrogen chloride.

$$HCl = \sum_{i=1}^{n} \left( Ci90 \times Qi \times 1.028 \right) \qquad \text{(Eq. 10)}$$

Where:

HCl = Hydrogen chloride emission rate from the boiler or process heater in units of pounds per million Btu.

Ci90 = 90th percentile confidence level concentration of chlorine in fuel type, i, in units of pounds per million Btu as calculated according to Equation 9 of this section.

Qi = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest content of chlorine. If you do not burn multiple fuel types, it is not necessary to determine the value of this term. Insert a value of "1" for Qi.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest content of chlorine.

1.028 = Molecular weight ratio of hydrogen chloride to chlorine.

(4) To demonstrate compliance with the applicable emission limit for mercury, the mercury emission rate that you calculate for your boiler or process heater using Equation 11 of this section must not exceed the applicable emission limit for mercury.

$$Mercury = \sum_{i=1}^{n} \left( Hgi90 \times Qi \right) \qquad \text{(Eq. 11)}$$

Where:

Mercury = Mercury emission rate from the boiler or process heater in units of pounds per million Btu.

Hgi90 = 90th percentile confidence level concentration of mercury in fuel, i, in units of pounds per million Btu as calculated according to Equation 9 of this section.

Qi = Fraction of total heat input from fuel type, i, based on the fuel mixture that has the highest mercury content. If you do not burn multiple fuel types, it is not necessary to determine the value of this term. Insert a value of "1" for Qi.

n = Number of different fuel types burned in your boiler or process heater for the mixture that has the highest mercury content.

(d) If you own or operate an existing unit with a heat input capacity of less than 10 million Btu per hour, you must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted a tune-up of the unit.

(e) You must include with the Notification of Compliance Status a signed certification that the energy assessment was completed according to Table 3 to this subpart and is an accurate depiction of your facility.

(f) You must submit the Notification of Compliance Status containing the results of the initial compliance demonstration according to the requirements in § 63.7545(e).

(g) If you elect to demonstrate that a gaseous fuel meets the specifications of an other gas 1 fuel as defined in § 63.7575, you must conduct an initial fuel specification analyses according to § 63.7521(f) through (i). If the mercury and hydrogen sulfide constituents in the gaseous fuels will never exceed the specifications included in the definition, you will include a signed certification with the Notification of Compliance Status that the initial fuel specification test meets the gas specifications outlined in the definition of other gas 1 fuels. If your gas constituents could vary above the specifications, you will conduct monthly testing according to the procedures in § 63.7521(f) through (i) and § 63.7540(c) and maintain records of the results of the testing as outlined in § 63.7555(g).

(h) If you own or operate a unit subject emission limits in Tables 1, 2, or 12 of this subpart, you must minimize the unit's startup and shutdown periods following the manufacturer's recommended procedures, if available. If manufacturer's recommended procedures are not available, you must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available. You must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted startups and shutdowns according to the manufacturer's recommended procedures or procedures specified for a unit of similar design if manufacturer's recommended procedures are not available.

**§ 63.7533 Can I use emission credits earned from implementation of energy conservation measures to comply with this subpart?**

(a) If you elect to comply with the alternative equivalent steam output-based emission limits, instead of the heat input-based limits, listed in Tables 1 and 2 of this subpart and you want to take credit for implementing energy conservation measures identified in an energy assessment, you may demonstrate compliance using emission reduction credits according to the procedures in this section. Owners or operators using this compliance approach must establish an emissions benchmark, calculate and document the emission credits, develop an Implementation Plan, comply with the general reporting requirements, and apply the emission credit according to the procedures in paragraphs (b) through (f) of this section.

(b) For each existing affected boiler for which you intend to apply emissions credits, establish a benchmark from which emission reduction credits may be generated by determining the actual annual fuel heat input to the affected boiler before initiation of an energy conservation activity to reduce energy demand (*i.e.,* fuel usage) according to paragraphs (b)(1) through (4) of this section. The benchmark shall be expressed in trillion Btu per year heat input.

(1) The benchmark from which emission credits may be generated shall be determined by using the most representative, accurate, and reliable process available for the source. The benchmark shall be established for a one-year period before the date that an energy demand reduction occurs, unless it can be demonstrated that a different time period is more representative of historical operations.

(2) Determine the starting point from which to measure progress. Inventory all fuel purchased and generated on-site (off-gases, residues) in physical units (MMBtu, million cubic feet, etc.).

(3) Document all uses of energy from the affected boiler. Use the most recent data available.

(4) Collect non-energy related facility and operational data to normalize, if necessary, the benchmark to current operations, such as building size, operating hours, etc. Use actual, not estimated, use data, if possible and data that are current and timely.

(c) Emissions credits can be generated if the energy conservation measures were implemented after January 14, 2011 and if sufficient information is

available to determine the appropriate value of credits.

(1) The following emission points cannot be used to generate emissions averaging credits:

(i) Energy conservation measures implemented on or before January 14, 2011, unless the level of energy demand reduction is increased after January 14, 2011, in which case credit will be allowed only for change in demand reduction achieved after January 14, 2011.

(ii) Emission credits on shut-down boilers. Boilers that are shut down cannot be used to generate credits.

(2) For all points included in calculating emissions credits, the owner or operator shall:

(i) Calculate annual credits for all energy demand points. Use Equation 12 to calculate credits. Energy conservation measures that meet the criteria of paragraph (c)(1) of this section shall not be included, except as specified in paragraph (c)(1)(i) of this section.

(3) Credits are generated by the difference between the benchmark that is established for each affected boiler, and the actual energy demand reductions from energy conservation measures implemented after January 14, 2011. Credits shall be calculated using Equation 12 of this section as follows:

(i) The overall equation for calculating credits is:

$$Credits = \sum_{i=1}^{n} EIS_{iactual} \div EI_{baseline} \qquad \text{(Eq. 12)}$$

Where:

Credits = Energy Input Savings for all energy conservation measures implemented for an affected boiler, million Btu per year.

$EIS_{iactual}$ = Energy Input Savings for each energy conservation measure implemented for an affected boiler, million Btu per year.

$EI_{baseline}$ = Energy Input for the affected boiler, million Btu.

n = Number of energy conservation measures included in the emissions credit for the affected boiler.

(d) The owner or operator shall develop and submit for approval an Implementation Plan containing all of the information required in this paragraph for all boilers to be included in an emissions credit approach. The Implementation Plan shall identify all existing affected boilers to be included in applying the emissions credits. The Implementation Plan shall include a description of the energy conservation measures implemented and the energy savings generated from each measure and an explanation of the criteria used for determining that savings. You must submit the implementation plan for emission credits to the applicable delegated authority for review and approval no later than 180 days before the date on which the facility intends to demonstrate compliance using the emission credit approach.

(e) The emissions rate from each existing boiler participating in the emissions credit option must be in compliance with the limits in Table 2 to this subpart at all times following the compliance date specified in § 63.7495.

(f) You must demonstrate initial compliance according to paragraph (f)(1) or (2) of this section.

(1) You must use Equation 13 of this section to demonstrate that the emissions from the affected boiler participating in the emissions credit compliance approach do not exceed the emission limits in Table 2 to this subpart.

$$E_{adj} = E_m \times (1 - EC) \qquad \text{(Eq. 13)}$$

Where:

$E_{adj}$ = Emission level adjusted applying the emission credits earned, lb per million Btu steam output for the affected boiler.

$E_m$ = Emissions measured during the performance test, lb per million Btu steam output for the affected boiler.

EC = Emission credits from equation 12 for the affected boiler.

## Continuous Compliance Requirements

### § 63.7535 How do I monitor and collect data to demonstrate continuous compliance?

(a) You must monitor and collect data according to this section and the site-specific monitoring plan required by § 63.7505(d).

(b) You must operate the monitoring system and collect data at all required intervals at all times that the affected source is operating, except for periods of monitoring system malfunctions or out of control periods (*see* § 63.8(c)(7) of this part), and required monitoring system quality assurance or control activities, including, as applicable, calibration checks and required zero and span adjustments. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(c) You may not use data recorded during monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in data averages and calculations used to report emissions or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(d) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments, failure to collect required data is a deviation of the monitoring requirements.

### § 63.7540 How do I demonstrate continuous compliance with the emission limitations, fuel specifications and work practice standards?

(a) You must demonstrate continuous compliance with each emission limit, operating limit, and work practice standard in Tables 1 through 3 to this subpart that applies to you according to the methods specified in Table 8 to this subpart and paragraphs (a)(1) through (11) of this section.

(1) Following the date on which the initial compliance demonstration is completed or is required to be completed under §§ 63.7 and 63.7510, whichever date comes first, operation above the established maximum or below the established minimum operating limits shall constitute a deviation of established operating limits listed in Table 4 of this subpart except during performance tests conducted to determine compliance with the emission limits or to establish new operating limits. Operating limits must

be confirmed or reestablished during performance tests.

(2) As specified in § 63.7550(c), you must keep records of the type and amount of all fuels burned in each boiler or process heater during the reporting period to demonstrate that all fuel types and mixtures of fuels burned would either result in lower emissions of hydrogen chloride and mercury than the applicable emission limit for each pollutant (if you demonstrate compliance through fuel analysis), or result in lower fuel input of chlorine and mercury than the maximum values calculated during the last performance test (if you demonstrate compliance through performance testing).

(3) If you demonstrate compliance with an applicable hydrogen chloride emission limit through fuel analysis and you plan to burn a new type of fuel, you must recalculate the hydrogen chloride emission rate using Equation 9 of § 63.7530 according to paragraphs (a)(3)(i) through (iii) of this section.

(i) You must determine the chlorine concentration for any new fuel type in units of pounds per million Btu, based on supplier data or your own fuel analysis, according to the provisions in your site-specific fuel analysis plan developed according to § 63.7521(b).

(ii) You must determine the new mixture of fuels that will have the highest content of chlorine.

(iii) Recalculate the hydrogen chloride emission rate from your boiler or process heater under these new conditions using Equation 10 of § 63.7530. The recalculated hydrogen chloride emission rate must be less than the applicable emission limit.

(4) If you demonstrate compliance with an applicable hydrogen chloride emission limit through performance testing and you plan to burn a new type of fuel or a new mixture of fuels, you must recalculate the maximum chlorine input using Equation 7 of § 63.7530. If the results of recalculating the maximum chlorine input using Equation 7 of § 63.7530 are greater than the maximum chlorine input level established during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.7520 to demonstrate that the hydrogen chloride emissions do not exceed the emission limit. You must also establish new operating limits based on this performance test according to the procedures in § 63.7530(b).

(5) If you demonstrate compliance with an applicable mercury emission limit through fuel analysis, and you plan to burn a new type of fuel, you must recalculate the mercury emission rate using Equation 11 of § 63.7530 according to the procedures specified in paragraphs (a)(5)(i) through (iii) of this section.

(i) You must determine the mercury concentration for any new fuel type in units of pounds per million Btu, based on supplier data or your own fuel analysis, according to the provisions in your site-specific fuel analysis plan developed according to § 63.7521(b).

(ii) You must determine the new mixture of fuels that will have the highest content of mercury.

(iii) Recalculate the mercury emission rate from your boiler or process heater under these new conditions using Equation 11 of § 63.7530. The recalculated mercury emission rate must be less than the applicable emission limit.

(6) If you demonstrate compliance with an applicable mercury emission limit through performance testing, and you plan to burn a new type of fuel or a new mixture of fuels, you must recalculate the maximum mercury input using Equation 8 of § 63.7530. If the results of recalculating the maximum mercury input using Equation 8 of § 63.7530 are higher than the maximum mercury input level established during the previous performance test, then you must conduct a new performance test within 60 days of burning the new fuel type or fuel mixture according to the procedures in § 63.7520 to demonstrate that the mercury emissions do not exceed the emission limit. You must also establish new operating limits based on this performance test according to the procedures in § 63.7530(b).

(7) If your unit is controlled with a fabric filter, and you demonstrate continuous compliance using a bag leak detection system, you must initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions as soon as practical, and operate and maintain the fabric filter system such that the alarm does not sound more than 5 percent of the operating time during a 6-month period. You must also keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of the operating time during each 6-month period that the alarm sounds. In calculating this operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm shall be counted as a minimum of 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time shall be counted as the actual amount of time taken to initiate corrective action.

(8) [Reserved].

(9) The owner or operator of an affected source using a CEMS measuring PM emissions to meet requirements of this subpart shall install, certify, operate, and maintain the PM CEMS as specified in paragraphs (a)(9)(i) through (a)(9)(iv) of this section.

(i) The owner or operator shall conduct a performance evaluation of the PM CEMS according to the applicable requirements of § 60.13, and Performance Specification 11 at 40 CFR part 60, appendix B of this chapter.

(ii) During each PM correlation testing run of the CEMS required by Performance Specification 11 at 40 CFR part 60, appendix B of this chapter, PM and oxygen (or carbon dioxide) data shall be collected concurrently (or within a 30-to 60-minute period) by both the CEMS and conducting performance tests using Method 5 or 5B at 40 CFR part 60, appendix A–3 or Method 17 at 40 CFR part 60, appendix A–6 of this chapter.

(iii) Quarterly accuracy determinations and daily calibration drift tests shall be performed in accordance with Procedure 2 at 40 CFR part 60, appendix F of this chapter. Relative Response Audits must be performed annually and Response Correlation Audits must be performed every 3 years.

(iv) After December 31, 2011, within 60 days after the date of completing each CEMS relative accuracy test audit or performance test conducted to demonstrate compliance with this subpart, you must submit the relative accuracy test audit data and performance test data to EPA by successfully submitting the data electronically into EPA's Central Data Exchange by using the Electronic Reporting Tool (see *http://www.epa.gov/ttn/chief/ert/ert tool.html/*).

(10) If your boiler or process heater is in either the natural gas, refinery gas, other gas 1, or Metal Process Furnace subcategories and has a heat input capacity of 10 million Btu per hour or greater, you must conduct a tune-up of the boiler or process heater annually to demonstrate continuous compliance as specified in paragraphs (a)(10)(i) through (a)(10)(vi) of this section. This requirement does not apply to limited-use boilers and process heaters, as defined in § 63.7575.

(i) As applicable, inspect the burner, and clean or replace any components of the burner as necessary (you may delay the burner inspection until the next scheduled unit shutdown, but you must inspect each burner at least once every 36 months);

(ii) Inspect the flame pattern, as applicable, and adjust the burner as necessary to optimize the flame pattern. The adjustment should be consistent with the manufacturer's specifications, if available;

(iii) Inspect the system controlling the air-to-fuel ratio, as applicable, and ensure that it is correctly calibrated and functioning properly;

(iv) Optimize total emissions of carbon monoxide. This optimization should be consistent with the manufacturer's specifications, if available;

(v) Measure the concentrations in the effluent stream of carbon monoxide in parts per million, by volume, and oxygen in volume percent, before and after the adjustments are made (measurements may be either on a dry or wet basis, as long as it is the same basis before and after the adjustments are made); and

(vi) Maintain on-site and submit, if requested by the Administrator, an annual report containing the information in paragraphs (a)(10)(vi)(A) through (C) of this section,

(A) The concentrations of carbon monoxide in the effluent stream in parts per million by volume, and oxygen in volume percent, measured before and after the adjustments of the boiler;

(B) A description of any corrective actions taken as a part of the combustion adjustment; and

(C) The type and amount of fuel used over the 12 months prior to the annual adjustment, but only if the unit was physically and legally capable of using more than one type of fuel during that period. Units sharing a fuel meter may estimate the fuel use by each unit.

(11) If your boiler or process heater has a heat input capacity of less than 10 million Btu per hour, or meets the definition of limited-use boiler or process heater in § 63.7575, you must conduct a biennial tune-up of the boiler or process heater as specified in paragraphs (a)(10)(i) through (a)(10)(vi) of this section to demonstrate continuous compliance.

(12) If the unit is not operating on the required date for a tune-up, the tune-up must be conducted within one week of startup.

(b) You must report each instance in which you did not meet each emission limit and operating limit in Tables 1 through 4 to this subpart that apply to you. These instances are deviations from the emission limits in this subpart. These deviations must be reported according to the requirements in § 63.7550.

(c) If you elected to demonstrate that the unit meets the specifications for hydrogen sulfide and mercury for the other gas 1 subcategory and you cannot submit a signed certification under § 63.7545(g) because the constituents could exceed the specifications, you must conduct monthly fuel specification testing of the gaseous fuels, according to the procedures in § 63.7521(f) through (i).

### § 63.7541 How do I demonstrate continuous compliance under the emissions averaging provision?

(a) Following the compliance date, the owner or operator must demonstrate compliance with this subpart on a continuous basis by meeting the requirements of paragraphs (a)(1) through (5) of this section.

(1) For each calendar month, demonstrate compliance with the average weighted emissions limit for the existing units participating in the emissions averaging option as determined in § 63.7522(f) and (g).

(2) You must maintain the applicable opacity limit according to paragraphs (a)(2)(i) and (ii) of this section.

(i) For each existing unit participating in the emissions averaging option that is equipped with a dry control system and not vented to a common stack, maintain opacity at or below the applicable limit.

(ii) For each group of units participating in the emissions averaging option where each unit in the group is equipped with a dry control system and vented to a common stack that does not receive emissions from non-affected units, maintain opacity at or below the applicable limit at the common stack.

(3) For each existing unit participating in the emissions averaging option that is equipped with a wet scrubber, maintain the 3-hour average parameter values at or below the operating limits established during the most recent performance test.

(4) For each existing unit participating in the emissions averaging option that has an approved alternative operating plan, maintain the 3-hour average parameter values at or below the operating limits established in the most recent performance test.

(5) For each existing unit participating in the emissions averaging option venting to a common stack configuration containing affected units from other subcategories, maintain the appropriate operating limit for each unit as specified in Table 4 to this subpart that applies.

(b) Any instance where the owner or operator fails to comply with the continuous monitoring requirements in paragraphs (a)(1) through (5) of this section is a deviation.

## Notification, Reports, and Records

### § 63.7545 What notifications must I submit and when?

(a) You must submit to the delegated authority all of the notifications in § 63.7(b) and (c), § 63.8(e), (f)(4) and (6), and § 63.9(b) through (h) that apply to you by the dates specified.

(b) As specified in § 63.9(b)(2), if you startup your affected source before May 20, 2011, you must submit an Initial Notification not later than 120 days after May 20, 2011.

(c) As specified in § 63.9(b)(4) and (b)(5), if you startup your new or reconstructed affected source on or after May 20, 2011, you must submit an Initial Notification not later than 15 days after the actual date of startup of the affected source.

(d) If you are required to conduct a performance test you must submit a Notification of Intent to conduct a performance test at least 60 days before the performance test is scheduled to begin.

(e) If you are required to conduct an initial compliance demonstration as specified in § 63.7530(a), you must submit a Notification of Compliance Status according to § 63.9(h)(2)(ii). For the initial compliance demonstration for each affected source, you must submit the Notification of Compliance Status, including all performance test results and fuel analyses, before the close of business on the 60th day following the completion of all performance test and/or other initial compliance demonstrations for the affected source according to § 63.10(d)(2). The Notification of Compliance Status report must contain all the information specified in paragraphs (e)(1) through (8), as applicable.

(1) A description of the affected unit(s) including identification of which subcategory the unit is in, the design heat input capacity of the unit, a description of the add-on controls used on the unit, description of the fuel(s) burned, including whether the fuel(s) were determined by you or EPA through a petition process to be a non-waste under § 241.3, whether the fuel(s) were processed from discarded non-hazardous secondary materials within the meaning of § 241.3, and justification for the selection of fuel(s) burned during the compliance demonstration.

(2) Summary of the results of all performance tests and fuel analyses, and calculations conducted to demonstrate initial compliance including all established operating limits.

(3) A summary of the maximum carbon monoxide emission levels recorded during the performance test to show that you have met any applicable emission standard in Table 1, 2, or 12 to this subpart.

(4) Identification of whether you plan to demonstrate compliance with each applicable emission limit through performance testing or fuel analysis.

(5) Identification of whether you plan to demonstrate compliance by emissions averaging and identification of whether you plan to demonstrate compliance by using emission credits through energy conservation:

(i) If you plan to demonstrate compliance by emission averaging, report the emission level that was being achieved or the control technology employed on May 20, 2011.

(6) A signed certification that you have met all applicable emission limits and work practice standards.

(7) If you had a deviation from any emission limit, work practice standard, or operating limit, you must also submit a description of the deviation, the duration of the deviation, and the corrective action taken in the Notification of Compliance Status report.

(8) In addition to the information required in § 63.9(h)(2), your notification of compliance status must include the following certification(s) of compliance, as applicable, and signed by a responsible official:

(i) "This facility complies with the requirements in § 63.7540(a)(10) to conduct an annual or biennial tune-up, as applicable, of each unit."

(ii) "This facility has had an energy assessment performed according to § 63.7530(e)."

(iii) Except for units that qualify for a statutory exemption as provided in section 129(g)(1) of the Clean Air Act, include the following: "No secondary materials that are solid waste were combusted in any affected unit."

(f) If you operate a unit designed to burn natural gas, refinery gas, or other gas 1 fuels that is subject to this subpart, and you intend to use a fuel other than natural gas, refinery gas, or other gas 1 fuel to fire the affected unit during a period of natural gas curtailment or supply interruption, as defined in § 63.7575, you must submit a notification of alternative fuel use within 48 hours of the declaration of each period of natural gas curtailment or supply interruption, as defined in § 63.7575. The notification must include the information specified in paragraphs (f)(1) through (5) of this section.

(1) Company name and address.

(2) Identification of the affected unit.

(3) Reason you are unable to use natural gas or equivalent fuel, including the date when the natural gas curtailment was declared or the natural gas supply interruption began.

(4) Type of alternative fuel that you intend to use.

(5) Dates when the alternative fuel use is expected to begin and end.

(g) If you intend to commence or recommence combustion of solid waste, you must provide 30 days prior notice of the date upon which you will commence or recommence combustion of solid waste. The notification must identify:

(1) The name of the owner or operator of the affected source, the location of the source, the boiler(s) or process heater(s) that will commence burning solid waste, and the date of the notice.

(2) The currently applicable subcategory under this subpart.

(3) The date on which you became subject to the currently applicable emission limits.

(4) The date upon which you will commence combusting solid waste.

(h) If you intend to switch fuels, and this fuel switch may result in the applicability of a different subcategory, you must provide 30 days prior notice of the date upon which you will switch fuels. The notification must identify:

(1) The name of the owner or operator of the affected source, the location of the source, the boiler(s) that will switch fuels, and the date of the notice.

(2) The currently applicable subcategory under this subpart.

(3) The date on which you became subject to the currently applicable standards.

(4) The date upon which you will commence the fuel switch.

**§ 63.7550 What reports must I submit and when?**

(a) You must submit each report in Table 9 to this subpart that applies to you.

(b) Unless the EPA Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date in Table 9 to this subpart and according to the requirements in paragraphs (b)(1) through (5) of this section. For units that are subject only to a requirement to conduct an annual or biennial tune-up according to § 63.7540(a)(10) or (a)(11), respectively, and not subject to emission limits or operating limits, you may submit only an annual or biennial compliance report, as applicable, as specified in paragraphs (b)(1) through (5) of this section, instead of a semi-annual compliance report.

(1) The first compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.7495 and ending on June 30 or December 31, whichever date is the first date that occurs at least 180 days (or 1 or 2 year, as applicable, if submitting an annual or biennial compliance report) after the compliance date that is specified for your source in § 63.7495.

(2) The first compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date is the first date following the end of the first calendar half after the compliance date that is specified for your source in § 63.7495. The first annual or biennial compliance report must be postmarked no later than January 31.

(3) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31. Annual and biennial compliance reports must cover the applicable one or two year periods from January 1 to December 31.

(4) Each subsequent compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date is the first date following the end of the semiannual reporting period. Annual and biennial compliance reports must be postmarked no later than January 31.

(5) For each affected source that is subject to permitting regulations pursuant to part 70 or part 71 of this chapter, and if the delegated authority has established dates for submitting semiannual reports pursuant to § 70.6(a)(3)(iii)(A) or § 71.6(a)(3)(iii)(A), you may submit the first and subsequent compliance reports according to the dates the delegated authority has established instead of according to the dates in paragraphs (b)(1) through (4) of this section.

(c) The compliance report must contain the information required in paragraphs (c)(1) through (13) of this section.

(1) Company name and address.

(2) Statement by a responsible official with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report.

(3) Date of report and beginning and ending dates of the reporting period.

(4) The total fuel use by each affected source subject to an emission limit, for each calendar month within the

semiannual (or annual or biennial) reporting period, including, but not limited to, a description of the fuel, whether the fuel has received a non-waste determination by EPA or your basis for concluding that the fuel is not a waste, and the total fuel usage amount with units of measure.

(5) A summary of the results of the annual performance tests for affected sources subject to an emission limit, a summary of any fuel analyses associated with performance tests, and documentation of any operating limits that were reestablished during this test, if applicable. If you are conducting performance tests once every 3 years consistent with § 63.7515(b) or (c), the date of the last 2 performance tests, a comparison of the emission level you achieved in the last 2 performance tests to the 75 percent emission limit threshold required in § 63.7515(b) or (c), and a statement as to whether there have been any operational changes since the last performance test that could increase emissions.

(6) A signed statement indicating that you burned no new types of fuel in an affected source subject to an emission limit. Or, if you did burn a new type of fuel and are subject to a hydrogen chloride emission limit, you must submit the calculation of chlorine input, using Equation 5 of § 63.7530, that demonstrates that your source is still within its maximum chlorine input level established during the previous performance testing (for sources that demonstrate compliance through performance testing) or you must submit the calculation of hydrogen chloride emission rate using Equation 10 of § 63.7530 that demonstrates that your source is still meeting the emission limit for hydrogen chloride emissions (for boilers or process heaters that demonstrate compliance through fuel analysis). If you burned a new type of fuel and are subject to a mercury emission limit, you must submit the calculation of mercury input, using Equation 8 of § 63.7530, that demonstrates that your source is still within its maximum mercury input level established during the previous performance testing (for sources that demonstrate compliance through performance testing), or you must submit the calculation of mercury emission rate using Equation 11 of § 63.7530 that demonstrates that your source is still meeting the emission limit for mercury emissions (for boilers or process heaters that demonstrate compliance through fuel analysis).

(7) If you wish to burn a new type of fuel in an affected source subject to an emission limit and you cannot demonstrate compliance with the maximum chlorine input operating limit using Equation 7 of § 63.7530 or the maximum mercury input operating limit using Equation 8 of § 63.7530, you must include in the compliance report a statement indicating the intent to conduct a new performance test within 60 days of starting to burn the new fuel.

(8) A summary of any monthly fuel analyses conducted to demonstrate compliance according to §§ 63.7521 and 63.7530 for affected sources subject to emission limits, and any fuel specification analyses conducted according to § 63.7521(f) and § 63.7530(g).

(9) If there are no deviations from any emission limits or operating limits in this subpart that apply to you, a statement that there were no deviations from the emission limits or operating limits during the reporting period.

(10) If there were no deviations from the monitoring requirements including no periods during which the CMSs, including CEMS, COMS, and continuous parameter monitoring systems, were out of control as specified in § 63.8(c)(7), a statement that there were no deviations and no periods during which the CMS were out of control during the reporting period.

(11) If a malfunction occurred during the reporting period, the report must include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by you during a malfunction of a boiler, process heater, or associated air pollution control device or CMS to minimize emissions in accordance with § 63.7500(a)(3), including actions taken to correct the malfunction.

(12) Include the date of the most recent tune-up for each unit subject to only the requirement to conduct an annual or biennial tune-up according to § 63.7540(a)(10) or (a)(11), respectively. Include the date of the most recent burner inspection if it was not done annually or biennially and was delayed until the next scheduled unit shutdown.

(13) If you plan to demonstrate compliance by emission averaging, certify the emission level achieved or the control technology employed is no less stringent that the level or control technology contained in the notification of compliance status in § 63.7545(e)(5)(i).

(d) For each deviation from an emission limit or operating limit in this subpart that occurs at an affected source where you are not using a CMS to comply with that emission limit or operating limit, the compliance report must additionally contain the information required in paragraphs (d)(1) through (4) of this section.

(1) The total operating time of each affected source during the reporting period.

(2) A description of the deviation and which emission limit or operating limit from which you deviated.

(3) Information on the number, duration, and cause of deviations (including unknown cause), as applicable, and the corrective action taken.

(4) A copy of the test report if the annual performance test showed a deviation from the emission limits.

(e) For each deviation from an emission limit, operating limit, and monitoring requirement in this subpart occurring at an affected source where you are using a CMS to comply with that emission limit or operating limit, you must include the information required in paragraphs (e)(1) through (12) of this section. This includes any deviations from your site-specific monitoring plan as required in § 63.7505(d).

(1) The date and time that each deviation started and stopped and description of the nature of the deviation (*i.e.,* what you deviated from).

(2) The date and time that each CMS was inoperative, except for zero (low-level) and high-level checks.

(3) The date, time, and duration that each CMS was out of control, including the information in § 63.8(c)(8).

(4) The date and time that each deviation started and stopped.

(5) A summary of the total duration of the deviation during the reporting period and the total duration as a percent of the total source operating time during that reporting period.

(6) An analysis of the total duration of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes.

(7) A summary of the total duration of CMS's downtime during the reporting period and the total duration of CMS downtime as a percent of the total source operating time during that reporting period.

(8) An identification of each parameter that was monitored at the affected source for which there was a deviation.

(9) A brief description of the source for which there was a deviation.

(10) A brief description of each CMS for which there was a deviation.

(11) The date of the latest CMS certification or audit for the system for which there was a deviation.

(12) A description of any changes in CMSs, processes, or controls since the last reporting period for the source for which there was a deviation.

(f) Each affected source that has obtained a Title V operating permit pursuant to part 70 or part 71 of this chapter must report all deviations as defined in this subpart in the semiannual monitoring report required by § 70.6(a)(3)(iii)(A) or § 71.6(a)(3)(iii)(A). If an affected source submits a compliance report pursuant to Table 9 to this subpart along with, or as part of, the semiannual monitoring report required by § 70.6(a)(3)(iii)(A) or § 71.6(a)(3)(iii)(A), and the compliance report includes all required information concerning deviations from any emission limit, operating limit, or work practice requirement in this subpart, submission of the compliance report satisfies any obligation to report the same deviations in the semiannual monitoring report. However, submission of a compliance report does not otherwise affect any obligation the affected source may have to report deviations from permit requirements to the delegated authority.

(g) [Reserved]

(h) As of January 1, 2012 and within 60 days after the date of completing each performance test, as defined in § 63.2, conducted to demonstrate compliance with this subpart, you must submit relative accuracy test audit (*i.e.*, reference method) data and performance test (*i.e.*, compliance test) data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/ert tool.html/*) or other compatible electronic spreadsheet. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

**§ 63.7555 What records must I keep?**

(a) You must keep records according to paragraphs (a)(1) and (2) of this section.

(1) A copy of each notification and report that you submitted to comply with this subpart, including all documentation supporting any Initial Notification or Notification of Compliance Status or semiannual compliance report that you submitted, according to the requirements in § 63.10(b)(2)(xiv).

(2) Records of performance tests, fuel analyses, or other compliance demonstrations and performance evaluations as required in § 63.10(b)(2)(viii).

(b) For each CEMS, COMS, and continuous monitoring system you must keep records according to paragraphs (b)(1) through (5) of this section.

(1) Records described in § 63.10(b)(2)(vii) through (xi).

(2) Monitoring data for continuous opacity monitoring system during a performance evaluation as required in § 63.6(h)(7)(i) and (ii).

(3) Previous (*i.e.,* superseded) versions of the performance evaluation plan as required in § 63.8(d)(3).

(4) Request for alternatives to relative accuracy test for CEMS as required in § 63.8(f)(6)(i).

(5) Records of the date and time that each deviation started and stopped.

(c) You must keep the records required in Table 8 to this subpart including records of all monitoring data and calculated averages for applicable operating limits, such as opacity, pressure drop, pH, and operating load, to show continuous compliance with each emission limit and operating limit that applies to you.

(d) For each boiler or process heater subject to an emission limit in Table 1, 2 or 12 to this subpart, you must also keep the applicable records in paragraphs (d)(1) through (8) of this section.

(1) You must keep records of monthly fuel use by each boiler or process heater, including the type(s) of fuel and amount(s) used.

(2) If you combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 41.3(b)(1), you must keep a record which documents how the secondary material meets each of the legitimacy criteria. If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2. If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a record that documents how the fuel satisfies the requirements of the petition process.

(3) You must keep records of monthly hours of operation by each boiler or process heater that meets the definition of limited-use boiler or process heater.

(4) A copy of all calculations and supporting documentation of maximum chlorine fuel input, using Equation 7 of § 63.7530, that were done to demonstrate continuous compliance with the hydrogen chloride emission limit, for sources that demonstrate compliance through performance testing. For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation of hydrogen chloride emission rates, using Equation 10 of § 63.7530, that were done to demonstrate compliance with the hydrogen chloride emission limit. Supporting documentation should include results of any fuel analyses and basis for the estimates of maximum chlorine fuel input or hydrogen chloride emission rates. You can use the results from one fuel analysis for multiple boilers and process heaters provided they are all burning the same fuel type. However, you must calculate chlorine fuel input, or hydrogen chloride emission rate, for each boiler and process heater.

(5) A copy of all calculations and supporting documentation of maximum mercury fuel input, using Equation 8 of § 63.7530, that were done to demonstrate continuous compliance with the mercury emission limit for sources that demonstrate compliance through performance testing. For sources that demonstrate compliance through fuel analysis, a copy of all calculations and supporting documentation of mercury emission rates, using Equation 11 of § 63.7530, that were done to demonstrate compliance with the mercury emission limit. Supporting documentation should include results of any fuel analyses and basis for the estimates of maximum mercury fuel input or mercury emission rates. You can use the results from one fuel analysis for multiple boilers and process heaters provided they are all burning the same fuel type. However, you must calculate mercury fuel input, or mercury emission rates, for each boiler and process heater.

(6) If, consistent with § 63.7515(b) and (c), you choose to stack test less frequently than annually, you must keep annual records that document that your emissions in the previous stack test(s) were less than 75 percent of the applicable emission limit, and document that there was no change in source operations including fuel composition and operation of air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past year.

(7) Records of the occurrence and duration of each malfunction of the boiler or process heater, or of the associated air pollution control and monitoring equipment.

(8) Records of actions taken during periods of malfunction to minimize emissions in accordance with the

general duty to minimize emissions in § 63.7500(a)(3), including corrective actions to restore the malfunctioning boiler or process heater, air pollution control, or monitoring equipment to its normal or usual manner of operation.

(e) If you elect to average emissions consistent with § 63.7522, you must additionally keep a copy of the emission averaging implementation plan required in § 63.7522(g), all calculations required under § 63.7522, including monthly records of heat input or steam generation, as applicable, and monitoring records consistent with § 63.7541.

(f) If you elect to use emission credits from energy conservation measures to demonstrate compliance according to § 63.7533, you must keep a copy of the Implementation Plan required in § 63.7533(d) and copies of all data and calculations used to establish credits according to § 63.7533(b), (c), and (f).

(g) If you elected to demonstrate that the unit meets the specifications for hydrogen sulfide and mercury for the other gas 1 subcategory and you cannot submit a signed certification under § 63.7545(g) because the constituents could exceed the specifications, you must maintain monthly records of the calculations and results of the fuel specifications for mercury and hydrogen sulfide in Table 6.

(h) If you operate a unit designed to burn natural gas, refinery gas, or other gas 1 fuel that is subject to this subpart, and you use an alternative fuel other than natural gas, refinery gas, or other gas 1 fuel, you must keep records of the total hours per calendar year that alternative fuel is burned.

### § 63.7560 In what form and how long must I keep my records?

(a) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(b) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record.

(c) You must keep each record on site, or they must be accessible from on site (for example, through a computer network), for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 63.10(b)(1). You can keep the records off site for the remaining 3 years.

## Other Requirements and Information

### § 63.7565 What parts of the General Provisions apply to me?

Table 10 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you.

### § 63.7570 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by EPA, or a delegated authority such as your State, local, or tribal agency. If the EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency (as well as EPA) has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under 40 CFR part 63, subpart E, the authorities listed in paragraphs (b)(1) through (5) of this section are retained by the EPA Administrator and are not transferred to the State, local, or tribal agency, however, EPA retains oversight of this subpart and can take enforcement actions, as appropriate.

(1) Approval of alternatives to the non-opacity emission limits and work practice standards in § 63.7500(a) and (b) under § 63.6(g).

(2) Approval of alternative opacity emission limits in § 63.7500(a) under § 63.6(h)(9).

(3) Approval of major change to test methods in Table 5 to this subpart under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90, and alternative analytical methods requested under § 63.7521(b)(2).

(4) Approval of major change to monitoring under § 63.8(f) and as defined in § 63.90, and approval of alternative operating parameters under § 63.7500(a)(2) and § 63.7522(g)(2).

(5) Approval of major change to recordkeeping and reporting under § 63.10(e) and as defined in § 63.90.

### § 63.7575 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2 (the General Provisions), and in this section as follows:

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

*Annual heat input* means the heat input for the 12 months preceding the compliance demonstration.

*Bag leak detection system* means a group of instruments that are capable of monitoring particulate matter loadings in the exhaust of a fabric filter (*i.e.,* baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on electrodynamic, triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

*Benchmarking* means a process of comparison against standard or average.

*Biomass or bio-based solid fuel* means any biomass-based solid fuel that is not a solid waste. This includes, but is not limited to, wood residue; wood products (*e.g.,* trees, tree stumps, tree limbs, bark, lumber, sawdust, sander dust, chips, scraps, slabs, millings, and shavings); animal manure, including litter and other bedding materials; vegetative agricultural and silvicultural materials, such as logging residues (slash), nut and grain hulls and chaff (*e.g.,* almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds. This definition of biomass is not intended to suggest that these materials are or are not solid waste.

*Blast furnace gas fuel-fired boiler or process heater* means an industrial/commercial/institutional boiler or process heater that receives 90 percent or more of its total annual gas volume from blast furnace gas.

*Boiler* means an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Controlled flame combustion refers to a steady-state, or near steady-state, process wherein fuel and/or oxidizer feed rates are controlled. A device combusting solid waste, as defined in § 241.3, is not a boiler unless the device is exempt from the definition of a solid waste incineration unit as provided in section 129(g)(1) of the Clean Air Act. Waste heat boilers are excluded from this definition.

*Boiler system* means the boiler and associated components, such as, the feed water system, the combustion air system, the fuel system (including burners), blowdown system, combustion control system, and energy consuming systems.

*Calendar year* means the period between January 1 and December 31, inclusive, for a given year.

*Coal* means all solid fuels classifiable as anthracite, bituminous, sub-

bituminous, or lignite by ASTM D388 (incorporated by reference, see § 63.14), coal refuse, and petroleum coke. For the purposes of this subpart, this definition of "coal" includes synthetic fuels derived from coal for creating useful heat, including but not limited to, solvent-refined coal, coal-oil mixtures, and coal-water mixtures. Coal derived gases are excluded from this definition.

*Coal refuse* means any by-product of coal mining or coal cleaning operations with an ash content greater than 50 percent (by weight) and a heating value less than 13,900 kilojoules per kilogram (6,000 Btu per pound) on a dry basis.

*Commercial/institutional boiler* means a boiler used in commercial establishments or institutional establishments such as medical centers, research centers, institutions of higher education, hotels, and laundries to provide steam and/or hot water.

*Common stack* means the exhaust of emissions from two or more affected units through a single flue. Affected units with a common stack may each have separate air pollution control systems located before the common stack, or may have a single air pollution control system located after the exhausts come together in a single flue.

*Cost-effective energy conservation measure* means a measure that is implemented to improve the energy efficiency of the boiler or facility that has a payback (return of investment) period of 2 years or less.

*Deviation.*

(1) *Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(i) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limit, operating limit, or work practice standard; or

(ii) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

(2) A deviation is not always a violation. The determination of whether a deviation constitutes a violation of the standard is up to the discretion of the entity responsible for enforcement of the standards.

*Dioxins/furans* means tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans.

*Distillate oil* means fuel oils, including recycled oils, that comply with the specifications for fuel oil numbers 1 and 2, as defined by ASTM D396 (incorporated by reference, see § 63.14).

*Dry scrubber* means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition. A dry scrubber is a dry control system.

*Dutch oven* means a unit having a refractory-walled cell connected to a conventional boiler setting. Fuel materials are introduced through an opening in the roof of the Dutch oven and burn in a pile on its floor.

*Electric utility steam generating unit* means a fossil fuel-fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A fossil fuel-fired unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale is considered an electric utility steam generating unit.

*Electrostatic precipitator (ESP)* means an add-on air pollution control device used to capture particulate matter by charging the particles using an electrostatic field, collecting the particles using a grounded collecting surface, and transporting the particles into a hopper. An electrostatic precipitator is usually a dry control system.

*Emission credit* means emission reductions above those required by this subpart. Emission credits generated may be used to comply with the emissions limits. Credits may come from pollution prevention projects that result in reduced fuel use by affected units. Shutdowns cannot be used to generate credits.

*Energy assessment* means the following only as this term is used in Table 3 to this subpart.

(1) Energy assessment for facilities with affected boilers and process heaters using less than 0.3 trillion Btu per year heat input will be one day in length maximum. The boiler system and energy use system accounting for at least 50 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a one-day energy assessment.

(2) The Energy assessment for facilities with affected boilers and process heaters using 0.3 to 1.0 trillion Btu per year will be 3 days in length maximum. The boiler system and any energy use system accounting for at least 33 percent of the energy output will be evaluated to identify energy savings opportunities, within the limit of performing a 3-day energy assessment.

(3) In the Energy assessment for facilities with affected boilers and process heaters using greater than 1.0 trillion Btu per year, the boiler system and any energy use system accounting for at least 20 percent of the energy output will be evaluated to identify energy savings opportunities.

*Energy management practices* means the set of practices and procedures designed to manage energy use that are demonstrated by the facility's energy policies, a facility energy manager and other staffing responsibilities, energy performance measurement and tracking methods, an energy saving goal, action plans, operating procedures, internal reporting requirements, and periodic review intervals used at the facility.

*Energy use system* includes, but is not limited to, process heating; compressed air systems; machine drive (motors, pumps, fans); process cooling; facility heating, ventilation, and air-conditioning systems; hot heater systems; building envelop; and lighting.

*Equivalent* means the following only as this term is used in Table 6 to this subpart:

(1) An equivalent sample collection procedure means a published voluntary consensus standard or practice (VCS) or EPA method that includes collection of a minimum of three composite fuel samples, with each composite consisting of a minimum of three increments collected at approximately equal intervals over the test period.

(2) An equivalent sample compositing procedure means a published VCS or EPA method to systematically mix and obtain a representative subsample (part) of the composite sample.

(3) An equivalent sample preparation procedure means a published VCS or EPA method that: Clearly states that the standard, practice or method is appropriate for the pollutant and the fuel matrix; or is cited as an appropriate sample preparation standard, practice or method for the pollutant in the chosen VCS or EPA determinative or analytical method.

(4) An equivalent procedure for determining heat content means a published VCS or EPA method to obtain gross calorific (or higher heating) value.

(5) An equivalent procedure for determining fuel moisture content means a published VCS or EPA method to obtain moisture content. If the sample analysis plan calls for determining metals (especially the mercury, selenium, or arsenic) using an aliquot of the dried sample, then the drying

temperature must be modified to prevent vaporizing these metals. On the other hand, if metals analysis is done on an "as received" basis, a separate aliquot can be dried to determine moisture content and the metals concentration mathematically adjusted to a dry basis.

(6) An equivalent pollutant (mercury, hydrogen chloride, hydrogen sulfide) determinative or analytical procedure means a published VCS or EPA method that clearly states that the standard, practice, or method is appropriate for the pollutant and the fuel matrix and has a published detection limit equal or lower than the methods listed in Table 6 to this subpart for the same purpose.

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse. A fabric filter is a dry control system.

*Federally enforceable* means all limitations and conditions that are enforceable by the EPA Administrator, including the requirements of 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, and any permit requirements established under 40 CFR 52.21 or under 40 CFR 51.18 and 40 CFR 51.24.

*Fluidized bed boiler* means a boiler utilizing a fluidized bed combustion process.

*Fluidized bed combustion* means a process where a fuel is burned in a bed of granulated particles, which are maintained in a mobile suspension by the forward flow of air and combustion products.

*Fuel cell* means a boiler type in which the fuel is dropped onto suspended fixed grates and is fired in a pile. The refractory-lined fuel cell uses combustion air preheating and positioning of secondary and tertiary air injection ports to improve boiler efficiency.

*Fuel type* means each category of fuels that share a common name or classification. Examples include, but are not limited to, bituminous coal, sub-bituminous coal, lignite, anthracite, biomass, residual oil. Individual fuel types received from different suppliers are not considered new fuel types.

*Gaseous fuel* includes, but is not limited to, natural gas, process gas, landfill gas, coal derived gas, refinery gas, and biogas. Blast furnace gas is exempted from this definition.

*Heat input* means heat derived from combustion of fuel in a boiler or process heater and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources such as gas turbines, internal combustion engines, kilns, etc.

*Hourly average* means the arithmetic average of at least four CMS data values representing the four 15-minute periods in an hour, or at least two 15-minute data values during an hour when CMS calibration, quality assurance, or maintenance activities are being performed.

*Hot water heater* means a closed vessel with a capacity of no more than 120 U.S. gallons in which water is heated by combustion of gaseous or liquid fuel and is withdrawn for use external to the vessel at pressures not exceeding 160 psig, including the apparatus by which the heat is generated and all controls and devices necessary to prevent water temperatures from exceeding 210 degrees Fahrenheit (99 degrees Celsius). *Hot water heater* also means a tankless unit that provides on demand hot water.

*Hybrid suspension grate boiler* means a boiler designed with air distributors to spread the fuel material over the entire width and depth of the boiler combustion zone. The drying and much of the combustion of the fuel takes place in suspension, and the combustion is completed on the grate or floor of the boiler.

*Industrial boiler* means a boiler used in manufacturing, processing, mining, and refining or any other industry to provide steam and/or hot water.

*Limited-use boiler or process heater* means any boiler or process heater that burns any amount of solid, liquid, or gaseous fuels, has a rated capacity of greater than 10 MMBtu per hour heat input, and has a federally enforceable limit of no more than 876 hours per year of operation.

*Liquid fuel subcategory* includes any boiler or process heater of any design that burns more than 10 percent liquid fuel and less than 10 percent solid fuel, based on the total annual heat input to the unit.

*Liquid fuel* includes, but is not limited to, distillate oil, residual oil, on-spec used oil, and biodiesel.

*Load fraction* means the actual heat input of the boiler or process heater divided by the average operating load determined according to Table 7 to this subpart.

*Metal process furnaces* include natural gas-fired annealing furnaces, preheat furnaces, reheat furnaces, aging furnaces, heat treat furnaces, and homogenizing furnaces.

*Million Btu (MMBtu)* means one million British thermal units.

*Minimum activated carbon injection rate* means load fraction (percent) multiplied by the lowest hourly average activated carbon injection rate measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limits.

*Minimum pressure drop* means the lowest hourly average pressure drop measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limit.

*Minimum scrubber effluent pH* means the lowest hourly average sorbent liquid pH measured at the inlet to the wet scrubber according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable hydrogen chloride emission limit.

*Minimum scrubber liquid flow rate* means the lowest hourly average liquid flow rate (*e.g.,* to the PM scrubber or to the acid gas scrubber) measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limit.

*Minimum scrubber pressure drop* means the lowest hourly average scrubber pressure drop measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limit.

*Minimum sorbent injection rate* means load fraction (percent) multiplied by the lowest hourly average sorbent injection rate for each sorbent measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limits.

*Minimum total secondary electric power* means the lowest hourly average total secondary electric power determined from the values of secondary voltage and secondary current to the electrostatic precipitator measured according to Table 7 to this subpart during the most recent performance test demonstrating compliance with the applicable emission limits.

*Natural gas* means:

(1) A naturally occurring mixture of hydrocarbon and nonhydrocarbon gases found in geologic formations beneath the earth's surface, of which the principal constituent is methane; or

(2) Liquid petroleum gas, as defined in ASTM D1835 (incorporated by reference, *see* § 63.14); or

(3) A mixture of hydrocarbons that maintains a gaseous state at ISO conditions. Additionally, natural gas must either be composed of at least 70 percent methane by volume or have a gross calorific value between 34 and 43 mega joules (MJ) per dry standard cubic

meter (910 and 1,150 Btu per dry standard cubic foot); or

(4) Propane or propane derived synthetic natural gas. Propane means a colorless gas derived from petroleum and natural gas, with the molecular structure $C_3H_8$.

*Opacity* means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

*Operating day* means a 24-hour period between 12 midnight and the following midnight during which any fuel is combusted at any time in the boiler or process heater unit. It is not necessary for fuel to be combusted for the entire 24-hour period.

*Other gas 1 fuel* means a gaseous fuel that is not natural gas or refinery gas and does not exceed the maximum concentration of 40 micrograms/cubic meters of mercury and 4 parts per million, by volume, of hydrogen sulfide.

*Particulate matter (PM)* means any finely divided solid or liquid material, other than uncombined water, as measured by the test methods specified under this subpart, or an approved alternative method.

*Period of natural gas curtailment or supply interruption* means a period of time during which the supply of natural gas to an affected facility is halted for reasons beyond the control of the facility. The act of entering into a contractual agreement with a supplier of natural gas established for curtailment purposes does not constitute a reason that is under the control of a facility for the purposes of this definition. An increase in the cost or unit price of natural gas does not constitute a period of natural gas curtailment or supply interruption.

*Process heater* means an enclosed device using controlled flame, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not come into direct contact with process materials. A device combusting solid waste, as defined in § 241.3, is not a process heater unless the device is exempt from the definition of a solid waste incineration unit as provided in section 129(g)(1) of the Clean Air Act. Process heaters do not include units used for comfort heat or space heat, food preparation for on-site consumption, or autoclaves.

*Pulverized coal boiler* means a boiler in which pulverized coal or other solid fossil fuel is introduced into an air stream that carries the coal to the combustion chamber of the boiler where it is fired in suspension.

*Qualified energy assessor* means:

(1) someone who has demonstrated capabilities to evaluate a set of the typical energy savings opportunities available in opportunity areas for steam generation and major energy using systems, including, but not limited to:

(i) Boiler combustion management.

(ii) Boiler thermal energy recovery, including

(A) Conventional feed water economizer,

(B) Conventional combustion air preheater, and

(C) Condensing economizer.

(iii) Boiler blowdown thermal energy recovery.

(iv) Primary energy resource selection, including

(A) Fuel (primary energy source) switching, and

(B) Applied steam energy versus direct-fired energy versus electricity.

(v) Insulation issues.

(vi) Steam trap and steam leak management.

(vi) Condensate recovery.

(viii) Steam end-use management.

(2) Capabilities and knowledge includes, but is not limited to:

(i) Background, experience, and recognized abilities to perform the assessment activities, data analysis, and report preparation.

(ii) Familiarity with operating and maintenance practices for steam or process heating systems.

(iii) Additional potential steam system improvement opportunities including improving steam turbine operations and reducing steam demand.

(iv) Additional process heating system opportunities including effective utilization of waste heat and use of proper process heating methods.

(v) Boiler-steam turbine cogeneration systems.

(vi) Industry specific steam end-use systems.

*Refinery gas* means any gas that is generated at a petroleum refinery and is combusted. Refinery gas includes natural gas when the natural gas is combined and combusted in any proportion with a gas generated at a refinery. Refinery gas includes gases generated from other facilities when that gas is combined and combusted in any proportion with gas generated at a refinery.

*Residual oil* means crude oil, and all fuel oil numbers 4, 5 and 6, as defined in ASTM D396–10 (incorporated by reference, see § 63.14(b)).

*Responsible official* means responsible official as defined in § 70.2.

*Solid fossil fuel* includes, and is not limited to, coal, coke, petroleum coke, and tire derived fuel.

*Solid fuel* means any solid fossil fuel or biomass or bio-based solid fuel.

*Steam output* means (1) for a boiler that produces steam for process or heating only (no power generation), the energy content in terms of MMBtu of the boiler steam output, and (2) for a boiler that cogenerates process steam and electricity (also known as combined heat and power (CHP)), the total energy output, which is the sum of the energy content of the steam exiting the turbine and sent to process in MMBtu and the energy of the electricity generated converted to MMBtu at a rate of 10,000 Btu per kilowatt-hour generated (10 MMBtu per megawatt-hour).

*Stoker* means a unit consisting of a mechanically operated fuel feeding mechanism, a stationary or moving grate to support the burning of fuel and admit under-grate air to the fuel, an overfire air system to complete combustion, and an ash discharge system. This definition of stoker includes air swept stokers. There are two general types of stokers: Underfeed and overfeed. Overfeed stokers include mass feed and spreader stokers.

*Suspension boiler* means a unit designed to feed the fuel by means of fuel distributors. The distributors inject air at the point where the fuel is introduced into the boiler in order to spread the fuel material over the boiler width. The drying (and much of the combustion) occurs while the material is suspended in air. The combustion of the fuel material is completed on a grate or floor below. Suspension boilers almost universally are designed to have high heat release rates to dry quickly the wet fuel as it is blown into the boilers.

*Temporary boiler* means any gaseous or liquid fuel boiler that is designed to, and is capable of, being carried or moved from one location to another by means of, for example, wheels, skids, carrying handles, dollies, trailers, or platforms. A boiler is not a temporary boiler if any one of the following conditions exists:

(1) The equipment is attached to a foundation.

(2) The boiler or a replacement remains at a location for more than 12 consecutive months. Any temporary boiler that replaces a temporary boiler at a location and performs the same or similar function will be included in calculating the consecutive time period.

(3) The equipment is located at a seasonal facility and operates during the full annual operating period of the seasonal facility, remains at the facility

for at least 2 years, and operates at that facility for at least 3 months each year.

(4) The equipment is moved from one location to another in an attempt to circumvent the residence time requirements of this definition.

*Tune-up* means adjustments made to a boiler in accordance with procedures supplied by the manufacturer (or an approved specialist) to optimize the combustion efficiency.

*Unit designed to burn biomass/bio-based solid subcategory* includes any boiler or process heater that burns at least 10 percent biomass or bio-based solids on an annual heat input basis in combination with solid fossil fuels, liquid fuels, or gaseous fuels.

*Unit designed to burn coal/solid fossil fuel subcategory* includes any boiler or process heater that burns any coal or other solid fossil fuel alone or at least 10 percent coal or other solid fossil fuel on an annual heat input basis in combination with liquid fuels, gaseous fuels, or less than 10 percent biomass and bio-based solids on an annual heat input basis.

*Unit designed to burn gas 1 subcategory* includes any boiler or process heater that burns only natural gas, refinery gas, and/or other gas 1 fuels; with the exception of liquid fuels burned for periodic testing not to exceed a combined total of 48 hours during any calendar year, or during periods of gas curtailment and gas supply emergencies.

*Unit designed to burn gas 2 (other) subcategory* includes any boiler or process heater that is not in the unit designed to burn gas 1 subcategory and burns any gaseous fuels either alone or in combination with less than 10 percent coal/solid fossil fuel, less than 10 percent biomass/bio-based solid fuel, and less than 10 percent liquid fuels on an annual heat input basis.

*Unit designed to burn liquid subcategory* includes any boiler or process heater that burns any liquid fuel, but less than 10 percent coal/solid fossil fuel and less than 10 percent biomass/bio-based solid fuel on an annual heat input basis, either alone or in combination with gaseous fuels. Gaseous fuel boilers and process heaters that burn liquid fuel for periodic testing of liquid fuel, maintenance, or operator training, not to exceed a combined total of 48 hours during any calendar year or during periods of maintenance, operator training, or testing of liquid fuel, not to exceed a combined total of 48 hours during any calendar year are not included in this definition. Gaseous fuel boilers and process heaters that burn liquid fuel during periods of gas curtailment or gas supply emergencies of any duration are also not included in this definition.

*Unit designed to burn liquid fuel that is a non-continental unit* means an industrial, commercial, or institutional boiler or process heater designed to burn liquid fuel located in the State of Hawaii, the Virgin Islands, Guam, American Samoa, the Commonwealth of Puerto Rico, or the Northern Mariana Islands.

*Unit designed to burn solid fuel subcategory* means any boiler or process heater that burns any solid fuel alone or at least 10 percent solid fuel on an annual heat input basis in combination with liquid fuels or gaseous fuels.

*Voluntary Consensus Standards or VCS* mean technical standards (*e.g.,* materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. EPA/Office of Air Quality Planning and Standards, by precedent, has only used VCS that are written in English. Examples of VCS bodies are: American Society of Testing and Materials (ASTM 100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–B2959, (800) 262–1373, *http://www.astm.org*), American Society of Mechanical Engineers (ASME ASME, Three Park Avenue, New York, NY 10016–5990, (800) 843–2763, *http://www.asme.org*), International Standards Organization (ISO 1, ch. de la Voie-Creuse, Case postale 56, CH–1211 Geneva 20, Switzerland, +41 22 749 01 11, *http://www.iso.org/iso/home.htm*), Standards Australia (AS Level 10, The Exchange Centre, 20 Bridge Street, Sydney, GPO Box 476, Sydney NSW 2001, + 61 2 9237 6171 *http://www.stadards.org.au*), British Standards Institution (BSI, 389 Chiswick High Road, London, W4 4AL, United Kingdom, +44 (0)20 8996 9001, *http://www.bsigroup.com*), Canadian Standards Association (CSA 5060 Spectrum Way, Suite 100, Mississauga, Ontario L4W 5N6, Canada, 800–463–6727, *http://www.csa.ca*), European Committee for Standardization (CEN CENELEC Management Centre Avenue Marnix 17 B–1000 Brussels, Belgium +32 2 550 08 11, *http://www.cen.eu/cen*), and German Engineering Standards (VDI VDI Guidelines Department, P.O. Box 10 11 39 40002, Duesseldorf, Germany, +49 211 6214–230, *http://www.vdi.eu*). The types of standards that are not considered VCS are standards developed by: The United States, *e.g.,* California (CARB) and Texas (TCEQ); industry groups, such as American Petroleum Institute (API), Gas Processors Association (GPA), and Gas Research Institute (GRI); and other branches of the U.S. government, *e.g.,* Department of Defense (DOD) and Department of Transportation (DOT). This does not preclude EPA from using standards developed by groups that are not VCS bodies within their rule. When this occurs, EPA has done searches and reviews for VCS equivalent to these non-EPA methods.

*Waste heat boiler* means a device that recovers normally unused energy and converts it to usable heat. Waste heat boilers are also referred to as heat recovery steam generators.

*Waste heat process heater* means an enclosed device that recovers normally unused energy and converts it to usable heat. Waste heat process heaters are also referred to as recuperative process heaters.

*Wet scrubber* means any add-on air pollution control device that mixes an aqueous stream or slurry with the exhaust gases from a boiler or process heater to control emissions of particulate matter or to absorb and neutralize acid gases, such as hydrogen chloride. A wet scrubber creates an aqueous stream or slurry as a byproduct of the emissions control process.

*Work practice standard* means any design, equipment, work practice, or operational standard, or combination thereof, that is promulgated pursuant to section 112(h) of the Clean Air Act.

**Tables to Subpart DDDDD of Part 63**

As stated in § 63.7500, you must comply with the following applicable emission limits:

TABLE 1 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS [a]

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | Or the emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| 1. Units in all subcategories designed to burn solid fuel. | a. Particulate Matter | 0.0011 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | 0.0011; (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 3 dscm per run. |
| | b. Hydrogen Chloride | 0.0022 lb per MMBtu of heat input. | 0.0021 | For M26A, collect a minimum of 1 dscm per run; for M26 collect a minimum of 60 liters per run. |
| | c. Mercury | 3.5E–06 lb per MMBtu of heat input. | 3.4E–06 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [b] collect a minimum of 2 dscm. |
| 2. Units designed to burn pulverized coal/solid fossil fuel. | a. Carbon monoxide (CO) | 12 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.01 | 1 hr minimum sampling time, use a span value of 30 ppmv. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | 2.8E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 3. Stokers designed to burn coal/solid fossil fuel. | a. CO | 6 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.005 | 1 hr minimum sampling time, use a span value of 20 ppmv. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | 2.8E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 4. Fluidized bed units designed to burn coal/solid fossil fuel. | a. CO | 18 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.02 | 1 hr minimum sampling time, use a span value of 40 ppmv. |
| | b. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 5. Stokers designed to burn biomass/bio-based solids. | a. CO | 160 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.13 | 1 hr minimum sampling time, use a span value of 400 ppmv. |
| | b. Dioxins/Furans | 0.005 ng/dscm (TEQ) corrected to 7 percent oxygen. | 4.4E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 6. Fluidized bed units designed to burn biomass/bio-based solids. | a. CO | 260 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.18 | 1 hr minimum sampling time, use a span value of 500 ppmv. |
| | b. Dioxins/Furans | 0.02 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–11 (TEQ) | Collect a minimum of 4 dscm per run. |
| 7. Suspension burners/Dutch Ovens designed to burn biomass/bio-based solids. | a. CO | 470 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.45 | 1 hr minimum sampling time, use a span value of 1000 ppmv. |
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–10 (TEQ) | Collect a minimum of 4 dscm per run. |
| 8. Fuel cells designed to burn biomass/bio-based solids. | a. CO | 470 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.23 | 1 hr minimum sampling time, use a span value of 1000 ppmv. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | 2.86E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 9. Hybrid suspension/grate units designed to burn biomass/bio-based solids. | a. CO | 1,500 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.84 | 1 hr minimum sampling time, use a span value of 3000 ppmv. |

TABLE 1 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS [a]—Continued

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | Or the emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–10 (TEQ) | Collect a minimum of 4 dscm per run. |
| 10. Units designed to burn liquid fuel. | a. Particulate Matter | 0.0013 lb per MMBtu of heat input (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | 0.001; (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | Collect a minimum of 3 dscm per run. |
| | b. Hydrogen Chloride | 0.00033 lb per MMBtu of heat input. | 0.0003 | For M26A: Collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 2.1E–07 lb per MMBtu of heat input. | 0.2E–06 | Collect enough volume to meet an in-stack detection limit data quality objective of 0.10 ug/dscm. |
| | d. CO | 3 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.0026 | 1 hr minimum sampling time, use a span value of 3 ppmv. |
| | e. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | 4.6E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 11. Units designed to burn liquid fuel located in non-continental States and territories. | a. Particulate Matter | 0.0013 lb per MMBtu of heat input (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | 0.001; (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | Collect a minimum of 3 dscm per run. |
| | b. Hydrogen Chloride | 0.00033 lb per MMBtu of heat input. | 0.0003 | For M26A: Collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 7.8E–07 lb per MMBtu of heat input. | 8.0E–07 | For M29, collect a minimum of 3 dscm per run; for M30B, collect a minimum sample as specified in the method; for ASTM D6784 [b] collect a minimum of 3 dscm. |
| | d. CO | 51 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.043 | 1 hr minimum sampling time, use a span value of 100 ppmv. |
| | e. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | 4.6E–12(TEQ) | Collect a minimum of 3 dscm per run. |
| 12. Units designed to burn gas 2 (other) gases. | a. Particulate Matter | 0.0067 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | .004; (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.0017 lb per MMBtu of heat input. | .003 | For M26A, Collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |

TABLE 1 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS [a]—Continued

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | Or the emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| | c. Mercury | 7.9E–06 lb per MMBtu of heat input. | 2.0E–07 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [b] collect a minimum of 2 dscm. |
| | d. CO | 3 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.002 | 1 hr minimum sampling time, use a span value of 10 ppmv. |
| | e. Dioxins/Furans | 0.08 ng/dscm (TEQ) corrected to 7 percent oxygen. | 4.1E–12 (TEQ) | Collect a minimum of 4 dscm per run |

[a] If your affected source is a new or reconstructed affected source that commenced construction or reconstruction after June 4, 2010, and before May 20, 2011, you may comply with the emission limits in Table 12 to this subpart until March 21, 2014. On and after March 21, 2014, you must comply with the emission limits in Table 1 to this subpart.

[b] Incorporated by reference, see § 63.14.

As stated in § 63.7500, you must comply with the following applicable emission limits:

TABLE 2 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR EXISTING BOILERS AND PROCESS HEATERS

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | The emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| 1. Units in all subcategories designed to burn solid fuel. | a. Particulate Matter | 0.039 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | 0.038; (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.035 lb per MMBtu of heat input. | 0.04 | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 4.6E–06 lb per MMBtu of heat input. | 4.5E–06 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| 2. Pulverized coal units designed to burn pulverized coal/solid fossil fuel. | a. CO | 160 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.14 | 1 hr minimum sampling time, use a span value of 300 ppmv. |
| | b. Dioxins/Furans | 0.004 ng/dscm (TEQ) corrected to 7 percent oxygen. | 3.7E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 3. Stokers designed to burn coal/solid fossil fuel. | a. CO | 270 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.25 | 1 hr minimum sampling time, use a span value of 500 ppmv. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | 2.8E–12 (TEQ) | Collect a minimum of 4 dscm per run. |

TABLE 2 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR EXISTING BOILERS AND PROCESS HEATERS—Continued

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | The emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| 4. Fluidized bed units designed to burn coal/solid fossil fuel. | a. CO | 82 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.08 | 1 hr minimum sampling time, use a span value of 200 ppmv |
| | b. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 5. Stokers designed to burn biomass/bio-based solid. | a. CO | 490 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.35 | 1 hr minimum sampling time, use a span value of 1000 ppmv. |
| | b. Dioxins/Furans | 0.005 ng/dscm (TEQ) corrected to 7 percent oxygen. | 4.4E–12 (TEQ) | Collect a minimum of 4 dscm per run. |
| 6. Fluidized bed units designed to burn biomass/bio-based solid. | a. CO | 430 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.28 | 1 hr minimum sampling time, use a span value of 850 ppmv. |
| | b. Dioxins/Furans | 0.02 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–11(TEQ) | Collect a minimum of 4 dscm per run. |
| 7. Suspension burners/Dutch Ovens designed to burn biomass/bio-based solid. | a. CO | 470 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.45 | 1 hr minimum sampling time, use a span value of 1000 ppmv. |
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–10 (TEQ) | Collect a minimum of 4 dscm per run. |
| 8. Fuel cells designed to burn biomass/bio-based solid. | a. CO | 690 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.34 | 1 hr minimum sampling time, use a span value of 1300 ppmv. |
| | b. Dioxins/Furans | 4 ng/dscm (TEQ) corrected to 7 percent oxygen. | 3.5E–09 (TEQ) | Collect a minimum of 4 dscm per run. |
| 9. Hybrid suspension/grate units designed to burn biomass/bio-based solid. | a. CO | 3,500 ppm by volume on a dry basis corrected to 3 percent oxygen. | 2.0 | 1 hr minimum sampling time, use a span value of 7000 ppmv. |
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | 1.8E–10 (TEQ) | Collect a minimum of 4 dscm per run. |
| 10. Units designed to burn liquid fuel. | a. Particulate Matter | 0.0075 lb per MMBtu of heat input (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | 0.0073; (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.00033 lb per MMBtu of heat input. | 0.0003 | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 200 liters per run. |
| | c. Mercury | 3.5E–06 lb per MMBtu of heat input. | 3.3E–06 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B collect a minimum sample as specified in the method, for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 10 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.0083 | 1 hr minimum sampling time, use a span value of 20 ppmv. |
| | e. Dioxins/Furans | 4 ng/dscm (TEQ) corrected to 7 percent oxygen. | 9.2E–09 (TEQ) | Collect a minimum of 1 dscm per run. |

TABLE 2 TO SUBPART DDDDD OF PART 63—EMISSION LIMITS FOR EXISTING BOILERS AND PROCESS HEATERS—Continued

[Units with heat input capacity of 10 million Btu per hour or greater]

| If your boiler or process heater is in this subcategory . . . | For the following pollutants . . . | The emissions must not exceed the following emission limits, except during periods of startup and shutdown . . . | The emissions must not exceed the following output-based limits (lb per MMBtu of steam output) . . . | Using this specified sampling volume or test run duration . . . |
|---|---|---|---|---|
| 11. Units designed to burn liquid fuel located in noncontinental States and territories. | a. Particulate Matter | 0.0075 lb per MMBtu of heat input (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | 0.0073; (30-day rolling average for residual oil-fired units 250 MMBtu/hr or greater, 3-run average for other units). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.00033 lb per MMBtu of heat input. | 0.0003 | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 200 liters per run. |
| | c. Mercury | 7.8E–07 lb per MMBtu of heat input. | 8.0E–07 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 160 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.13 | 1 hr minimum sampling time, use a span value of 300 ppmv. |
| | e. Dioxins/Furans | 4 ng/dscm (TEQ) corrected to 7 percent oxygen. | 9.2E–09 (TEQ) | Collect a minimum of 1 dscm per run. |
| 12. Units designed to burn gas 2 (other) gases. | a. Particulate Matter | 0.043 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | 0.026; (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.0017 lb per MMBtu of heat input. | 0.001 | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 1.3E–05 lb per MMBtu of heat input. | 7.8E–06 | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 9 ppm by volume on a dry basis corrected to 3 percent oxygen. | 0.005 | 1 hr minimum sampling time, use a span value of 20 ppmv. |
| | e. Dioxins/Furans | 0.08 ng/dscm (TEQ) corrected to 7 percent oxygen. | 3.9E–11 (TEQ) | Collect a minimum of 4 dscm per run. |

[a] Incorporated by reference, see § 63.14.

As stated in § 63.7500, you must comply with the following applicable work practice standards:

TABLE 3 TO SUBPART DDDDD OF PART 63—WORK PRACTICE STANDARDS

| If your unit is . . . | You must meet the following . . . |
|---|---|
| 1. A new or existing boiler or process heater with heat input capacity of less than 10 million Btu per hour or a limited use boiler or process heater. | Conduct a tune-up of the boiler or process heater biennially as specified in § 63.7540. |

TABLE 3 TO SUBPART DDDDD OF PART 63—WORK PRACTICE STANDARDS—Continued

| If your unit is . . . | You must meet the following . . . |
|---|---|
| 2. A new or existing boiler or process heater in either the Gas 1 or Metal Process Furnace subcategory with heat input capacity of 10 million Btu per hour or greater. | Conduct a tune-up of the boiler or process heater annually as specified in § 63.7540. |
| 3. An existing boiler or process heater located at a major source facility | Must have a one-time energy assessment performed on the major source facility by qualified energy assessor. An energy assessment completed on or after January 1, 2008, that meets or is amended to meet the energy assessment requirements in this table, satisfies the energy assessment requirement. The energy assessment must include:<br>a. A visual inspection of the boiler or process heater system.<br>b. An evaluation of operating characteristics of the facility, specifications of energy using systems, operating and maintenance procedures, and unusual operating constraints,<br>c. An inventory of major energy consuming systems,<br>d. A review of available architectural and engineering plans, facility operation and maintenance procedures and logs, and fuel usage,<br>e. A review of the facility's energy management practices and provide recommendations for improvements consistent with the definition of energy management practices,<br>f. A list of major energy conservation measures,<br>g. A list of the energy savings potential of the energy conservation measures identified, and<br>h. A comprehensive report detailing the ways to improve efficiency, the cost of specific improvements, benefits, and the time frame for recouping those investments. |
| 4. An existing or new unit subject to emission limits in Tables 1, 2, or 12 of this subpart.. | Minimize the unit's startup and shutdown periods following the manufacturer's recommended procedures. If manufacturer's recommended procedures are not available, you must follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available. |

As stated in § 63.7500, you must comply with the applicable operating limits:

TABLE 4 TO SUBPART DDDDD OF PART 63—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS

| If you demonstrate compliance using . . . | You must meet these operating limits . . . |
|---|---|
| 1. Wet PM scrubber control | Maintain the 12-hour block average pressure drop and the 12-hour block average liquid flow rate at or above the lowest 1-hour average pressure drop and the lowest 1-hour average liquid flow rate, respectively, measured during the most recent performance test demonstrating compliance with the PM emission limitation according to § 63.7530(b) and Table 7 to this subpart. |
| 2. Wet acid gas (HCl) scrubber control | Maintain the 12-hour block average effluent pH at or above the lowest 1-hour average pH and the 12-hour block average liquid flow rate at or above the lowest 1-hour average liquid flow rate measured during the most recent performance test demonstrating compliance with the HCl emission limitation according to § 63.7530(b) and Table 7 to this subpart. |
| 3. Fabric filter control on units not required to install and operate a PM CEMS. | a. Maintain opacity to less than or equal to 10 percent opacity (daily block average); or<br>b. Install and operate a bag leak detection system according to § 63.7525 and operate the fabric filter such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during each 6-month period. |
| 4. Electrostatic precipitator control on units not required to install and operate a PM CEMS. | a. This option is for boilers and process heaters that operate dry control systems (*i.e.,* an ESP without a wet scrubber). Existing and new boilers and process heaters must maintain opacity to less than or equal to 10 percent opacity (daily block average); or<br>b. This option is only for boilers and process heaters not subject to PM CEMS or continuous compliance with an opacity limit (i.e., COMS). Maintain the minimum total secondary electric power input of the electrostatic precipitator at or above the operating limits established during the performance test according to § 63.7530(b) and Table 7 to this subpart. |
| 5. Dry scrubber or carbon injection control | Maintain the minimum sorbent or carbon injection rate as defined in § 63.7575 of this subpart. |

TABLE 4 TO SUBPART DDDDD OF PART 63—OPERATING LIMITS FOR BOILERS AND PROCESS HEATERS—Continued

| If you demonstrate compliance using . . . | You must meet these operating limits . . . |
|---|---|
| 6. Any other add-on air pollution control type on units not required to install and operate a PM CEMS. | This option is for boilers and process heaters that operate dry control systems. Existing and new boilers and process heaters must maintain opacity to less than or equal to 10 percent opacity (daily block average). |
| 7. Fuel analysis | Maintain the fuel type or fuel mixture such that the applicable emission rates calculated according to § 63.7530(c)(1), (2) and/or (3) is less than the applicable emission limits. |
| 8. Performance testing | For boilers and process heaters that demonstrate compliance with a performance test, maintain the operating load of each unit such that is does not exceed 110 percent of the average operating load recorded during the most recent performance test. |
| 9. Continuous Oxygen Monitoring System | For boilers and process heaters subject to a carbon monoxide emission limit that demonstrate compliance with an $O_2$ CEMS as specified in § 63.7525(a), maintain the oxygen level of the stack gas such that it is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test. |

As stated in § 63.7520, you must comply with the following requirements for performance testing for existing, new or reconstructed affected sources:

TABLE 5 TO SUBPART DDDDD OF PART 63—PERFORMANCE TESTING REQUIREMENTS

| To conduct a performance test for the following pollutant... | You must... | Using... |
|---|---|---|
| 1. Particulate Matter | a. Select sampling ports location and the number of traverse points. | Method 1 at 40 CFR part 60, appendix A–1 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas.. | Method 2, 2F, or 2G at 40 CFR part 60, appendix A–1 or A–2 to part 60 of this chapter. |
| | c. Determine oxygen or carbon dioxide concentration of the stack gas. | Method 3A or 3B at 40 CFR part 60, appendix A–2 to part 60 of this chapter, or ANSI/ASME PTC 19.10–1981.[a] |
| | d. Measure the moisture content of the stack gas | Method 4 at 40 CFR part 60, appendix A–3 of this chapter. |
| | e. Measure the particulate matter emission concentration. | Method 5 or 17 (positive pressure fabric filters must use Method 5D) at 40 CFR part 60, appendix A–3 or A–6 of this chapter. |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology at 40 CFR part 60, appendix A–7 of this chapter. |
| 2. Hydrogen chloride | a. Select sampling ports location and the number of traverse points. | Method 1 at 40 CFR part 60, appendix A–1 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G at 40 CFR part 60, appendix A–2 of this chapter. |
| | c. Determine oxygen or carbon dioxide concentration of the stack gas. | Method 3A or 3B at 40 CFR part 60, appendix A–2 of this chapter, or ANSI/ASME PTC 19.10–1981.[a] |
| | d. Measure the moisture content of the stack gas | Method 4 at 40 CFR part 60, appendix A–3 of this chapter. |
| | e. Measure the hydrogen chloride emission concentration. | Method 26 or 26A (M26 or M26A) at 40 CFR part 60, appendix A–8 of this chapter. |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology at 40 CFR part 60, appendix A–7 of this chapter. |
| 3. Mercury | a. Select sampling ports location and the number of traverse points. | Method 1 at 40 CFR part 60, appendix A–1 of this chapter. |
| | b. Determine velocity and volumetric flow-rate of the stack gas. | Method 2, 2F, or 2G at 40 CFR part 60, appendix A–1 or A–2 of this chapter. |
| | c. Determine oxygen or carbon dioxide concentration of the stack gas. | Method 3A or 3B at 40 CFR part 60, appendix A–1 of this chapter, or ANSI/ASME PTC 19.10–1981.[a] |
| | d. Measure the moisture content of the stack gas | Method 4 at 40 CFR part 60, appendix A–3 of this chapter. |
| | e. Measure the mercury emission concentration | Method 29, 30A, or 30B (M29, M30A, or M30B) at 40 CFR part 60, appendix A–8 of this chapter or Method 101A at 40 CFR part 60, appendix B of this chapter, or ASTM Method D6784.[a] |
| | f. Convert emissions concentration to lb per MMBtu emission rates. | Method 19 F-factor methodology at 40 CFR part 60, appendix A–7 of this chapter. |
| 4. CO | a. Select the sampling ports location and the number of traverse points. | Method 1 at 40 CFR part 60, appendix A–1 of this chapter. |

TABLE 5 TO SUBPART DDDDD OF PART 63—PERFORMANCE TESTING REQUIREMENTS—Continued

| To conduct a performance test for the following pollutant... | You must... | Using... |
|---|---|---|
| | b. Determine oxygen concentration of the stack gas | Method 3A or 3B at 40 CFR part 60, appendix A–3 of this chapter, or ASTM D6522–00 (Reapproved 2005), or ANSI/ASME PTC 19.10–1981.[a] |
| | c. Measure the moisture content of the stack gas | Method 4 at 40 CFR part 60, appendix A–3 of this chapter. |
| | d. Measure the CO emission concentration | Method 10 at 40 CFR part 60, appendix A–4 of this chapter. Use a span value of 2 times the concentration of the applicable emission limit. |
| 5. Dioxins/Furans | a. Select the sampling ports location and the number of traverse points. | Method 1 at 40 CFR part 60, appendix A–1 of this chapter. |
| | b. Determine oxygen concentration of the stack gas | Method 3A or 3B at 40 CFR part 60, appendix A–3 of this chapter, or ASTM D6522–00 (Reapproved 2005),[a] or ANSI/ASME PTC 19.10–1981.[a] |
| | c. Measure the moisture content of the stack gas | Method 4 at 40 CFR part 60, appendix A–3 of this chapter. |
| | d. Measure the dioxins/furans emission concentration | Method 23 at 40 CFR part 60, appendix A–7 of this chapter. |
| | e. Multiply the measured dioxins/furans emission concentration by the appropriate toxic equivalency factor. | Table 11 of this subpart. |

[a] Incorporated by reference, see § 63.14.

As stated in § 63.7521, you must comply with the following requirements for fuel analysis testing for existing, new or reconstructed affected sources. However, equivalent methods (as defined in § 63.7575) may be used in lieu of the prescribed methods at the discretion of the source owner or operator:

TABLE 6 TO SUBPART DDDDD OF PART 63—FUEL ANALYSIS REQUIREMENTS

| To conduct a fuel analysis for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| 1. Mercury | a. Collect fuel samples | Procedure in § 63.7521(c) or ASTM D2234/D2234M[a] (for coal) or ASTM D6323[a] (for biomass), or equivalent. |
| | b. Composite fuel samples | Procedure in § 63.7521(d) or equivalent. |
| | c. Prepare composited fuel samples | EPA SW–846–3050B[a] (for solid samples), EPA SW–846–3020A[a] (for liquid samples), ASTM D2013/D2013M[a] (for coal), ASTM D5198[a] (for biomass), or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865[a] (for coal) or ASTM E711[a] (for biomass), or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173[a] or ASTM E871,[a] or equivalent. |
| | f. Measure mercury concentration in fuel sample. | ASTM D6722[a] (for coal), EPA SW–846–7471B[a] (for solid samples), or EPA SW–846–7470A[a] (for liquid samples), or equivalent. |
| | g. Convert concentration into units of pounds of pollutant per MMBtu of heat content. | |
| 2. Hydrogen Chloride | a. Collect fuel samples | Procedure in § 63.7521(c) or ASTM D2234/D2234M[a] (for coal) or ASTM D6323[a] (for biomass), or equivalent. |
| | b. Composite fuel samples | Procedure in § 63.7521(d) or equivalent. |
| | c. Prepare composited fuel samples | EPA SW–846–3050B[a] (for solid samples), EPA SW–846–3020A[a] (for liquid samples), ASTM D2013/D2013M[a] (for coal), or ASTM D5198[a] (for biomass), or equivalent. |
| | d. Determine heat content of the fuel type | ASTM D5865[a] (for coal) or ASTM E711[a] (for biomass), or equivalent. |
| | e. Determine moisture content of the fuel type | ASTM D3173[a] or ASTM E871,[a] or equivalent. |
| | f. Measure chlorine concentration in fuel sample. | EPA SW–846–9250,[a] ASTM D6721[a] (for coal), or ASTM E776[a] (for biomass), or equivalent. |
| | g. Convert concentrations into units of pounds of pollutant per MMBtu of heat content. | |
| 3. Mercury Fuel Specification for other gas 1 fuels. | a. Measure mercury concentration in the fuel sample. | ASTM D5954,[a] ASTM D6350,[a] ISO 6978–1:2003(E),[a] or ISO 6978–2:2003(E)[a], or equivalent. |
| | b. Convert concentration to unit of micrograms/cubic meter. | |

TABLE 6 TO SUBPART DDDDD OF PART 63—FUEL ANALYSIS REQUIREMENTS—Continued

| To conduct a fuel analysis for the following pollutant . . . | You must . . . | Using . . . |
|---|---|---|
| 4. Hydrogen Sulfide Fuel Specification for other gas 1 fuels. | a. Measure total hydrogen sulfide .....<br>b. Convert to ppm ..... | ASTM D4084a or equivalent. |

[a] Incorporated by reference, see § 63.14.

As stated in § 63.7520, you must comply with the following requirements for establishing operating limits:

TABLE 7 TO SUBPART DDDDD OF PART 63—ESTABLISHING OPERATING LIMITS

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must . . . | Using . . . | According to the following requirements |
|---|---|---|---|---|
| 1. Particulate matter or mercury. | a. Wet scrubber operating parameters. | i. Establish a site-specific minimum pressure drop and minimum flow rate operating limit according to § 63.7530(b). | (1) Data from the pressure drop and liquid flow rate monitors and the particulate matter or mercury performance test. | (a) You must collect pressure drop and liquid flow rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the lowest hourly average pressure drop and liquid flow rate by computing the hourly averages using all of the 15-minute readings taken during each performance test. |
| | b. Electrostatic precipitator operating parameters (option only for units that operate wet scrubbers). | i. Establish a site-specific minimum total secondary electric power input according to § 63.7530(b). | (1) Data from the voltage and secondary amperage monitors during the particulate matter or mercury performance test. | (a) You must collect secondary voltage and secondary amperage for each ESP cell and calculate total secondary electric power input data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the average total secondary electric power input by computing the hourly averages using all of the 15-minute readings taken during each performance test. |
| 2. Hydrogen Chloride ..... | a. Wet scrubber operating parameters. | i. Establish site-specific minimum pressure drop, effluent pH, and flow rate operating limits according to § 63.7530(b). | (1) Data from the pressure drop, pH, and liquid flow-rate monitors and the hydrogen chloride performance test. | (a) You must collect pH and liquid flow-rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the hourly average pH and liquid flow rate by computing the hourly averages using all of the 15-minute readings taken during each performance test. |

TABLE 7 TO SUBPART DDDDD OF PART 63—ESTABLISHING OPERATING LIMITS—Continued

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must . . . | Using . . . | According to the following requirements |
|---|---|---|---|---|
| | b. Dry scrubber operating parameters. | i. Establish a site-specific minimum sorbent injection rate operating limit according to § 63.7530(b). If different acid gas sorbents are used during the hydrogen chloride performance test, the average value for each sorbent becomes the site-specific operating limit for that sorbent. | (1) Data from the sorbent injection rate monitors and hydrogen chloride or mercury performance test. | (a) You must collect sorbent injection rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the hourly average sorbent injection rate by computing the hourly averages using all of the 15-minute readings taken during each performance test.<br>(c) Determine the lowest hourly average of the three test run averages established during the performance test as your operating limit. When your unit operates at lower loads, multiply your sorbent injection rate by the load fraction (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5) to determine the required injection rate. |
| 3. Mercury and dioxins/furans. | a. Activated carbon injection. | i. Establish a site-specific minimum activated carbon injection rate operating limit according to § 63.7530(b). | (1) Data from the activated carbon rate monitors and mercury and dioxins/furans performance tests. | (a) You must collect activated carbon injection rate data every 15 minutes during the entire period of the performance tests;<br>(b) Determine the hourly average activated carbon injection rate by computing the hourly averages using all of the 15-minute readings taken during each performance test.<br>(c) Determine the lowest hourly average established during the performance test as your operating limit. When your unit operates at lower loads, multiply your activated carbon injection rate by the load fraction (e.g., actual heat input divided by heat input during performance test, for 50 percent load, multiply the injection rate operating limit by 0.5) to determine the required injection rate. |
| 4. Carbon monoxide ..... | a. Oxygen ..... | i. Establish a unit-specific limit for minimum oxygen level according to § 63.7520. | (1) Data from the oxygen monitor specified in § 63.7525(a). | (a) You must collect oxygen data every 15 minutes during the entire period of the performance tests; |

TABLE 7 TO SUBPART DDDDD OF PART 63—ESTABLISHING OPERATING LIMITS—Continued

| If you have an applicable emission limit for . . . | And your operating limits are based on . . . | You must . . . | Using . . . | According to the following requirements |
|---|---|---|---|---|
| | | | | (b) Determine the hourly average oxygen concentration by computing the hourly averages using all of the 15-minute readings taken during each performance test.<br>(c) Determine the lowest hourly average established during the performance test as your minimum operating limit. |
| 5. Any pollutant for which compliance is demonstrated by a performance test. | a. Boiler or process heater operating load. | i. Establish a unit specific limit for maximum operating load according to § 63.7520(c). | (1) Data from the operating load monitors or from steam generation monitors. | (a) You must collect operating load or steam generation data every 15 minutes during the entire period of the performance test.<br>(b) Determine the average operating load by computing the hourly averages using all of the 15-minute readings taken during each performance test.<br>(c) Determine the average of the three test run averages during the performance test, and multiply this by 1.1 (110 percent) as your operating limit. |

As stated in § 63.7540, you must show continuous compliance with the emission limitations for affected sources according to the following:

TABLE 8 TO SUBPART DDDDD OF PART 63—DEMONSTRATING CONTINUOUS COMPLIANCE

| If you must meet the following operating limits or work practice standards . . . | You must demonstrate continuous compliance by . . . |
|---|---|
| 1. Opacity | a. Collecting the opacity monitoring system data according to § 63.7525(c) and § 63.7535; and<br>b. Reducing the opacity monitoring data to 6-minute averages; and<br>c. Maintaining opacity to less than or equal to 10 percent (daily block average). |
| 2. Fabric Filter Bag Leak Detection Operation | Installing and operating a bag leak detection system according to § 63.7525 and operating the fabric filter such that the requirements in § 63.7540(a)(9) are met. |
| 3. Wet Scrubber Pressure Drop and Liquid Flow-rate. | a. Collecting the pressure drop and liquid flow rate monitoring system data according to §§ 63.7525 and 63.7535; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average pressure drop and liquid flow-rate at or above the operating limits established during the performance test according to § 63.7530(b). |
| 4. Wet Scrubber pH | a. Collecting the pH monitoring system data according to §§ 63.7525 and 63.7535; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average pH at or above the operating limit established during the performance test according to § 63.7530(b). |
| 5. Dry Scrubber Sorbent or Carbon Injection Rate. | a. Collecting the sorbent or carbon injection rate monitoring system data for the dry scrubber according to §§ 63.7525 and 63.7535; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average sorbent or carbon injection rate at or above the minimum sorbent or carbon injection rate as defined in § 63.7575. |
| 6. Electrostatic Precipitator Total Secondary Electric Power Input. | a. Collecting the total secondary electric power input monitoring system data for the electrostatic precipitator according to §§ 63.7525 and 63.7535; and<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average total secondary electric power input at or above the operating limits established during the performance test according to § 63.7530(b). |
| 7. Fuel Pollutant Content | a. Only burning the fuel types and fuel mixtures used to demonstrate compliance with the applicable emission limit according to § 63.7530(b) or (c) as applicable; and<br>b. Keeping monthly records of fuel use according to § 63.7540(a). |

TABLE 8 TO SUBPART DDDDD OF PART 63—DEMONSTRATING CONTINUOUS COMPLIANCE—Continued

| If you must meet the following operating limits or work practice standards . . . | You must demonstrate continuous compliance by . . . |
|---|---|
| 8. Oxygen content | a. Continuously monitor the oxygen content in the combustion exhaust according to § 63.7525(a).<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintain the 12-hour block average oxygen content in the exhaust at or above the lowest hourly average oxygen level measured during the most recent carbon monoxide performance test. |
| 9. Boiler or process heater operating load | a. Collecting operating load data or steam generation data every 15 minutes.<br>b. Reducing the data to 12-hour block averages; and<br>c. Maintaining the 12-hour average operating load at or below the operating limit established during the performance test according to § 63.7520(c). |

As stated in § 63.7550, you must comply with the following requirements for reports:

TABLE 9 TO SUBPART DDDDD OF PART 63—REPORTING REQUIREMENTS

| You must submit a(n) | The report must contain . . . | You must submit the report . . . |
|---|---|---|
| 1. Compliance report | a. Information required in § 63.7550(c)(1) through (12); and<br>b. If there are no deviations from any emission limitation (emission limit and operating limit) that applies to you and there are no deviations from the requirements for work practice standards in Table 3 to this subpart that apply to you, a statement that there were no deviations from the emission limitations and work practice standards during the reporting period. If there were no periods during which the CMSs, including continuous emissions monitoring system, continuous opacity monitoring system, and operating parameter monitoring systems, were out-of-control as specified in § 63.8(c)(7), a statement that there were no periods during which the CMSs were out-of-control during the reporting period; and<br>c. If you have a deviation from any emission limitation (emission limit and operating limit) where you are not using a CMS to comply with that emission limit or operating limit, or a deviation from a work practice standard during the reporting period, the report must contain the information in § 63.7550(d); and<br>d. If there were periods during which the CMSs, including continuous emissions monitoring system, continuous opacity monitoring system, and operating parameter monitoring systems, were out-of-control as specified in § 63.8(c)(7), or otherwise not operating, the report must contain the information in § 63.7550(e). | Semiannually, annually, or biennially according to the requirements in § 63.7550(b). |

As stated in § 63.7565, you must comply with the applicable General Provisions according to the following:

TABLE 10 TO SUBPART DDDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD

| Citation | Subject | Applies to subpart DDDDD |
|---|---|---|
| § 63.1 | Applicability | Yes. |
| § 63.2 | Definitions | Yes. Additional terms defined in § 63.7575 |
| § 63.3 | Units and Abbreviations | Yes. |
| § 63.4 | Prohibited Activities and Circumvention | Yes. |
| § 63.5 | Preconstruction Review and Notification Requirements | Yes. |
| § 63.6(a), (b)(1)–(b)(5), (b)(7), (c) | Compliance with Standards and Maintenance Requirements | Yes. |
| § 63.6(e)(1)(i) | General duty to minimize emissions. | No. See § 63.7500(a)(3) for the general duty requirement. |
| § 63.6(e)(1)(ii) | Requirement to correct malfunctions as soon as practicable. | No. |
| § 63.6(e)(3) | Startup, shutdown, and malfunction plan requirements. | No. |
| § 63.6(f)(1) | Startup, shutdown, and malfunction exemptions for compliance with non-opacity emission standards.. | No. |
| § 63.6(f)(2) and (3) | Compliance with non-opacity emission standards. | Yes. |
| § 63.6(g) | Use of alternative standards | Yes. |
| § 63.6(h)(1) | Startup, shutdown, and malfunction exemptions to opacity standards. | No. See § 63.7500(a). |
| § 63.6(h)(2) to (h)(9) | Determining compliance with opacity emission standards | Yes. |

TABLE 10 TO SUBPART DDDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD—Continued

| Citation | Subject | Applies to subpart DDDDD |
|---|---|---|
| § 63.6(i) | Extension of compliance. | Yes. |
| § 63.6(j) | Presidential exemption. | Yes. |
| § 63.7(a), (b), (c), and (d) | Performance Testing Requirements | Yes. |
| § 63.7(e)(1) | Conditions for conducting performance tests. | No. Subpart DDDDD specifies conditions for conducting performance tests at § 63.7520(a). |
| § 63.7(e)(2)–(e)(9), (f), (g), and (h) | Performance Testing Requirements | Yes. |
| § 63.8(a) and (b) | Applicability and Conduct of Monitoring | Yes. |
| § 63.8(c)(1) | Operation and maintenance of CMS | Yes. |
| § 63.8(c)(1)(i) | General duty to minimize emissions and CMS operation | No. See § 63.7500(a)(3). |
| § 63.8(c)(1)(ii) | Operation and maintenance of CMS | Yes. |
| § 63.8(c)(1)(iii) | Startup, shutdown, and malfunction plans for CMS | No. |
| § 63.8(c)(2) to (c)(9) | Operation and maintenance of CMS | Yes. |
| § 63.8(d)(1) and (2) | Monitoring Requirements, Quality Control Program | Yes. |
| § 63.8(d)(3) | Written procedures for CMS | Yes, except for the last sentence, which refers to a startup, shutdown, and malfunction plan. Startup, shutdown, and malfunction plans are not required. |
| § 63.8(e) | Performance evaluation of a CMS | Yes. |
| § 63.8(f) | Use of an alternative monitoring method. | Yes. |
| 63.8(g) | Reduction of monitoring data. | Yes. |
| § 63.9 | Notification Requirements | Yes. |
| § 63.10(a), (b)(1) | Recordkeeping and Reporting Requirements | Yes. |
| § 63.10(b)(2)(i) | Recordkeeping of occurrence and duration of startups or shutdowns | Yes. |
| § 63.10(b)(2)(ii) | Recordkeeping of malfunctions | No. See § 63.7555(d)(7) for recordkeeping of occurrence and duration and § 63.7555(d)(8) for actions taken during malfunctions. |
| § 63.10(b)(2)(iii) | Maintenance records | Yes. |
| § 63.10(b)(2)(iv) and (v) | Actions taken to minimize emissions during startup, shutdown, or malfunction. | No. |
| § 63.10(b)(2)(vi) | Recordkeeping for CMS malfunctions | Yes. |
| § 63.10(b)(2)(vii) to (xiv) | Other CMS requirements | Yes. |
| § 63.10(b)(3) | Recordkeeping requirements for applicability determinations | No. |
| § 63.10(c)(1) to (9) | Recordkeeping for sources with CMS | Yes. |
| § 63.10(c)(10) and (11) | Recording nature and cause of malfunctions, and corrective actions | No. See § 63.7555(d)(7) for recordkeeping of occurrence and duration and § 63.7555(d)(8) for actions taken during malfunctions. |
| § 63.10(c)(12) and (13) | Recordkeeping for sources with CMS | Yes. |
| § 63.10(c)(15) | Use of startup, shutdown, and malfunction plan | No. |
| § 63.10(d)(1) and (2) | General reporting requirements | Yes. |
| § 63.10(d)(3) | Reporting opacity or visible emission observation results | No. |
| § 63.10(d)(4) | Progress reports under an extension of compliance | Yes. |
| § 63.10(d)(5) | Startup, shutdown, and malfunction reports | No. See § 63.7550(c)(11) for malfunction reporting requirements. |
| § 63.10(e) and (f) | | Yes. |
| § 63.11 | Control Device Requirements | No. |
| § 63.12 | State Authority and Delegation | Yes. |
| § 63.13–63.16 | Addresses, Incorporation by Reference, Availability of Information, Performance Track Provisions. | Yes. |
| § 63.1(a)(5),(a)(7)–(a)(9), (b)(2), (c)(3)-(4), (d), 63.6(b)(6), (c)(3), (c)(4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv), 63.8(a)(3), 63.9(b)(3), (h)(4), 63.10(c)(2)–(4), (c)(9).. | Reserved | No. |

TABLE 11 TO SUBPART DDDDD OF PART 63—TOXIC EQUIVALENCY FACTORS FOR DIOXINS/FURANS

| Dioxin/furan congener | Toxic equivalency factor |
|---|---|
| 2,3,7,8-tetrachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,7,8-pentachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |

TABLE 11 TO SUBPART DDDDD OF PART 63—TOXIC EQUIVALENCY FACTORS FOR DIOXINS/FURANS—Continued

| Dioxin/furan congener | Toxic equivalency factor |
|---|---|
| 1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin | 0.01 |
| octachlorinated dibenzo-p-dioxin | 0.0003 |
| 2,3,7,8-tetrachlorinated dibenzofuran | 0.1 |
| 2,3,4,7,8-pentachlorinated dibenzofuran | 0.3 |
| 1,2,3,7,8-pentachlorinated dibenzofuran | 0.03 |
| 1,2,3,4,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzofuran | 0.1 |
| 2,3,4,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzofuran | 0.01 |
| 1,2,3,4,7,8,9-heptachlorinated dibenzofuran | 0.01 |
| octachlorinated dibenzofuran | 0.0003 |

TABLE 12 TO SUBPART DDDDD OF PART 63—ALTERNATIVE EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS THAT COMMENCED CONSTRUCTION OR RECONSTRUCTION AFTER JUNE 4, 2010, AND BEFORE MAY 20, 2011

| If your boiler or process heater is in this subcategory | For the following pollutants | The emissions must not exceed the following emission limits, except during periods of startup and shutdown | Using this specified sampling volume or test run duration |
|---|---|---|---|
| 1. Units in all subcategories designed to burn solid fuel | a. Mercury | 3.5E–06 lb per MMBtu of heat input. | For M29, collect a minimum of 2 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| 2. Units in all subcategories designed to burn solid fuel that combust at least 10 percent biomass/bio-based solids on an annual heat input basis and less than 10 percent coal/solid fossil fuels on an annual heat input basis. | a. Particulate Matter | 0.008 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.004 lb per MMBtu of heat input. | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| 3. Units in all subcategories designed to burn solid fuel that combust at least 10 percent coal/solid fossil fuels on an annual heat input basis and less than 10 percent biomass/bio-based solids on an annual heat input basis. | a. Particulate Matter | 0.0011 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 3 dscm per run. |
| | b. Hydrogen Chloride | 0.0022 lb per MMBtu of heat input. | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| 4. Units designed to burn pulverized coal/solid fossil fuel. | a. CO | 90 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 5. Stokers designed to burn coal/solid fossil fuel | a. CO | 7 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 6. Fluidized bed units designed to burn coal/solid fossil fuel. | a. CO | 30 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |

TABLE 12 TO SUBPART DDDDD OF PART 63—ALTERNATIVE EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS THAT COMMENCED CONSTRUCTION OR RECONSTRUCTION AFTER JUNE 4, 2010, AND BEFORE MAY 20, 2011—Continued

| If your boiler or process heater is in this subcategory | For the following pollutants | The emissions must not exceed the following emission limits, except during periods of startup and shutdown | Using this specified sampling volume or test run duration |
|---|---|---|---|
| | b. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 7. Stokers designed to burn biomass/bio-based solids | a. CO | 560 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.005 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 8. Fluidized bed units designed to burn biomass/bio-based solids. | a. CO | 260 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.02 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 9. Suspension burners/Dutch Ovens designed to burn biomass/bio-based solids. | a. CO | 1,010 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 10. Fuel cells designed to burn biomass/bio-based solids. | a. CO | 470 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.003 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 11. Hybrid suspension/grate units designed to burn biomass/bio-based solids. | a. CO | 1,500 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | b. Dioxins/Furans | 0.2 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 12. Units designed to burn liquid fuel | a. Particulate Matter | 0.002 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 2 dscm per run. |
| | b. Hydrogen Chloride | 0.0032 lb per MMBtu of heat input. | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 3.0E–07 lb per MMBtu of heat input. | For M29, collect a minimum of 2 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 3 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | e. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 13. Units designed to burn liquid fuel located in non-continental States and territories. | a. Particulate Matter | 0.002 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 2 dscm per run. |

TABLE 12 TO SUBPART DDDDD OF PART 63—ALTERNATIVE EMISSION LIMITS FOR NEW OR RECONSTRUCTED BOILERS AND PROCESS HEATERS THAT COMMENCED CONSTRUCTION OR RECONSTRUCTION AFTER JUNE 4, 2010, AND BEFORE MAY 20, 2011—Continued

| If your boiler or process heater is in this subcategory | For the following pollutants | The emissions must not exceed the following emission limits, except during periods of startup and shutdown | Using this specified sampling volume or test run duration |
|---|---|---|---|
| | b. Hydrogen Chloride | 0.0032 lb per MMBtu of heat input. | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 7.8E–07 lb per MMBtu of heat input. | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 51 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | e. Dioxins/Furans | 0.002 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |
| 14. Units designed to burn gas 2 (other) gases | a. Particulate Matter | 0.0067 lb per MMBtu of heat input (30-day rolling average for units 250 MMBtu/hr or greater, 3-run average for units less than 250 MMBtu/hr). | Collect a minimum of 1 dscm per run. |
| | b. Hydrogen Chloride | 0.0017 lb per MMBtu of heat input. | For M26A, collect a minimum of 1 dscm per run; for M26, collect a minimum of 60 liters per run. |
| | c. Mercury | 7.9E–06 lb per MMBtu of heat input. | For M29, collect a minimum of 1 dscm per run; for M30A or M30B, collect a minimum sample as specified in the method; for ASTM D6784 [a] collect a minimum of 2 dscm. |
| | d. CO | 3 ppm by volume on a dry basis corrected to 3 percent oxygen. | 1 hr minimum sampling time. |
| | e. Dioxins/Furans | 0.08 ng/dscm (TEQ) corrected to 7 percent oxygen. | Collect a minimum of 4 dscm per run. |

[a] Incorporated by reference, see § 63.14.

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Part VI

## Environmental Protection Agency

40 CFR Part 60
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

**[EPA–HQ–OAR–2003–0119; FRL–9273–4]**

**RIN 2060–AO12**

## Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This action promulgates EPA's final response to the 2001 voluntary remand of the December 1, 2000, new source performance standards and emission guidelines for commercial and industrial solid waste incineration units and the vacatur and remand of several definitions by the District of Columbia Circuit Court of Appeals in 2007. In addition, this action includes the 5-year technology review of the new source performance standards and emission guidelines required under section 129 of the Clean Air Act. This action also promulgates other amendments that EPA believes are necessary to address air emissions from commercial and industrial solid waste incineration units.

**DATES:** The final rule is effective on May 20, 2011. The incorporation by reference of certain publications listed in the final rule are approved by the Director of the Federal Register as of May 20, 2011.

**ADDRESSES:** EPA established a single docket under Docket ID Number EPA–HQ–OAR–2003–0119 for this action. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information 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 through *http://www.regulations.gov*, or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Toni Jones, Natural Resources and Commerce Group, Sector Policies and Programs Division (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0316; facsimile number: (919) 541–3470; e-mail address: *jones.toni@epa.gov*, or Ms. Charlene Spells, Natural Resources and Commerce Group, Sector Policies and Programs Division (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5255; facsimile number: (919) 541–3470; e-mail address: *spells.charlene@epa.gov.*

**SUPPLEMENTARY INFORMATION:** *Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

7-PAH 7 Polyaromatic Hydrocarbons
16-PAH 16 Polyaromatic Hydrocarbons
ACI Activated Carbon Injection
ANSI American National Standards Institute
ASME American Society of Mechanical Engineers
ASTM American Society for Testing and Materials
BAT Best Available Technology
CAA Clean Air Act
Cd Cadmium
CDX Central Data Exchange
CEMS Continuous Emissions Monitoring Systems
CFR Code of Federal Regulations
CISWI Commercial and Industrial Solid Waste Incineration
CO Carbon Monoxide
$CO_2$ Carbon Dioxide
Catalyst Carbon Monoxide Oxidation Catalyst
The Court U.S. Court of Appeals for the District of Columbia Circuit
CSA Canadian Standards Association
CWA Clean Water Act
D/F Dioxin/Furan
DIFF Dry Sorbent Injection Fabric Filter
dscf Dry Standard Cubic Foot
dscm Dry Standard Cubic Meter
EG Emission Guidelines
EJ Environmental Justice
EMPC Estimated Maximum Possible Concentration
EOM Extractable Organic Matter
ERT Electronic Reporting Tool
ERU Energy Recovery Unit
ESP Electrostatic Precipitator
FF Fabric Filters
HAP Hazardous Air Pollutants
HCl Hydrogen Chloride
Hg Mercury
HMI Hospital, Medical and Infectious
HMIWI Hospital, Medical and Infectious Waste Incineration
HWC Hazardous Waste Combustor
ICR Information Collection Request
ISO International Standards Organization
LBMS Linkageless Burner Management System
LML Lowest Measured Level
MACT Maximum Achievable Control Technology
MDL Method Detection Level
mg/dscm Milligrams per Dry Standard Cubic Meter
mmBtu/hr Million British Thermal Units per Hour
MSW Municipal Solid Waste
MW Megawatts
MWC Municipal Waste Combustor
NAAQS National Ambient Air Quality Standards
NAICS North American Industrial Classification System
ND Nondetect
NESHAP National Emission Standards for Hazardous Air Pollutants
ng/dscm Nanograms per Dry Standard Cubic Meter
$NO_X$ Nitrogen Oxides
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
O&M Operations and Maintenance
OMB Office of Management and Budget
OP Office of Policy
OSWI Other Solid Waste Incineration
Pb Lead
PCBs Polychlorinated Biphenyls
PCDD Polychlorinated Dibenzodioxins
PCDF Polychlorinated Dibenzofurans
PM Particulate Matter
POM Polycyclic Organic Matter
ppm Parts Per Million
ppmv Parts Per Million by Volume
ppmvd Parts Per Million by Dry Volume
PRA Paper Reduction Act
PS Performance Specification
QA/QC Quality Assurance/Quality Control
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RIN Regulatory Information Number
RTO Regenerative Thermal Oxidizer
SCR Selective Catalytic Reduction
SARU Sulfuric Acid Regeneration Unit
SNCR Selective Noncatalytic Reduction
$SO_2$ Sulfur Dioxide
SSI Sewage Sludge Incineration
SSM Startup, Shutdown, and Malfunction
SWDA Solid Waste Disposal Act
TBtu Tera British Thermal Unit
TEF Total Equivalency Factor
TEQ Toxic Equivalency
TMB Total Mass Basis
tpy Tons Per Year
TRI Toxics Release Inventory
TTN Technology Transfer Network
ug/dscm Micrograms per Dry Standard Cubic Meter
UMRA Unfunded Mandates Reform Act
UL Upper Limit
UPL Upper Prediction Limit
UTL Upper Tolerance Limit
VCS Voluntary Consensus Standards
WWW Worldwide Web

*Organization of this document.* The information presented in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?

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B. What is the history of the CISWI standards?
C. How is the solid waste definition addressed in this final rule?
D. What is the relationship between the final rule and other combustion rules?
E. What is EPA's approach for conducting a 5-year review under CAA section 129(a)(5)?
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F. What is the compliance schedule?
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H. What are the requirements for submission of emissions test results to EPA?
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IV. Summary of Significant Changes Since Proposal
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C. Control Technology Assumptions for the Floor and Beyond-the-Floor
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F. New Data/Corrections to Existing Data
G. Testing and Monitoring
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L. Biased Data Collection From Phase II ICR Testing
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B. What are the water and solid waste impacts?
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F. What are the benefits?
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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 and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. General Information

### *A. Does this action apply to me?*

Categories and entities potentially affected by the final action are those that operate CISWI units. The NSPS and EG, hereinafter referred to as "standards," for CISWI affect the following categories of sources:

| Category | NAICS code | Examples of potentially regulated entities |
|---|---|---|
| Any industrial or commercial facility using a solid waste incinerator. | 211, 212, 486 | Mining, oil and gas exploration operations; pipeline operators. |
| | 221 | Utility providers. |
| | 321, 322, 337 | Manufacturers of wood products; manufacturers of pulp, paper and paperboard; manufacturers of furniture and related products. |
| | 325, 326 | Manufacturers of chemicals and allied products; manufacturers of plastics and rubber products. |
| | 327 | Manufacturers of cement; nonmetallic mineral product manufacturing. |
| | 333, 336 | Manufacturers of machinery; manufacturers of transportation equipment. |
| | 423, 44 | Merchant wholesalers, durable goods; retail trade. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the final action. If you have any questions regarding the applicability of the final action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### *B. Where can I get a copy of this document?*

In addition to being available in the docket, an electronic copy of the final action will also be available on the WWW through the TTN. Following signature, a copy of the final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

### *C. Judicial Review*

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the Court by May 20, 2011. Section 307(d)(7)(B) of the CAA further provides that "only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment can be raised during judicial review." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to both of the contacts listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

## II. Background Information

*A. What is the statutory authority for this final rule?*

Section 129 of the CAA, entitled "Solid Waste Combustion," requires EPA to develop and adopt standards for solid waste incineration units pursuant to CAA sections 111 and 129. Section 129(a)(1)(A) of the CAA requires EPA to establish performance standards, including emission limitations, for "solid waste incineration units" generally and, in particular, for "solid waste incineration units combusting commercial or industrial waste" (CAA section 129(a)(1)(D)). Section 129 of the CAA defines "solid waste incineration unit" as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public" (section 129(g)(1)). Section 129 of the CAA also provides that "solid waste" shall have the meaning established by EPA pursuant to its authority under the RCRA (section 129(g)(6)).

In *Natural Resources Defense Council* v. *EPA,* 489 F.3d 1250 (DC Cir. 2007), the Court vacated the CISWI Definitions Rule (70 FR 55568, September 22, 2005), which EPA issued pursuant to CAA section 129(a)(1)(D). In that rule, EPA defined the term "commercial or industrial solid waste incineration unit" to mean a combustion unit that combusts "commercial or industrial waste." The rule defined "commercial or industrial waste" to mean waste combusted at a unit that does not recover thermal energy from the combustion for a useful purpose. Under these definitions, only those units that combusted commercial or industrial waste and were not designed to, or did not operate to, recover thermal energy from the combustion, were subject to CAA section 129 standards. In vacating the rule, the Court found that the definitions in the amendments to the CISWI regulations were inconsistent with the CAA. Specifically, the Court held that the term "solid waste incineration unit" in CAA section 129(g)(1) "unambiguously include[s] among the incineration units subject to its standards any facility that combusts any commercial or industrial solid waste material at all—subject to the four statutory exceptions identified [in CAA section 129(g)(1)]" *NRDC* v. *EPA,* 489 F.3d at 1257–58.

In response to the Court's vacatur of the CISWI Definitions Rule, EPA initiated a rulemaking to define which non-hazardous secondary materials is "solid waste" for purposes of subtitle D (non-hazardous waste) of RCRA when burned in a combustion unit. See 74 FR 41 (January 2, 2009) soliciting comment on whether certain non-hazardous secondary materials used as alternative fuels or ingredients are solid wastes within the meaning of subtitle D of the RCRA. That definition, once established, will determine the applicability of CAA section 129(a) to commercial and industrial combustion units.

On the same day EPA proposed standards for CISWI units, EPA issued a proposed definition of non-hazardous secondary materials that are solid waste pursuant to subtitle D of RCRA (75 FR 31844, June 4, 2010). In a parallel action to today's final CISWI rule, EPA is promulgating a final definition of solid waste that identifies whether non-hazardous secondary materials burned as fuels in combustion units are solid waste. That action, hereinafter referred to as the "Non-hazardous Solid Waste Definition Rulemaking," is relevant to this proceeding because some ERUs and waste-burning kilns combust secondary materials in their combustion units which are defined as solid waste under the new definition. Units that combust solid waste (as defined under the new non-hazardous solid waste definition) will be subject to standards in the final CAA section 129 CISWI rules rather than to the standards under CAA section 112 applicable to boilers, process heaters, and cement kilns.

At proposal, we acknowledged that we had incomplete information on the exact nature of the non-hazardous secondary materials that ERUs and waste-burning kilns combust. For example, we indicated that we lacked complete information concerning the provider(s) of the non-hazardous secondary materials, how much processing the non-hazardous secondary materials may have undergone, if any, and other issues potentially relevant in a determination as to whether non-hazardous secondary materials are solid waste, all information relevant not only in this rulemaking but also in developing a definition in the concurrent Non-hazardous Solid Waste Definition Rulemaking.

In developing standards for this final rule, we used best efforts to estimate which units would have been classified as CISWI (i.e., units combusting solid waste) had the final definition of non-hazardous solid waste been in place at the time of the performance testing. The standards (and, necessarily, the pool of best performers establishing the floors for each standard) are based on the performance of this universe of sources.[1] In evaluating which sources would have been classified as CISWI had the new definition of solid waste been effective, EPA used the information currently available on which non-hazardous secondary materials the sources combust, as supplemented by information obtained from public comment and further information gathered by EPA after the public comment period of this rule.

Energy recovery units (*i.e.,* boilers and process heaters) and waste-burning kilns (*i.e.,* cement kilns) that are burning solid waste (as defined in new section 241) will be subject to today's standards.

Sections 111(b) and 129(a) of the CAA address emissions from new CISWI units (*i.e.,* NSPS) and CAA sections 111(d) and 129(b) address emissions from existing CISWI units (*i.e.,* EG). The NSPS are directly enforceable federal regulations and under CAA section 129(f)(1) become effective 6 months after promulgation. Under CAA section 129(f)(2), the EG become effective and enforceable no later than 3 years after EPA approves a state plan implementing the EG or 5 years after the date they are promulgated, whichever is earlier.

The CAA sets forth a two-stage approach to regulating emissions from solid waste incinerator units. The statute also provides EPA with substantial discretion to distinguish among classes, types, and sizes of incineration units within a category while setting standards. In the first stage of setting standards, CAA section 129(a)(2) requires EPA to establish technology-based emission standards that reflect levels of control EPA determines are achievable for new and existing units, after considering costs, nonair quality health and environmental impacts and energy requirements associated with the implementation of the standards. Section 129(a)(5) of the CAA then directs EPA to review those

[1] Section 112(D) MACT standards are based on the performance of sources at a moment in time (or over some demarcated timeframe), and EPA therefore bases those standards on performance of sources classified as part of the source category at the time their performance is evaluated (*i.e.,* the time of performance testing). However, EPA could not use this approach here. Sources combusting non-hazardous secondary materials, the best example being alternative fuels, were not classified as CISWI absent a regulatory definition of solid waste classifying such secondary materials. In order to issue the CISWI standards by the mandated promulgation deadline, EPA thus deviated from its usual practice and based the standards on the performance of devices which would have been classified as CISWI had the final waste definition been in place at the time of the performance testing even though these sources were not CISWI at the time. There was no approach that would be based on the sources' actual status that would have allowed EPA to complete this CISWI rule by the time of the mandated deadline for promulgation.

standards and revise them as necessary every 5 years. In the second stage, CAA section 129(h)(3) requires EPA to determine whether further revisions of the standards are necessary in order to provide an ample margin of safety to protect public health. *See, e.g., NRDC and LEAN* v. *EPA,* 529 F.3d 1077, 1079–80 (D.C. Cir. 2008) addressing the similarly required two-stage approach under CAA sections 112(d) and (f) and upholding EPA's implementation of same.

In setting forth the methodology EPA must use to establish the first-stage technology-based standards for the NSPS and EG, CAA section 129(a)(2) provides that standards "applicable to solid waste incineration units promulgated under section 111 and this section shall reflect the maximum degree of reduction in emissions of [certain listed air pollutants] that the Administrator, taking into consideration the cost of achieving such emission reduction and any nonair quality health and environmental impacts and energy requirements, determines is achievable for new and existing units in each category." This level of control is referred to as a MACT standard.

In promulgating a MACT standard, EPA must first calculate the minimum stringency levels for new and existing solid waste incineration units in a category, generally based on levels of emissions control achieved or required to be achieved by the subject units. The minimum level of stringency is called the MACT "floor," and CAA section 129(a)(2) sets forth differing levels of minimum stringency that EPA's standards must achieve, based on whether they regulate new and reconstructed sources, or existing sources. For new and reconstructed sources, CAA section 129(a)(2) provides that the "degree of reduction in emissions that is deemed achievable * * * shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator." Emissions standards for existing units may be less stringent than standards for new units, but "shall not be less stringent than the average emissions limitation achieved by the best-performing 12 percent of units in the category."

Maximum Achievable Control Technology analyses involve an assessment of the emissions from the best-performing unit or units in a source category. The assessment can be based on actual emissions data, knowledge of the air pollution control in place in combination with actual emissions data, or on state regulatory requirements that may enable EPA to estimate the actual performance of the regulated units. For each source category, the assessment involves a review of actual emissions data with an appropriate accounting for emissions variability. Other methods of estimating emissions can be used, if the methods can be shown to provide reasonable estimates of the actual emissions performance of a source or sources. Where there is more than one method or technology to control emissions, the analysis may result in a series of potential regulations (called regulatory options), one of which is selected as MACT.

Each regulatory option EPA considers must be at least as stringent as the CAA's minimum stringency "floor" requirements. EPA must examine, but is not necessarily required to adopt, more stringent "beyond-the-floor" regulatory options to determine MACT. Unlike the floor minimum stringency requirements, EPA must consider various impacts of the more stringent regulatory options in determining whether MACT standards are to reflect "beyond-the-floor" requirements. If EPA concludes that the more stringent regulatory options have unreasonable impacts, EPA selects the "floor-based" regulatory option as MACT. However, if EPA concludes that impacts associated with "beyond-the-floor" levels of control are reasonable in light of additional emissions reductions achieved, EPA selects those levels as MACT.

The CAA requires that MACT for new sources be no less stringent than the emissions control achieved in practice by the best-controlled similar unit. Under CAA section 129(a)(2), EPA determines the best control currently in use for a given pollutant and establishes one potential regulatory option at the emission level achieved by that control with an appropriate accounting for emissions variability. More stringent potential beyond-the-floor regulatory options might reflect controls used on other sources that could be applied to the source category in question.

For existing sources, the CAA requires that MACT be no less stringent than the average emissions limitation achieved by the best-performing 12 percent of units in a source category. EPA must determine some measure of the average emissions limitation achieved by the best-performing 12 percent of units to form the floor regulatory option. More stringent beyond-the-floor regulatory options reflect other or additional controls capable of achieving better performance.

*B. What is the history of the CISWI standards?*

On December 1, 2000, EPA published a notice of final rulemaking establishing the NSPS and EG for CISWI units (60 FR 75338), hereinafter referred to as the 2000 CISWI rule. On August 17, 2001, EPA granted a Request for Reconsideration, pursuant to CAA section 307(d)(7)(B) of the CAA, submitted on behalf of the National Wildlife Federation and the Louisiana Environmental Action Network, related to the definition of "commercial and industrial solid waste incineration unit" and "commercial or industrial waste" in EPA's CISWI rulemaking. In granting the Petition for Reconsideration, EPA agreed to undertake further notice and comment proceedings related to these definitions. On January 30, 2001, Sierra Club filed a petition for review in the Court challenging EPA's final CISWI rule. On September 6, 2001, the Court entered an order granting EPA's motion for a voluntary remand of the CISWI rule, without vacatur. EPA's request for a voluntary remand of the final CISWI rule was taken to allow the EPA to address concerns related to EPA's procedures for establishing MACT floors for CISWI units in light of the Court's decision in *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855 (DC Cir. 2001)(*Cement Kiln*). Neither EPA's granting of the Petition for Reconsideration, nor the Court's order granting a voluntary remand, stayed, vacated, or otherwise influenced the effectiveness of the 2000 CISWI rule. Specifically, CAA section 307(d)(7)(B) provides that "reconsideration shall not postpone the effectiveness of the rule," except that "[t]he effectiveness of the rule may be stayed during such reconsideration * * * by the Administrator or the Court for a period not to exceed three months." Neither EPA nor the Court stayed the effectiveness of the final CISWI regulations in connection with the reconsideration petition. In addition, the Court granted EPA's motion for a remand without vacatur; therefore, the remand order had no impact on the implementation of the 2000 CISWI rule.

On February 17, 2004, EPA published a proposed rule soliciting comments on the definitions of "solid waste," "commercial and industrial waste," and "commercial and industrial solid waste incineration unit." On September 22, 2005, EPA published in the **Federal Register** the final rule reflecting our decisions with respect to the CISWI Definitions Rule. The rule was challenged and, on June 8, 2007, the Court vacated and remanded the CISWI

Definitions Rule. In vacating the rule, the Court found that CAA section 129 unambiguously includes among the incineration units subject to its standards, any facility that combusts any solid waste material, subject to four statutory exceptions. While the Court vacated the CISWI Definitions Rule, the 2000 CISWI rule remains in effect.

On June 4, 2010, EPA proposed revised NSPS and EG for CISWI units (75 FR 31938). Today's final action constitutes EPA's response to the voluntary remand of the 2000 CISWI rule and to the 2007 vacatur and remand of the CISWI Definitions Rule. In addition, these amendments address the 5-year technology review that is required under CAA section 129(a)(5).

*C. How is the solid waste definition addressed in this final rule?*

The RCRA definition of solid waste is integral in defining the CISWI source category. EPA defines the non-hazardous secondary materials that are solid waste under RCRA in the final Non-hazardous Solid Waste Definition Rulemaking. At proposal, the Non-hazardous Solid Waste Definition Rulemaking proposed a definition of solid waste and identified an "alternative approach" for consideration and comment. However, the final solid waste definition does not incorporate the "alternative approach," and more closely reflects the proposed definition of non-hazardous secondary materials that are solid waste.

*D. What is the relationship between the final rule and other combustion rules?*

These amendments address the combustion of solid waste materials (as defined by the Administrator under RCRA in the concurrent Non-hazardous Solid Waste Definition Rulemaking) in combustion units at commercial and industrial facilities. If an owner or operator of a CISWI unit permanently ceases combusting solid waste, the affected unit would no longer be subject to this regulation under CAA section 129. Section 112 rules of the CAA, applicable to boilers and process heaters at major sources and boilers at area sources, are being promulgated in parallel actions that are relevant to this action because those standards would apply to subject boilers and process heaters that do not combust solid waste. Boilers and process heaters that combust solid waste are subject to CISWI as ERUs. EPA has also finalized revised CAA section 112 NESHAP from the Portland Cement Manufacturing Industry (75 FR 21136, September 9, 2010). Cement kilns combusting solid waste are waste-burning kilns subject to this final rule, not the otherwise applicable NESHAP.

*E. What is EPA's approach for conducting a 5-year review under CAA section 129(a)(5)?*

Section 129(a)(5) of the CAA requires EPA to conduct a review of the section 129 standards at 5-year intervals and, in accordance with CAA sections 129 and 111, revise the standards. We do not interpret CAA section 129(a)(5), together with CAA section 111, as requiring EPA to recalculate MACT floors in connection with this periodic review. (71 FR 27324, 27327–28, May 10, 2006; *NRDC and LEAN* v. *EPA,* 529 F.3d 1077, 1083–84 (DC Cir. 2008) (upholding EPA's interpretation that the periodic review requirement in CAA section 112(d)(6) does not impose an obligation to recalculate MACT floors). Rather, in conducting such periodic reviews, EPA attempts to assess the performance of and variability associated with control measures affecting emissions performance at sources in the subject source category (including the installed emissions control equipment), along with recent developments in practices, processes, and control technologies, and determines whether it is appropriate to revise the standards. This is the same general approach taken by EPA in periodically reviewing CAA section 111 standards, because CAA section 111 contains a similar review and revise provision.

Our obligation to conduct a 5-year review based on implementation of the 2000 CISWI rule is fulfilled with the finalization of these CISWI standards. This action responds to the vacatur and remand of the CISWI Definition Rule and the voluntary remand of the 2000 CISWI NSPS and EG, and, in this response, EPA is requiring new standards based on a MACT methodology that is consistent with the CAA and District of Columbia Circuit Court precedent. The MACT levels required herein reflect MACT floor levels determined by current emissions data from CISWI units, and, therefore, reflect the current performance of the best-performing unit or units subject to the CISWI standards. Consequently, we believe that our obligation to conduct a 5-year review based on implementation of the 2000 CISWI rule is fulfilled.

Our conclusion is supported by the fact that the revised MACT standards included in this final remand response are based on the available performance data for the currently operating CISWI units, including those units that are subject to the 2000 CISWI rule and those units that will be subject to the CISWI standards for the first time based on the final Non-hazardous Solid Waste Definition Rulemaking under RCRA. In establishing MACT floors based on currently available emissions information, we address the technology review's goals of assessing the performance efficiency of the installed equipment and ensuring that the emission limits reflect the performance of the technologies required by the MACT standards. In addition, in establishing these final standards, we considered whether new technologies, processes, and improvements in practices have been demonstrated at sources subject to the 2000 CISWI rule and at sources that will be subject to these proposed standards for the first time based on the proposed definition of solid waste. Accordingly, the remand response in this final action fulfills EPA's obligations regarding the 5-year review of the CISWI standards. Further discussion of the EPA's response to the CAA section 129(a)(5) 5-year review is found in section III.B of the proposal preamble (75 FR 31946).

*F. What is the relationship of this final action to section 112(c)(6) of the CAA?*

Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). EPA has identified certain CISWI units as sources necessary to meet the 90 percent requirement under section 112(c)(6). In the **Federal Register** notice "Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements", 63 FR 17838, 17849, Table 2 (1998), EPA identified source categories that must be "subject to regulation" for purposes of CAA section 112(c)(6). Included in that list are cement kilns and combustion units (e.g., major source boilers and process heaters). Cement kilns, boilers, and process heaters that combust solid waste are subject to the CAA section 129 standards for CISWI as either waste-burning kilns or ERUs. These CISWI units emit five of the seven CAA section 112(c)(6) pollutants: POM, dioxins, furans, Hg and PCBs. The POM emitted by CISWI is composed of 7–PAH and 16–PAH.

For purposes of CAA section 112(c)(6), EPA has determined that standards promulgated under CAA section 129 are substantively equivalent to those promulgated under CAA section 112(d). (63 FR 17845; 62 FR 33625, 33632 (1997)). As discussed in more detail in response to comments on

this issue, the CAA section 129 standards effectively control emissions of the five identified CAA section 112(c)(6) pollutants. Further, since CAA section 129(h)(2) precludes EPA from regulating CISWI units under CAA section 112(d), EPA cannot further regulate the emissions of 112(c)(6) pollutants from CISWI units under CAA section 112(d). As a result, EPA considers emissions of these five pollutants from waste-burning kilns and ERUs "subject to standards" for purposes of CAA section 112(c)(6). The remaining CISWI subcategories will be subject to MACT standards either in this action or in a future action, but regulation of the remaining subcategories is not required for EPA to complete its 112(c)(6) obligations.

## III. Summary of the Final Rule

### *A. Which units are affected by this final rule?*

This final rule defines a CISWI unit as any combustion unit at a commercial or industrial facility that is used to combust solid waste (as defined under RCRA). (40 CFR 60.2265 (NSPS) and 60.2875 (EG)). Therefore, in this final rule, CISWI units subject to standards in this final rule include incinerators designed to burn discarded waste materials; units designed for heat recovery that combust solid waste materials (*i.e.,* ERUs that would be boilers or process heaters if they did not burn solid waste); and waste burning kilns (*i.e.,* units that would be cement kilns if they did not burn solid waste); we also define other CISWI units that are not subject to standards in this final action. The final rule contains definitions of the four subcategories of CISWI units that are subject to standards under these amendments: incinerators, small remote incinerators, ERUs, and waste burning kilns. At proposal, we also defined and proposed standards for burn-off ovens. Based on information obtained during proposal, and because we do not need such units to comply with our section 112(c)(6) obligations, we are not finalizing standards for burn-off ovens as explained further below in response to comments on this issue.

We are revising the definition of CISWI unit to reflect the Court's decision that all units burning solid waste as defined under RCRA are to be covered by regulation under CAA section 129. To ensure consistency with the definition of CISWI unit, we are also adding a definition of "solid waste incineration unit" and removing the definition of "commercial and industrial waste."

The 2000 CISWI rule, through the definition of "commercial and industrial waste," excluded from regulation combustion units at commercial or industrial facilities that recovered energy for a useful purpose. We are eliminating those exemptions that were vacated by the Court.

Qualifying small power producers, qualifying cogeneration units, and materials recovery units continue to be expressly exempt from coverage pursuant to CAA exclusions from the definition of "solid waste incineration unit" set forth in CAA section 129(g)(1). Units that are required to have a permit under section 3005 of the SWDA (*i.e.,* hazardous waste combustion units) are also exempt from section 129 rules per CAA section 129(g)(1). Air curtain incinerators at commercial or industrial facilities combusting "clean wood" waste are also excluded from the definition of solid waste incineration unit set forth in CAA section 129(g)(1), but that section provides that such units must comply with opacity limits to maintain that exemption.

Solid waste incineration units that are included within the scope of other CAA section 129 categories include MWC units; institutional, pathological waste incineration units (EPA intends to regulate these units under OSWI standards); SSI units (EPA is issuing final standards for these units in a concurrent action), and HMIWI units. These solid waste incineration units will remain exempt from the CISWI standards. As stated above, we created subcategories for waste-burning kilns and ERUs, and they are subject to this final rule in light of the CISWI Definitions Rule vacatur. We note that other CAA section 129 standards may contain an exemption for cement kilns. Those exemptions do not excuse waste burning kilns from compliance with these final standards. As those other CAA section 129 rules are amended, we will clarify that cement kilns that meet the definition of waste-burning kiln and other CISWI units, that may be expressly exempt from those standards, are subject to CISWI standards if they are located at a commercial or industrial facility and they combust solid waste.

### *B. What are the emission limits in the final rule?*

The final MACT floor emission limits for new and existing sources are presented in Tables 1 and 2 of this preamble. These emission limits are based on subcategories established considering sources that we believe are CISWI units under the final definition of non-hazardous secondary materials, as discussed in the concurrent Non-hazardous Solid Waste Definition Rulemaking. The final MACT floor emission limits for existing sources in each subcategory are shown in Table 1 of this preamble.

TABLE 1—COMPARISON OF EXISTING SOURCE MACT FLOOR LIMITS FOR 2000 CISWI RULE AND THE FINAL MACT FLOOR LIMITS (BASED ON THE DEFINITION OF SOLID WASTE IN THE FINAL NON-HAZARDOUS SOLID WASTE DEFINITION RULEMAKING)

| Pollutant (units) [a] | Incinerators (2000 CISWI limit) | Final CISWI subcategories | | | | |
|---|---|---|---|---|---|---|
| | | Incinerators | ERUs—solids | ERUs—liquid/gas | Waste-burning kilns | Small, remote incinerators |
| HCl (ppmv) | 62 | 29 | 0.45 | 14 [b] | 25 [b] | 220 |
| CO (ppmv) | 157 | 36 [b] | 490 (biomass units)/59 (coal units). | 36 | 110 | 20 |
| Pb (mg/dscm) | 0.04 | 0.0036 | 0.0036 [b] | 0.096 | 0.0026 | 2.7 |
| Cd (mg/dscm) | 0.004 | 0.0026 | 0.00051 [b] | 0.023 | 0.00048 | 0.61 |
| Hg (mg/dscm) | 0.47 | 0.0054 | 0.00033 | 0.0013 [b] | 0.0079 [b] | 0.0057 |
| PM, filterable (mg/dscm) | 70 | 34 | 250 | 110 | 6.2 | 230 |
| Dioxin, furans, total (ng/dscm). | (no limit) | 4.6 | 0.35 | 2.9 [b] | 0.20 | 1,200 |
| Dioxin, furans, TEQ (ng/dscm). | 0.41 | 0.13 | 0.059 | 0.32 [b] | 0.0070 | 57 |
| $NO_X$ (ppmv) | 388 | 53 | 290 (biomass units)/340 (coal units). | 76 | 540 | 240 |

TABLE 1—COMPARISON OF EXISTING SOURCE MACT FLOOR LIMITS FOR 2000 CISWI RULE AND THE FINAL MACT FLOOR LIMITS (BASED ON THE DEFINITION OF SOLID WASTE IN THE FINAL NON-HAZARDOUS SOLID WASTE DEFINITION RULEMAKING)—Continued

| Pollutant (units) [a] | Incinerators (2000 CISWI limit) | Final CISWI subcategories | | | | |
|---|---|---|---|---|---|---|
| | | Incinerators | ERUs—solids | ERUs—liquid/gas | Waste-burning kilns | Small, remote incinerators |
| $SO_2$ (ppmv) | 20 | 11 | 6.2 (biomass units)/650 (coal units). | 720 | 38 | 420 |

[a] All emission limits are expressed as concentrations corrected to 7 percent oxygen.
[b] See the memorandum "CISWI Emission Limit Calculations for Existing and New Sources" for details on this calculation.

The new source MACT floor emission limits for each CISWI subcategory are shown in Table 2 of this preamble.

TABLE 2—COMPARISON OF NEW SOURCE MACT FLOOR LIMITS FOR 2000 CISWI RULE AND THE FINAL MACT FLOOR LIMITS (BASED ON THE PRIMARY DEFINITION OF SOLID WASTE IN THE SOLID WASTE DEFINITION RULE)

| Pollutant (units) [a] | Incinerators (2000 limit) | Final CISWI subcategories | | | | |
|---|---|---|---|---|---|---|
| | | Incinerators | ERUs—solids | ERUs—liquid/gas | Waste-burning kilns | Small, remote incinerators |
| HCl (ppmv) | 62 | 0.091 | 0.45 [c] | 14b | 3.0 [b] | 200 |
| CO (ppmv) | 157 | 12 | 160 (biomass units)/ 46 (coal units). | 36 | 90 | 12 |
| Pb (mg/dscm) | 0.04 | 0.0019 [b] | 0.0031 | 0.096 | 0.0026 | 0.26 |
| Cd (mg/dscm) | 0.004 | 0.0023 | 0.00051 [c] | 0.023 | 0.00048 [c] | 0.61 [c] |
| Hg (mg/dscm) | 0.47 | 0.00016 | 0.00033 [c] | 0.00025 [d] | 0.0062 [e] | 0.0035 [b] |
| PM, filterable (mg/dscm) | 70 | 18 | 250 [c] | 110 | 2.5 | 230 [c] |
| Dioxin, furans, total (ng/dscm). | (no limit) | 0.052 [b] | 0.068 | (no limit) | 0.090 | 1,200 [c] |
| Dioxin, furans, TEQ (ng/dscm). | 0.41 | 0.13 [c] | 0.011 | 0.002 [d] | 0.0030 | 31 |
| $NO_X$ (ppmv) | 388 | 23 | 290[c] (biomass units)/340 (coal units). | 76 | 200 | 78 |
| $SO_2$ (ppmv) | 20 | 11 [c] | 6.2 [c] (biomass units)/650 (coal units). | 720 | 38 | 1.2 |

[a] All emission limits are measured at 7 percent oxygen.
[b] *See* the memorandum "CISWI Emission Limit Calculations for Existing and New Sources" for details on this calculation.
[c] The NSPS limit equals the EG limit. The EG limit was selected as the NSPS limit.
[d] Dioxin/furan TEQ and Hg limits for ERUs—liquid/gas were replaced with D/F TEQ limits for liquid fuel major source boilers. *See* "CISWI Emission Limit Calculations for Existing and New Sources" for details.
[e] Hg limit was developed using material input data from CISWI kilns identified within the Portland Cement NESHAP database. *See* the memorandum "CISWI Emission Limit Calculations for Existing and New Sources" for details on this calculation.

*C. What are the testing and monitoring requirements?*

This final rule requires all CISWI units to demonstrate initial compliance with the revised emission limits. For existing CISWI units, these amendments require annual inspections of scrubbers, FF, and other air pollution control devices that are used to meet the emission limits. In addition, a Method 22 (40 CFR part 60, appendix A–7) visible emissions test of the ash handling operations is required during the annual compliance test for all subcategories except waste-burning kilns, which do not have ash handling systems. Furthermore, for any existing CISWI unit that operates a FF air pollution control device, we are requiring that a bag leak detection system be installed to monitor the device. These amendments continue to require parametric monitoring of all other add-on air pollution control devices, such as wet scrubbers and ACI. Commercial and industrial solid waste incineration units that install SNCR technology to reduce $NO_X$ emissions are required to monitor the reagent (*e.g.,* ammonia or urea) injection rate and secondary chamber temperature (if applicable to the CISWI unit).

This final rule also requires subcategory-specific monitoring requirements in addition to the aforementioned inspection, bag leak detection, and parametric monitoring requirements that are applicable to all CISWI units. Existing incinerators, small, remote incinerators, and ERUs would have annual emissions testing for all nine pollutants: PM, $SO_2$, HCl, $NO_X$, CO, lead, Cd, Hg, and dioxins and furans. Existing kilns are required to monitor Hg, PM, and HCl (if no wet scrubber) emissions using a CEMS and perform annual testing for the remaining pollutants. These amendments provide reduced annual testing requirements for all nine pollutants when testing results are shown to be well below the limits. If the ERU has a design capacity less than or equal to 250 mmBtu/hr and is not equipped with a wet scrubber control device, then a continuous opacity monitor is required or, as an alternative, a PM CEMS could be employed (see below). If the ERU has a design capacity greater than 250 mmBtu/hr, then PM emissions must be monitored using a PM CEMS.

For new CISWI units, the final rule requires the same monitoring

requirements as for existing units, but also requires CO CEMS for all subcategories. Additionally, $SO_2$ and $NO_X$ CEMS are required for all new kilns.

For all subcategories of existing CISWI units, use of CO CEMS is an approved alternative and specific language with requirements for CO CEMS is included in these amendments. For new and existing CISWI units, use of PM, $NO_X$, $SO_2$, HCl, multi-metals and Hg CEMS and integrated sorbent trap Hg monitoring and dioxin monitoring (continuous sampling with periodic sample analysis) also are approved alternatives, and specific language for those alternatives is included in these amendments.

*D. What are the requirements during periods of SSM?*

The 2000 CISWI standards did not apply during periods of SSM. This final rule revises the 2000 CISWI rule such that the standards apply at all times, including during SSM periods. As further explained in section V.H of this preamble, the revision is being made in light of the Court decision that vacated portions of regulations related to SSM in the General Provisions of 40 CFR part 63. EPA is including in this final rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. The full rationale for these decisions is presented in section V.H of this preamble.

*E. How do the rule amendments affect the applicability of the 2000 NSPS and EG?*

Incinerators subject to the 2000 CISWI standards are treated differently under the amended standards than they were under the 2000 CISWI rule in terms of whether they are "existing" or "new" sources.[2] Consistent with the CAA section 129 definition of "new" sources, there are new dates defining what units are "new" sources. Incinerators that are currently subject to the NSPS will become "existing" sources under the final amended standards and are required to meet the revised EG by the applicable compliance date for the revised guidelines. Those units will continue to be NSPS units subject to the 2000 CISWI rule until they become "existing" sources under the amended standards. Incinerators and small remote incinerators that are existing sources under the 2000 EG must continue to comply with those standards until the applicable compliance date for the revised EG, at which time those sources must be in compliance with the applicable EG.

Commercial and industrial solid waste incineration units in the four subcategories for which we are issuing final standards in this rule that commenced construction after June 4, 2010, or for which a modification is commenced on or after 6 months after promulgation of these final standards, are "new" units subject to more stringent NSPS emission limits. Units for which construction or modification is commenced prior to those dates would be existing units subject to the EG, except that units in the incinerators and small remote incinerators subcategories remain subject to the 2000 CISWI rule until the compliance date of the CISWI EG as discussed below. Commercial and industrial solid waste incineration units in the subcategories other than the incinerator subcategory and small remote incinerator subcategory (if a unit was not exempt) will not in any case be subject to the standards in the 2000 CISWI rule.

Under this final rule, incinerators that commenced construction after November 30, 1999, and on or before June 4, 2010, or that were reconstructed or modified prior to the date 6 months after promulgation of any revised final standards, are subject to the 2000 CISWI NSPS until the applicable compliance date for the revised EG, at which time those units would become "existing" sources. Similarly, units in the incinerator or small remote incinerator subcategories that are subject to the EG under the 2000 CISWI rule must meet the revised EG by the applicable compliance date for the revised guidelines. Commercial and industrial solid waste incineration units that commence construction after June 4, 2010, or that are reconstructed or modified 6 months or more after the date of promulgation of the revised standards, must meet the revised NSPS emission limits in the NSPS within 6 months after the promulgation date of the amendments or upon startup, whichever is later.

*F. What is the compliance schedule?*

New CISWI units must demonstrate compliance with the applicable emission limit within 60 days after the CISWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup.

Existing CISWI units must demonstrate compliance with the applicable emission limits as expeditiously as practicable after approval of a state plan, but no later than 3 years from the date of approval of a state plan or 5 years after promulgation of these revised standards, whichever is earlier.

*G. What is the state plan implementation schedule?*

Under the final amendments to the EG, and consistent with CAA section 129, revised state plans containing the revised existing source emission limits and other requirements in the final amendments are due within 1 year after promulgation of the amendments. States must submit revised state plans to EPA March 21, 2012.

These amendments to the EG allow existing CISWI to demonstrate compliance with the amended standards as expeditiously as practicable after approval of a state plan, but no later than 3 years from the date of approval of a state plan or 5 years after promulgation of the revised standards, whichever is earlier. Because we believe that many CISWI units will find it necessary to retrofit existing emission control equipment and/or install additional emission control equipment in order to meet the final revised limits, EPA anticipates that states may choose to provide the 3-year compliance period allowed by CAA section 129(f)(2).

In revising the standards in a state plan, a state has two options. First, it may include both the 2000 CISWI standards and the new standards in its revised state plan, which allows a phased approach in applying the new limits. The state plan must make clear that the standards in the 2000 CISWI rule remain in force for subject units and apply until the date the revised existing source standards are effective (as defined in the state plan).[3] States where existing CISWI incinerators do not need to improve their performance to meet the revised standards, may want to consider a second approach as follows. The state may replace the 2000 CISWI rule standards with the standards in this final rule; follow the procedures in 40 CFR part 60, subpart B; and submit a revised state plan to EPA for approval. If the revised state plan contains only the revised standards (*i.e.,* the 2000 CISWI rule standards are not retained), then the revised standards must become effective immediately for those units that are subject to the 2000 CISWI rule, since the 2000 CISWI rule

[2] We believe that all the units in the small remote incinerator subcategory as defined in this final rule qualified for the exemption for MWC in the 2000 CISWI standards. *See* 40 CFR 60.2020(c)(2) and 60.2555(c)(2).

[3] All sources currently subject to the 2000 CISWI EG or NSPS will become existing sources in the incinerator or small remote incinerator subcategories once the final revised CISWI standards are in place. *See* section III.F of this preamble.

standards would be removed from the state plan.

EPA will revise the existing federal plan to incorporate any changes to existing source emission limits and other requirements that EPA has promulgated. The federal plan applies to CISWI units in any state without an approved state plan. The proposed amendments to the EG would allow existing CISWI units subject to the federal plan up to 5 years after promulgation of the revised standards to demonstrate compliance with the amended standards, as required by CAA section 129(b)(3).

*H. What are the requirements for submission of emissions test results to EPA?*

EPA must have performance test data and other compliance data to conduct effective reviews of CAA section 112 and 129 standards, as well as for many other purposes including compliance determinations, emissions factor development, and annual emissions rate determinations. In conducting these required reviews, EPA has found it ineffective and time consuming not only for us but also for regulatory agencies and source owners and operators to locate, collect, and submit emissions test data because of varied locations for data storage and varied data storage methods. One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for cumbersome paper copies.

In this final rule, EPA is taking steps to improve data accessibility. Owners and operators of CISWI units are required to submit to EPA an electronic copy of reports of certain performance tests required under the CISWI EG and NSPS. Sources must submit data through the ERT. The ERT was developed with input from stack testing companies who generally collect and compile performance test data electronically and offices within state and local agencies which perform field test assessments. The ERT is currently available, and access to direct data submittal to EPA's electronic emissions database (WebFIRE) is scheduled to become available by December 31, 2011.

The requirement to submit source test data electronically to EPA will not require any additional performance testing and will apply to those performance tests conducted using test methods that are supported by ERT. The ERT contains a specific electronic data entry form for most of the commonly used EPA reference methods. The Web site listed below contains a listing of the pollutants and test methods supported by ERT. In addition, when a facility submits performance test data to WebFIRE, there would be no additional requirements for emissions test data compilation. Moreover, EPA believes industry will benefit from development of improved emissions factors, fewer follow-up information requests, and better regulation development as discussed below. The information to be reported is already required for the existing test methods and is necessary to evaluate the conformance to the test method.

One major advantage of collecting source test data through the ERT is that it provides a standardized method to compile and store much of the documentation required to be reported by this final rule while clearly stating what testing information EPA requires. Another important benefit of submitting these data to EPA at the time the source test is conducted is that it substantially reduces the effort involved in data collection activities in the future. Specifically, because EPA would already have adequate source category data to conduct residual risk assessments or technology reviews, there would likely be fewer or less substantial data collection requests (*e.g.,* CAA section 114 letters). This results in a reduced burden on both affected facilities (in terms of reduced labor to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests).

State/local/tribal agencies may also benefit in that their review may be more streamlined and accurate because the states would not have to re-enter the data to assess the calculations and verify the data entry. Finally, another benefit of submitting these data to WebFIRE electronically is that these data would improve greatly the overall quality of the existing and new emissions factors by supplementing the pool of emissions test data upon which the emissions factor is based and by ensuring that data are more representative of current industry operational procedures. A common complaint EPA receives from industry and regulators is that emissions factors are outdated or not representative of a particular source category. Receiving and incorporating data for most performance tests would ensure that emissions factors, when updated, represent accurately the most current operational practices. In summary, receiving test data already collected for other purposes and using them in the emissions factors development program would save industry, state/local/tribal agencies, and EPA, time and money and work to improve the quality of emissions inventories and related regulatory decisions.

As mentioned earlier, the electronic database that would be used is EPA's WebFIRE, which is a database accessible through EPA's TTN (see *http://cfpub.epa.gov/webfire/*). The WebFIRE database was constructed to store emissions test and other data for use in developing emissions factors. A description of the WebFIRE database can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*.

Source owners and operators will be able to transmit data collected via the ERT through EPA's CDX network for storage in the WebFIRE database. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html*.

Source owners and operators must register with the CDX system to obtain a user name and password before being able to submit data to the CDX. The CDX registration page can be found at *https://cdx.epa.gov/SSL/CDX/regwarning.asp?Referer=registration*. If they have a current CDX account (*e.g.,* they submit reports for the EPA's TRI Program to the CDX), then the existing user name and password can be used to log in to the CDX.

*I. What are the costs and benefits of this final rule?*

EPA estimated the costs and benefits associated with the final rule, and the results are shown in the following table. For more information on the costs and benefits for this rule, see the Regulatory Impact Analysis (RIA) in the EPA–HQ–OAR–2003–0119.

TABLE 3—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE CISWI NSPS AND EMISSIONS GUIDELINES IN 2015

[Millions of 2008$] [a d]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Option 1: MACT Floor: | | |
| Total Monetized Benefits [b] | $340 to $830 | $310 to $750. |
| Total Social Costs [c]; | $280 | $280. |
| Net Benefits | $60 to $550 | $30 to $470. |
| Non-monetized Benefits | 25,000 tons of CO.<br>470 tons of HCl.<br>260 pounds of Hg.<br>0.95 tons of Cd.<br>4.1 tons of lead.<br>92 grams of dioxins/furans.<br>Health effects from $NO_2$ and $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |
| Option 2: Beyond-the-Floor: | | |
| Total Monetized Benefits [b] | $430 to $1,100 | $390 to $960. |
| Total Social Costs [c] | $300 | $300. |
| Net Benefits | $130 to $770 | $90 to $660. |
| Non-monetized Benefits | 25,000 tons of CO.<br>470 tons of HCl.<br>260 pounds of Hg.<br>0.95 tons of Cd.<br>4.1 tons of lead.<br>92 grams of dioxins/furans.<br>Health effects from $NO_2$ and $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |

[a] All estimates are for the implementation year (2015), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[b] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $NO_X$ and $SO_2$. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope, et al. (2002) to Laden, et al. (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at $3.8 million.

[c] The methodology used to estimate social costs for 1 year in the multimarket model using surplus changes results in the same social costs for both discount rates.

[d] The estimates in this table reflect the estimates in the RIA. Due to last minute changes, we were unable to incorporate the final engineering costs and emission reductions into the RIA, which would decrease the costs by approximately 22% and increase the monetized benefits by approximately 4% from those shown here.

## IV. Summary of Significant Changes Since Proposal

EPA received over 3,500 public comments on the proposed rulemaking. Furthermore, we conducted three public hearings to allow the public to comment on the proposed rulemaking and the inter-related Boiler and RCRA rules. Following are the major changes to the rule since the proposal. The rationale for these and any other significant changes can be found in section V of this preamble or in the document titled "Commercial and Industrial Solid Waste Incineration (CISWI) Rule: EPA's Response to Public Comments" available in the docket for this rulemaking.

- Clarified and revised the applicability and compliance requirements for CISWI units that cease or begin combusting solid waste.
- Determined that this final action will not subject burn-off ovens, soil treatment units, cyclonic burn barrels, laboratory analysis units, and space heaters to this standard.
- Further subcategorized ERUs with separate limits for $NO_X$, CO, and $SO_2$ for coal and biomass units.
- Revised the definition of small, remote incinerators.
- Incorporated new data submitted by facilities since December 15, 2010.
- Revised the emission limit methodology to use the UPL for ERUs and waste-burning kilns.
- Revised the statistical analysis to use the log normal distribution of data in cases where a normal data distribution is not indicated conclusively by normality tests for the data.
- Revised the nondetect methodology to calculate emission limits using three times the reported nondetect values where the value equal to three times the representative MDL was greater than the calculated MACT floor emission limit.
- Revised the requirements for opacity.
- Revised the monitoring requirements for continuous compliance via testing and parametric monitoring and to allow CEMS use to demonstrate compliance over a 30-day rolling average as an alternative.
- Revised the CO CEMS monitoring requirement from mandatory to voluntary for existing ERUs.
- Incorporated hourly CEMS data into emissions limit calculations and 24-hour CEMS data into costing and impacts analyses.
- Revised the calculation methodology of D/F TEQ and clarified that sources must comply with either the TMB or TEQ basis limit.
- Added tire certification procedures for all CISWI units to allow them to certify that the tires are from a program that enables them to be considered non-waste materials.
- Added recordkeeping and reporting requirements for units that burn materials other than traditional fuels.

- Revised the annual performance testing requirements to clarify the schedule for completion of subsequent performance tests.
- Revised the reduced testing provision to state testing for a given pollutant may be performed every 3 years, instead of annually, if measured emissions during two consecutive annual performance tests are less than 75 percent of the applicable emission limit.
- Revised the test methods for cement kilns to require EPA Method 321 for HCl testing of these units.
- Removed the allowance for sources to use the results of previously conducted tests to demonstrate compliance.
- Revised monitoring requirements for the waste-burning kilns subcategory.
- Provided an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions.

## V. Public Comments

### *A. Legal and Applicability Issues, Compliance Schedule, and Certification Procedures*

#### 1. Section 129 vs. Section 112—Applicability for Waste Firing Boilers and Kilns That Opt To Stop Burning Waste

*Comment:* Many commenters stated that ERUs and waste-burning kilns should be able to move between CAA sections 129 and 112 standards based on the materials being burned. Commenters argued that EPA should provide flexibility for operators of units burning co-fired waste to consider the stringency of all applicable standards and opt into the appropriate rule. Many commenters contended that requiring operators who stop burning solid waste to remain regulated under CISWI would penalize them with no benefit gained. One commenter stated that no law or regulation prevents EPA from allowing a unit to opt out of CISWI and that the concern that facilities would "backslide" from MACT control levels is not applicable. Further, commenters argued that the once-in-always-in policy should not apply to CISWI and requested clarification on how the policy applies to sources subject to CAA section 129 standards that either continue or begin combusting solid waste. One commenter requested that EPA clarify whether the CISWI rule would apply to any kiln that is actually using solid waste or to any kiln authorized to do so.

*Response:* This rule addresses the combustion of solid waste materials (as defined by the Administrator under RCRA) in combustion units at commercial and industrial facilities. If an owner or operator of a CISWI unit permanently ceases combusting solid waste, the affected unit is no longer subject to this regulation under CAA section 129, and the unit would become subject to any applicable regulations under CAA section 112. Likewise, if an owner or operator of any commercial or industrial unit starts combusting solid waste in that unit, it becomes subject to CISWI, and is no longer subject to any previously applicable regulations under section 112. Consistent with CAA section 129(h)(2), no solid waste incineration unit subject to performance standards under section 129 and section 111 shall be subject to standards under section 112(d) of the Act.

CISWI units that cease burning solid waste in the ERU and waste-burning kiln subcategories may be subject to one of three rulemaking actions under CAA section 112. EPA is finalizing in a parallel action two NESHAP applicable to boilers, one for area source boilers and one for major source boilers that also regulates process heaters at major sources. EPA also recently finalized revised NESHAP for cement kilns (74 FR 54970, September 9, 2010). Energy recovery units and waste-burning kilns subject to CISWI that cease burning solid waste, and thus cease being subject to this final rule, will be subject to the NESHAP for area source boilers, major source boilers and process heaters, or cement kilns, as appropriate.

Today's final rule includes provisions to address the situation where CISWI units cease burning solid waste, and where existing commercial and industrial facilities start burning solid waste. Units that cease burning solid waste remain subject to CISWI for at least 6 months after solid waste is no longer present in the combustion chamber. After 6 months, sources must either comply with any applicable section 112 standards or, if they intend to combust solid waste in the unit in the future, opt to remain subject to CISWI. Sources switching out of CISWI due to cessation of solid waste combustion must submit advance notification of the effective date of the waste-to-fuel switch consistent with new procedures in this rule. Units that begin combusting solid waste are considered existing sources under CISWI and must comply with the emissions guidelines set forth in the CISWI final rule at the time they begin burning solid waste.

EPA acknowledges that sources may stop and start burning solid waste in their combustion units, and that regulatory procedures are necessary to guide sources through the changes in applicability that may result due to a switch in combustion materials. New provisions in the final rule account for the fact that facilities may start and stop burning solid waste and ensure that any resulting changes in applicability between section 129 and section 112 rules do not occur with so much frequency that sources are unable to demonstrate continuing compliance with the applicable standards.

To ensure that frequent switching does not impede our ability to determine continuous compliance and create undue permitting and testing burdens, sources remain subject to CISWI for a minimum of 6 months. The definition of CISWI unit has been revised to clarify that a CISWI unit includes a distinct operating unit of any commercial or industrial facility that combusts any solid waste in a 12-month period. This change accounts for sources that periodically burn solid waste throughout a given 12-month period, but that also has long periods in which no solid waste is combusted at all. We believe this change will reduce administrative and compliance costs to both the source and the regulatory agencies. For example, sources will not have to re-establish initial compliance with CISWI or revise their operating permit to reflect a switch out of and back into the CISWI regulations. Instead, facilities that combust solid waste would continue to be subject to the CISWI regulations at least 6 months after waste is no longer combusted. The regulations also allow facilities to remain subject to CISWI beyond 6 months after cessation of solid waste combustion, at their own discretion, if the source determined that continued compliance with CISWI is appropriate because the source intends to combust solid waste in the future. Source owners or operators may, alternatively, choose a date at least 6 months after ceasing solid waste combustion on which they would no longer be subject to CISWI, and would instead be subject to any applicable section 112 standards. This date is called the effective date of the waste-to-fuel switch.

Specifically, the new provisions direct a source owner or operator to select an effective date for the waste-to-fuel, or fuel-to-waste switch, and that date becomes the date on which all of the newly applicable requirements apply. When a source begins combusting solid waste, the effective date of the fuel-to-waste switch must be the same as the actual date the unit begins combusting solid waste because by statute any source that combusts any solid waste is a solid waste incineration unit subject to standards under CAA section 129. *See* section 129(g)(1)

(defining "solid waste incineration unit"). For sources that cease burning solid waste, they may pick an effective date for the waste-to-fuel switch that is at least 6 months after the last date on which solid waste is combusted. This allows sources that cease combusting solid waste to comply with an applicable NESHAP or opt to remain subject to CISWI at the discretion of the owner or operator. We allow the owner or operator of a CISWI unit the option of remaining subject to CISWI to account for sources that may want to retain the ability to burn waste intermittently without having to periodically switch between the section 112 and section 129 regulatory programs. If a source wishes to end applicability of CISWI to its unit, the source must submit an advance notification of the effective date of the waste-to-fuel switch. The source must be in compliance with any NESHAP that applies as a result of ceasing the combustion of solid waste on the effective date of the waste-to-fuel switch. The source must remain in continuous compliance with the CISWI regulations until that date.

As stated above, boiler and process heaters that commence combustion of any solid waste and become solid waste incineration units as defined in section 129(g)(1) are subject to CISWI standards applicable to ERUs as of the date they commence combusting solid waste. Likewise, cement kilns that begin combusting solid waste and become solid waste incineration units must comply with the CISWI standards applicable to waste-burning kilns at the time they begin combusting solid waste.

The new waste-to-fuel switch provisions in the final rule include requirements to conduct performance testing that will assure compliance with all applicable standards. Specifically, performance tests must be conducted within 60 days of the date on which the unit begins combusting solid waste. In addition, the owner or operator must collect and report any PM CEMS and/or PM parametric monitoring data for those monitors that are operated at the same time as the performance test to determine whether the existing calibrations and/or correlations are still applicable. After the testing is completed, and it is demonstrated that the source is operating in compliance with the applicable standards, the owner or operator should adjust any PM CEMS calibration and any correlation for PM to correspond to the performance test results and data.

The new provisions also require advance notification of the effective date of the waste-to-fuel switch. The notification includes basic information that will enable the reviewing authority to determine the date on which CISWI will no longer apply to the facility and the date on which any newly applicable section 112 regulations may apply. Notification must be submitted to both the EPA Regional Office and the delegated state or local agency.

To ensure that frequent switching does not impede our ability to determine continuous compliance, sources may not switch between applicable section 129 and section 112 standards without completing the initial performance test. Therefore, sources that wish to start burning solid waste before they have demonstrated compliance with their existing section 112 standard must complete the performance test for the 112 rule before switching to solid waste combustion.

If a source switches back to a fuel or non-waste material for which a performance test was conducted within the 6 months preceding the effective date of the fuel-to-waste or waste-to-fuel switch, and if there are no changed conditions that would affect emissions, the source need not retest that source until 6 months from the effective date of the switch.

If a source is subject to any emissions limits for which compliance is determined on an annual average or other averaging period that is for a period of time less than the period in which the source will be combusting the fuel or non-waste material, the source must comply with the emission limit in the shorter time period in which the fuel or material is combusted. For example, if a source chooses to demonstrate compliance with the Hg limits of the major source Boiler NESHAP through fuel analysis, which has a 12-month rolling average limit, and opts to start burning solid waste and become subject to CISWI after combusting the fuel under the Boiler NESHAP for only 9 months, the source must demonstrate compliance with the Hg limit based on a 9-month average instead of the annual average. The EPA believes this is necessary to assure that switching to solid waste combustion does not compromise our ability to determine compliance with standards under section 112.

The rules do not allow for compliance extensions associated with changes to the fuels or materials that are combusted. After the first substantive compliance date (*e.g.,* the effective date of the state program or 5 years after publication of the final CISWI rule for incineration units), sources must be in compliance with the standard that is applicable to the source based on the type of unit and the fuels or materials that are combusted. Sources that change fuels or materials are considered existing sources and, as such, they must be in compliance on the date they begin combusting the new fuel or material. For example, a waste-burning cement kiln that ceases burning solid waste becomes subject to and must comply with the Portland Cement NESHAP as of the date that it is no longer subject to CISWI. For all sources that commence combustion of solid waste, the CISWI requirements become applicable on the date that the fuel switch occurs.

2. Homogeneous Waste

*Comment:* Many commenters requested that EPA reaffirm the exemption of qualifying small power production and cogeneration facilities as promulgated in the 2000 CISWI regulations. Several commenters requested that EPA clarify the term "homogeneous waste." Some commenters requested that certain mixtures or blends of fuels fall under the definition of homogeneous waste.

*Response:* Homogeneous wastes are stable, consistent in formulation, have known fuel properties, have a defined origin, have predictable chemical and physical attributes, and result in consistent combustion characteristics and have a consistent emissions profile. Qualifying small power production and cogeneration facilities requesting an exemption from CISWI on the basis that they burn homogeneous waste may be asked to demonstrate, using defined test methods acceptable to EPA, that the physical and chemical characteristics of the waste are consistent throughout such that the emission profile of any sample of waste combusted is similar or identical to any other sample. Mixtures of different types of wastes are generally not homogeneous, unless the mixtures are from materials that are each individually determined to be homogeneous, are from known origin, are mixed in constant proportion, and are conditioned or processed, such as would occur in the gasification of the wastes. Gasification processes that incorporate clean up technologies in the production of synthesis gas would generally result in a homogeneous product, however a consistent waste input would still be necessary to ensure a consistent emissions profile of the synthesis gas. Whether a waste is homogeneous is a case-by-case determination. As such, EPA has added provisions to the CISWI rule that require source owners or operators seeking the exemption to submit a request for a homogeneous fuel determination to EPA, and that they support their request

with information describing the materials to be combusted and why they believe the waste is homogeneous. The determination of what constitutes a homogeneous waste is not delegable to the state or local agencies.

3. Lab Analysis Units

*Comment:* Commenters stated that they do not believe CAA section 129 is intended to regulate laboratory analysis units that involve combustion to generate analytical results. Commenters contend that samples are not solid waste and have definite purpose separate from disposal of sample material. They stated that it is physically impossible for many, if not all, of these uses to comply with CISWI requirements and therefore operations would likely cease. Several commenters indicated that it is unclear as to whether the material referenced in the existing definition of laboratory units in 40 CFR 60.2020(o) (subpart CCCC) and 40 CFR 60.2555(o) (subpart DDDD) is a solid waste. Several commenters stated that other CISWI requirements including operator certification, performance tests, and SSM requirements are not appropriate for laboratory units. If regulated, commenters requested that EPA clarify whether the rule is applicable to all laboratory units or limited to those at commercial and industrial facilities. Many argued that EPA underestimated the number of laboratory units affected by this regulation because the Phase I ICR was not clear that these units were included in the scope of the survey. Commenters also stated that EPA did not provide cost or impact analysis for these units.

*Response:* EPA agrees that samples used in laboratory analysis units have a purpose separate from the disposal of material, and we believe based on the information available at this time, that the material that is combusted is likely not a solid waste as that term is defined in the Solid Waste Definition Rule. We have no information that refutes our conclusions, and we have no data from laboratory analysis units on which to establish section 129 standards in any case. We have determined that this final action will not subject laboratory analysis units to this standard.

4. Asphalt Recycling

*Comment:* One commenter requested that EPA provide a clarification as to whether asphalt plants utilizing recycled asphalt would be subject to the CISWI rule.

*Response:* EPA did not receive any information to indicate that recycled asphalt is a solid waste, or that the recycled asphalt or solid waste is being combusted in asphalt plants. Absent that information, we are not establishing separate standards regulating asphalt plants at this time. However, any combustion unit that combusts solid waste and meets the definition of a CISWI unit may be subject to the CISWI rule, including combustion units at asphalt plants. If the combustion unit is recovering useful heat (*e.g.,* process heaters and boilers), the unit may be subject to standards applicable to ERUs and sources should contact EPA or their state for a specific determination.

5. Chemical Recovery (SARUs)

*Comment:* Several commenters suggested that EPA provide a clear definition of a chemical recovery unit in the final rule. They requested that EPA specifically define chemical recovery units burning pulping liquors and kilns burning lime as not CISWI units.

Commenters suggested that EPA include language that explicitly states SARUs are not subject to CISWI citing the CAA exemption for analogous processes. Some commenters argued that materials burned in SARUs are not "solid wastes" because they are not burned for the purpose of being disposed of or discarded. Instead, commenters asserted that the primary purpose of SARUs is to combust materials to recover sulfur in order to produce virgin sulfuric acid. A few commenters also stated that SARUs are already regulated under 40 CFR part 60, subpart H, Standards of Performance for Sulfuric Acid Plants.

*Response:* The Solid Waste Definition Rule exempts materials pursuant to subtitle C of RCRA. Any SARU, chemical recovery unit, recovery furnace, or lime kiln that is exempt pursuant to subtitle C of RCRA is not a CISWI unit subject to this final rule unless the unit combusts material that is solid waste and is not specifically exempt from the definition pursuant to subtitle C of RCRA. We are currently not aware of any subtitle C exempt facilities burning such materials. We are also not aware of any lime kilns that are combusting solid waste as that term is defined in the Solid Waste Definition Rule. To the extent there are lime kilns or chemical recovery units combusting solid waste, those units may be subject to the final CISWI standards as incinerators, ERUs, or waste-burning kilns, as appropriate. Units discussed in this comment that are combusting solid waste should consult EPA or their state concerning applicability of this final rule to their combustion unit.

6. Exemptions—Hazardous Waste Combustion Units

*Comment:* Several commenters urged EPA to retain the exemption for hazardous waste combustion units or clarify that these units are not subject to the proposed rule and do not need an exemption. Commenters suggested that the removal of this exemption could shift certain RCRA provisions from a RCRA permit to a Title V permit.

*Response:* Hazardous waste combustion units that are required to have a permit under section 3005 of the SWDA are exempt from CAA section 129 rules per CAA section 129(g)(1). Thus, these hazardous waste combustion units would not be subject to the CISWI requirements.

7. CISWI Promulgation Schedule and 112(c)(6) Obligations

*Comment:* Many commenters requested that EPA delay issuing the CISWI standard until the Solid Waste Definition Rule is finalized. They argued that the court-ordered deadline does not apply to CISWI and that the lack of certainty in the outcome of the Non-Hazardous Solid Waste Definition Rule affects all aspects of the CISWI proposal including the number of facilities affected, the MACT floors, and the total anticipated compliance costs. Some commenters believe that this violates EPA's duty to provide a full and fair opportunity to develop and submit comments on the proposal. They contend that this problem can only be addressed by promulgating the waste rule and then re-proposing CISWI standards based on the known population of units.

One commenter suggests that EPA's proposal to treat the proposed CAA section 129 standards as satisfying CAA section 112(c)(6) requirements is unlawful. They argue that EPA's statement that its proposed CAA section 129 standards "effectively control" emissions of POM and PCBs, identified in CAA section 112(c)(6) as pollutants for which EPA must regulate 90 percent of aggregate emissions under CAA sections 112(d)(2) or 112(d)(4), is illegal. The commenter asserts that the CAA requires EPA to subject 90 percent of the emissions of the pollutants identified in CAA section 112(c)(6), including POM and PCBs, to CAA section 112(d)(2) or (d)(4) standards. The commenter argues that assuming EPA could meet CAA section 112(c)(6) requirements by taking credit for standards established under CAA section 129, EPA would have to set specific CAA section 129 standards for POM and PCBs. They suggest that although CAA section 129(a)(4) gives

EPA authority to do just that, EPA has not proposed CAA section 129 standards for POM or PCBs. The commenter believes that the proposed CISWI standards would not satisfy CAA section 112(c)(6) even if CAA section 129 standards could do so. The commenter states that EPA cannot meet its obligations to regulate PCBs and POM under CAA section 112(c)(6) with the proposed CAA section 129 standards for other pollutants. Another commenter claims that they cannot find documentation in the proposed rulemaking package to explain how and why coverage of CISWI sources is necessary to meet the 90 percent requirement.

*Response:* EPA disagrees with the commenters who suggest the Court-ordered deadline does not apply to certain CISWI units. The EPA maintains that we are under a Court-ordered deadline to complete our CAA section 112(c)(6) obligations by January 16, 2011. Because we need certain CISWI units to comply with our 112(c)(6) obligations, the Court-ordered deadline requires EPA to promulgate the CISWI standards for certain subcategories by January 16, 2010. The EPA may therefore not postpone issuance of the final CISWI rules until after the Solid Waste Definition Rule is promulgated.

Section 112(c)(6) of the CAA requires EPA to regulate sources accounting for not less than 90 percent of the aggregate emissions of each pollutant listed in CAA section 112(c)(6). EPA has historically interpreted CAA section 112(c)(6) as allowing EPA to count CAA section 129 emission standards, such as CISWI, for the purpose of meeting its 90 percent obligation under CAA section 112(c)(6) (62 FR 33625, 33632, June 20, 1997). For example, both municipal waste combustion units and medical waste incinerators are listed CAA section 112(c)(6) source categories, and they are regulated under CAA section 129.

As EPA stated in 1998, we need to issue emissions standards for all Portland Cement kilns that combust non-hazardous waste (both major and area sources) to meet our obligation under CAA section 112(c)(6) (63 FR 17838, 17849, April 10, 1998). In addition, EPA must issue standards for commercial and institutional combustion units (*e.g.,* boilers and process heaters) to comply with the section 112(c)(6) obligation (63 FR 32006, June 4, 2010). We must set standards for all CAA section 112(c)(6) categories by the Court-ordered deadline, and that includes setting emission standards pursuant to CAA section 129 for those Portland Cement kilns and commercial and institutional boilers and process heaters that combust non-hazardous solid waste and are thus subject to CISWI as waste-burning kilns and ERUs, respectively.

As we stated in section VI of the proposed rule, section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). EPA has identified certain CISWI units as sources necessary to meet the 90 percent requirement under section 112(c)(6). In the **Federal Register** notice "Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements," 63 FR 17838, 17849, Table 2 (1998), EPA identified source categories that must be "subject to regulation" for purposes of CAA section 112(c)(6). Included in that list are cement kilns and combustion units (*e.g.,* major source boilers and process heaters). Cement kilns, boilers, and process heaters that combust solid waste are subject to the CAA section 129 standards for CISWI as either waste-burning kilns or ERUs. These CISWI units emit five of the seven CAA section 112(c)(6) pollutants: POM, dioxins, furans, Hg and PCBs. The POM emitted by CISWI is composed of 7–PAH, 16–PAH, and EOM.

For purposes of CAA section 112(c)(6), EPA has determined that standards promulgated under CAA section 129 are substantively equivalent to those promulgated under CAA section 112(d). (63 FR 17845; 62 FR 33625, 33632 (1997)). As discussed in more detail in response to comments on this issue, the CAA section 129 standards effectively control emissions of the five identified CAA section 112(c)(6) pollutants. Further, since CAA section 129(h)(2) precludes EPA from regulating CISWI units under CAA section 112(d), EPA cannot further regulate the emissions of 112(c)(6) pollutants from CISWI units under CAA section 112(d). As a result, EPA considers emissions of these five pollutants from waste-burning kilns and ERUs "subject to standards" for purposes of CAA section 112(c)(6). The remaining CISWI subcategories will be subject to MACT standards either in this action or in a future action, but regulation of the remaining subcategories is not required for EPA to complete its 112(c)(6) obligations.

As required by the statute, the CAA section 129 CISWI standards include numeric emission limitations for the nine pollutants specified in CAA section 129(a)(4). The combination of waste segregation, good combustion practices, and add-on air pollution control equipment (sorbent injection, FF, wet scrubbers, or combinations thereof) effectively reduces emissions of the pollutants for which emission limits are required under CAA section 129: Hg, dioxins, furans, Cd, Pb, PM, $SO_2$, HCl, CO, and $NO_X$. Thus, the standards specifically require reduction in emissions of three of the CAA section 112(c)(6) pollutants: dioxins, furans, and Hg. As explained below, the air pollution controls necessary to comply with the requirements of the CISWI standards also effectively reduce emissions of the following CAA section 112(c)(6) pollutants that are emitted from waste-burning kilns and ERUs: POM and PCBs. Although the CAA section 129 CISWI standards do not have separate, specific emissions standards for POM and PCBs, emissions of these two CAA section 112(c)(6) pollutants are effectively controlled by the same control measures used to comply with the numerical emissions limits for the pollutants enumerated in CAA section 129(a)(4). Specifically, as by-products of combustion, the formation of POM and PCBs is effectively reduced by the combustion and post-combustion practices required to comply with the CAA section 129 standards, primarily the standards for CO and D/F. In fact, EPA has used CO as a surrogate for organic HAP such as POM, and the controls for PCBs are the same controls that reduce emissions of dioxin and furans. Polycyclic Organic Matter and PCBs that do form during combustion are further controlled by the various post-combustion CISWI controls. The add-on PM control systems (either FF or wet scrubber) and ACI further reduce emissions of these organic pollutants and also reduce Hg emissions, as is evidenced by performance data for MWCs and another similar source category, HMIWI. Specifically, the post-MACT compliance tests at currently operating HMIWI that were also operational at the time of promulgation of the 1997 HMIWI MACT standards show that, for those units, the regulations reduced Hg emissions by about 60 percent and reduced dioxin and furans emissions by about 80 percent from pre-MACT levels. Dioxin and furans have similar chemical composition and structure as PCBs and POM; moreover, similar controls have been demonstrated to reduce emissions of D/F, POM, and PCBs from MWCs. It is reasonable to conclude that POM and PCB emissions would be effectively controlled to a MACT level at all CISWI

units meeting the emission limits for the section 129 pollutants. Thus, while the rule does not identify specific numerical limits for POM and PCB, emissions of those pollutants are, for the reasons noted above, nonetheless "subject to regulation" for purposes of CAA section 112(c)(6).

Finally, we disagree with comments that EPA should not finalize the CISWI standards until after the Solid Waste Definition Rule is final because EPA does not know the population of sources that will be subject to the CISWI standards. As stated above, we must finalize the CISWI standards for certain subcategories to comply with the Court-ordered deadline; but, in any case, we would not postpone the standards absent the deadline based on the commenters' issue. EPA must establish standards for all rules based on the best information available at the time of issuance. In this case, we have included those units that we believe combust solid waste as that term is defined in the final Solid Waste Definition Rule. We have no information at this time that allows us to determine that the units we have included are not combusting solid waste. Furthermore, sources in the waste-burning kilns and ERUs subcategories and their CAA section 112 counterparts may start or stop combusting solid waste at any time and thus move between CAA sections 112 and 129. Sources in any of the subcategories could also cease operation all together. For these reasons, we conclude it is not appropriate to postpone regulation in this case because we could never be certain that the list of units we identify is perfect. We maintain that the approach we have taken is reasonable because it is based on the best information available to EPA at the time of promulgation.

8. CISWI Implementation Schedule

*Comment:* Several commenters suggested that the date for compliance should be set at 5 or 6 years, not 3 years. Several commenters raised concern that many facilities may not have sufficient time to engineer and design the emissions control systems, raise the amount of capital to purchase the equipment, and install the required equipment. In addition, there could be hardware backlogs, insufficient skilled labor, and gridlock in state permitting processes which could delay compliance. Further commenters stated that they need time to plan a shutdown of a unit when everything is properly staged to ensure minimal disruption of the facility's operation.

*Response:* The terms of CAA section 129(b)(2), where state plan implementation schedules are specified, outline the maximum time available for implementation and enforcement of EG for solid waste incineration units. As CAA section 129(b)(2) states, the state plan "* * * shall provide that each unit subject to the guidelines shall be in compliance with all requirements of this section not later than 3 years after the state plan is approved by the Administrator but not later than 5 years after the guidelines were promulgated." This allows 2 years for state plans to be updated, modified, and approved by the Administrator, followed by a period of compliance not to exceed 3 years after the state plan has been approved.

*B. MACT Floor Analysis*

1. Pollutant-by-Pollutant Approach and Alternative Approaches

*Comment:* Many commenters objected to setting MACT floors on a pollutant-by-pollutant basis. They argue that setting MACT floors on a pollutant-by-pollutant basis is unlawful and results in MACT floors that bear no relation to emission limits that are being achieved at the best-performing existing sources pursuant to CAA section 129(a)(2). The commenters suggested that EPA has misinterpreted many court cases involving CAA section 112(d) over the years and that the proposed MACT standards are inconsistent with the legal principles established under previous court decisions because emission standards must be "achieved in practice" before finalizing the regulation. Commenters continued by explaining that EPA applies the "achieved in practice" standard on a pollutant-by-pollutant basis, which results in a final standard that they assert has never been achieved by any subject facility or best performer. Some commenters contended that this method violates the plain language and intent of the MACT process, and the result is a MACT floor that reflects a standard that no one plant in existence currently achieves. The commenters declared that the plain language of MACT process requires EPA to set a MACT floor for existing sources that is not less stringent than "the average emission limitation achieved by the best-performing 12 percent of units in the category." The commenters asserted that CAA sections 129(a)(2) and 112(d) use of the terms "best-performing" and "existing" clearly means that sources in a category or subcategory that are used to set the MACT floor are to be real, not theoretical or hypothetical sources. Some commenters maintained that CAA section 129(a)(2) instructs that the MACT floor "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source" and the phrase "achieved in practice" can only mean that Congress intended actual sources, performing under real-life conditions, to be the benchmark for determining the MACT floors. The commenters stated that in the CISWI rulemaking, EPA has chosen to establish the MACT floor by assessing the best-performing sources on a pollutant-by-pollutant basis, rather than by identifying the overall best-performing sources taking into account all pollutants.

Some commenters insisted that if Congress wanted EPA to establish separate MACT floor levels for different pollutants, it would have worded CAA section 129(a)(2) to allow this result by referring to the best-performing sources "for each pollutant" or "for each group of pollutants." Further, they argued that EPA's pollutant-by-pollutant methodology is at odds with the legislative history underlying the MACT setting process. The commenters cited the Senate report on the 1990 Amendments where Congress required "the selection of emissions limitations which have been achieved in practice (rather than those which are merely theoretical) by sources of a similar type or character. An emissions limitation achieved in practice is one based on control technology that works reasonably well (doesn't require frequent and extensive modification or repair) under realistic operating conditions." *See* S. Rep. No. 228, 101st Cong., 1st Sess. 169 (1989). The commenters suggested that the focus on overall performance is not surprising because in the 1990 CAA Amendments, Congress abandoned the previous focus on individual pollutant standards, and adopted the technology-based multi-pollutant approach to regulating emissions in use under the CWA. A few commenters suggested that if one source can achieve a firm degree of control for one pollutant but not for another, there may be no justification for including it in the set of sources from which the floor is calculated.

Several commenters recommended that EPA develop overall rankings for each unit in each subcategory based on their emissions of all nine pollutants and develop floors based on a common set of top performers. The commenters asserted that this approach would identify the overall best-performing sources taking into account all pollutants. The commenters argued that the statute unambiguously directs EPA to set standards based on the overall performance of "units." They

maintained that CAA section 129(a)(2) specifies that emissions standards must be established based on the performance of "units" in the category or subcategory, and that EPA's discretion in setting standards for such units is limited to distinguishing among classes, types, and sizes of units. By setting floors based on the average of the top performing 12 percent of units in a subcategory and also using a confidence limit to attempt to account for variability, one would assume that at least 6 percent of all units in each subcategory would be able to comply with the emission limits with no further controls.

Several commenters argued that while an individual MACT floor for one pollutant might not appear cost-prohibitive, the total cost implications when combined with all of the other MACT floors for other pollutants, could become especially onerous, potentially forcing some regulated parties out of business, and barring the market entry for other potential entities. The commenters contended that this result is compounded when the proposed emission limits cannot be met even after the installation and proper operation of MACT hardware such as scrubbers and baghouses. The commenters stated that some facilities cannot operate certain types of control devices due to local operational constraints and feed material composition. The commenters declared that such a result violates the court's declaration in *National Lime Association* 627 F.2d 416, 443 (DC Cir. 1980), that under the CAA "EPA has a statutory duty to promulgate achievable standards." A few commenters insisted that while the CAA was authored with the intent of reducing air pollution, Congress did not intend to disrupt the "productive capacity" of the United States through the promulgation of economically unachievable standards. 42 U.S.C. 7401(b)(1). The commenters maintained that by setting MACT floors individually and ignoring the collective cost implications of the entire rule, EPA would effectively disregard the CAA requirement that air pollution control be advanced while promoting the nation's "productive capacity." The commenters stated that emissions standards are to be established by taking costs into consideration. 42 U.S.C. 7429(a)(2).

One commenter discussed that EPA previously used a pollutant-by-pollutant methodology to set MACT floors in the context of the Proposed National Emissions Standards for Hazardous Waste Combustors (69 FR 21198, April 20, 2004), hereinafter referred to as the HWC NESHAP. The commenter stated that several parties submitted public comments questioning EPA's approach and pointed to the fact that EPA had failed to cite a single existing source which met the various MACT floor standards. They stated that EPA attempted to defend its practice of establishing pollutant-by-pollutant MACT standards by citing the *Chemical Manufacturer Association* v. *EPA,* 870 F.2d 177, 239 1989), clarified 885 F.2d 253, 264 (5th Cir. 1989), cert. denied, 495 U.S. 910, (1990), a Fifth Circuit case where the court held that, under the CWA, "best available technology" referred to the single best-performing plant on a pollutant-by-pollutant basis. The commenter asserts that EPA's reliance on *Chemical Manufacturer Association* v. *EPA* is misplaced as the CAA's procedure regarding the selection of MACT technologies differs on a textual basis from the CWA's procedure for identifying BAT. The commenter argued that under the CWA, BAT standards are to be set based on "the best practicable control technology currently available." The commenter suggested that the Court in *Chemical Manufacturer Association* v. *EPA* read this provision to allow for pollutant-by-pollutant determinations finding no statutory requirement that all of the BATs actually be achieved by an existing plant, just that each technology be demonstrated available. 885 F.2d at 264. The commenter continued that the CAA, on the other hand, more narrowly limits the basis for MACT designation to what has been achieved at existing sources, not what could be hypothetically achievable on a per-pollutant basis.

A few commenters also cited the HWC NESHAP as an example where EPA attempted to support its use of the pollutant-by-pollutant methodology by stating that "EPA believes that because all our standards are not technically interdependent (*i.e.,* implementation of one emission control technology does not prevent the source from implementing another control technology), the fact that sources are not achieving all the standards simultaneously does not indicate a flaw in the methodology." The commenters argued that EPA's conclusion in the HWC NESHAP is inapplicable to the proposed CISWI rule. They provided an example problem that they claimed has been observed in the MSW industry using ACI (an EPA-identified technology to reduce Hg emissions) and could also occur in the cement industry could be the formation of additional solid-phase dioxins/furans, thus increasing the emissions of D/F (which are regulated under the MACT standards). The commenters suggested that these findings call into question EPA's legal justification that control requirements for one pollutant do not impact another. Several commenters suggested that there is an inverse relationship between CO and $NO_X$ where improving combustion to control CO may affect $NO_X$. Finally, many commenters requested that EPA require work practice standards in lieu of emission limits for certain ERUs.

*Response:* We disagree with the commenters who object to setting MACT floors on a pollutant-by-pollutant basis. Contrary to the commenters' suggestion, CAA section 129(a)(2) does not mandate a total facility approach. EPA previously has explained that although CAA section 129 does not unambiguously declare that MACT floors must be established on a pollutant-by-pollutant basis, applying the requirement to set MACT floors based on what has been achieved by the best-performing sources for *each* of the pollutants covered by CAA section 129 is a reasonable interpretation of EPA's obligation under that provision (62 FR 48363–64).

Commenters' primary argument is premised on a reading of two clauses in CAA section 129(a)(2). Specifically, commenters cite the provision of CAA section 129 that, for new sources, states that MACT floors "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar unit" and, for existing sources, states that MACT floors must be based on "the average emissions limitation achieved by the best-performing 12 percent of units in the category." Commenters make the assumption that "achieved in practice" as applied to the best controlled "similar unit" and "best-performing 12 percent of units in the category" must be interpreted to mean the best-performing unit or units with respect to the entire suite of pollutants.

EPA makes no such assumption, primarily because to do so would lead to the illogical result of basing emissions limitations on units that may not be the best-performing source for any single covered pollutant. Instead, EPA interprets the provision to support establishing emissions standards based on the actual emissions of "the best controlled similar unit" or "best-performing 12 percent of units in the category" for each covered pollutant. Even if we were to conclude that the commenters' interpretation is equally reasonable under the statute, which we do not, the commenters' interpretation is certainly not compelled by the statute. We maintain that our interpretation is reasonable under the

statute and appropriate given the problems associated with implementing the commenters' approach.

Commenters' interpretation also ignores the rest of the CAA section 129. That provision requires EPA to "establish performance standards and other requirements pursuant to section [111] of this title and this section [129] for each category of solid waste incineration units." Pursuant to CAA section 129(a)(2), those standards "shall reflect the *maximum degree of reduction* in emissions of air pollutants listed under section (a)(4) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impacts and energy requirements, determines is achievable for new or existing units in each category" (emphasis added). Subsection (a)(4) then states: "The performance standards promulgated under section [111] of this title and this section [129] and applicable to solid waste incineration units shall specify numerical emissions limitations for the following substances or mixtures: particulate matter (total and fine), opacity (as appropriate), sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins and furans." Thus, the statute requires EPA to set individual numeric (a) Performance standards; (b) based on the maximum degree of reduction in emissions actually achieved; (c) for each of nine listed pollutants. Based on this, EPA believes—and has long believed—the statute supports, if not requires, that MACT floors be derived for each pollutant based on the emissions levels achieved for each pollutant.

Looking at the statute as a whole, EPA declared in 1997 rulemaking for medical waste incinerators: "The EPA does not agree that the MACT floors are to be based upon one overall unit" (62 FR 48364). Pointing for instance to CAA section 129(a)(4), EPA explained:

> This provision certainly appears to direct maximum reduction of each specified pollutant. Moreover, although the provisions do not state whether there is to be a separate floor for each pollutant, the fact that Congress singled out these pollutants suggests that the floor level of control need not be limited by the performance of devices that only control some of these pollutants well.

*Id.*

Since 1997, the courts have consistently acknowledged that EPA set emission standards based on the best-performing source for *each* pollutant. *See, e.g., Cement Kiln,* 255 F.3d 855, 858 (DC Cir.) ("[T]he Agency first sets emission floors for each pollutant and source category * * *"). Accordingly, EPA's pollutant-by-pollutant approach has, as outlined above, been in place since 1997 for medical waste incinerators, and even earlier for other types of incinerators regulated under section 129. *See, e.g.,* 59 FR 48198 (Sept. 20, 1994) (MWC). Commenters fail to cite to a single case even questioning EPA's pollutant-by-pollutant approach. In addition, such an approach has been upheld in other contexts. *See, e.g., Chemical Manufacturers Association* v. *EPA,* 870 F.2d 177, 239 (5th Cir. 1989) (concluding that basing CWA BAT standards on a pollutant-by-pollutant basis was a rational interpretation of EPA's obligations under that similar statute). Commenters maintain that the CWA BAT analogy is not apt due to differences in the statute. We disagree and note that the CAA MACT provisions were fashioned on that CWA program. S. Rep. No. 228, 101st Cong. 2d sess. 133–34.

Further, utilizing the single-unit theory proffered by commenters would likely result in EPA setting the standards at levels that could, for some pollutants, actually be based on emissions limitations achieved by the worst-performing unit, rather than the best-performing unit, as required by the statute (61 FR 173687, April 19, 1996; 62 FR 48363–64, September 15, 1997). For example, if the best-performing 12 percent of facilities for metals did not control PCDD/PCDF as well as a different 12 percent of facilities, the floor for PCDD/PCDF and metals would end up not reflecting best performance. Moreover, a single-unit approach would require EPA to make value judgments as to which pollutant reductions are most critical in working to identify the single unit that reduces emissions of the nine pollutants on an overall best-performing basis. Such value judgments are antithetical to the command of the statute at the MACT floor stage. It would essentially require EPA to prioritize the nine pollutants based on the relative risk to human health of each pollutant, a criterion that has no place in the establishment of MACT floors. The idea is to set limits that, as an initial matter, require all sources in a category to at least clean up their emissions to the level that their best performing peers have shown can be achieved. *Sierra Club* v. *EPA (Copper Smelters),* 353 F.3d 976, 979–80 (DC Cir. 2004).

Commenters' argument that Congress could have mandated a pollutant-by-pollutant result by using the phrase "for each pollutant" at appropriate points in CAA section 129(a)(2) misses the point. While doing so would have removed ambiguity from CAA section 129(a)(2), the fact that the statute does not contain the phrase does not compel any inference that Congress was *sub silentio* mandating a different result when it left the provision ambiguous on this issue. The argument that MACT floors set pollutant-by-pollutant are based on the performance of a hypothetical facility, so that the limitations are not based on those achieved in practice, just re-begs the question of whether CAA section 129(a)(2) refers to whole facilities or individual pollutants. All of the limitations in the floors in this rule of course reflect sources' actual performance and were achieved in practice.

An interpretation that the floor level of control must be limited by the performance of devices that only control some of these pollutants effectively "guts the standards" by including worse performers in the averaging process, whereas EPA's interpretation promotes the evident Congressional objective of having the floor reflect the average performance of best-performing sources. Since Congress has not spoken to the precise question at issue, and EPA's interpretation effectuates statutory goals and policies in a reasonable manner, its interpretation must be upheld. *See Chevron* v. *NRDC,* 467 U.S. 837 (1984).

The legislative history can sometimes be so clear as to give clear meaning to what is otherwise ambiguous statutory text, but that is not the case with the legislative history cited by the commenters: "The selection of emissions limitations which have been achieved in practice (rather than those which are merely theoretical) by sources of a similar type or character. An emissions limitation achieved in practice is one based on control technology that works reasonably well (doesn't require frequent and extensive modification or repair) under realistic operating conditions." *See* S. Rep. No. 228, 101st Cong., 1st Sess. 169 (1989). In fact, that language quoted equally supports EPA's approach of establishing the standards based on actual emission data from existing sources, which we consider realistic operating conditions. We further consider whether all the MACT standards can be achieved simultaneously under realistic operating conditions by evaluating the compatibility of different control technologies for the various 129 pollutants, as discussed below.

Commenters also make much of the fact that no single facility is presently achieving all of the nine pollutant limits proposed. But this fact is irrelevant, and only shows that plants will need to reduce their emissions of certain

pollutants to meet standards reflecting the average of best industry performers for that pollutant. We recognize that the pollutant-by-pollutant approach for determining the MACT floor can, as it does in this case, increase the overall cost of the regulation compared to the cost under a unit-based methodology. For example, the pollutant-by-pollutant approach for the CISWI regulation results in a stringent MACT floor for HCl based on control using a wet scrubber, and stringent MACT floors for PM and metals based on control using a FF. We interpret CAA section 129 to support determining the MACT floor in this manner, and we believe that Congress did in fact, intend that sources subject to regulations developed under CAA section 129 meet emissions limits that are achieved by the best controlled unit for each pollutant, as long as the control systems are compatible with each other. To our knowledge, there is no technical reason why these air pollution control systems cannot be combined. Regarding the inverse relationship between CO and $NO_X$ with regard to combustion control, it is incumbent upon the CISWI facility to determine whether combustion conditions can be adjusted to meet both standards and, if not, install add-on $NO_X$ controls as necessary, *e.g.,* SNCR systems.

All available data for cement kilns indicate that there is no technical problem achieving the floor levels for each pollutant simultaneously, using the MACT floor technology. For most kilns, compliance with the Hg limits will be accomplished using ACI followed by a second PM control consisting of a FF. There is no technical impediment to using this same system for control of PCDD/PCDF. We note that the ACI system would have to be installed downstream of the existing PM control, therefore, there would be no effect on the cement kiln dust collected in the existing PM control. One industry commenter claimed ACI increases dioxin emissions. Considering the fact that ACI can actually be used to remove dioxins from kiln exhaust gas, we see no basis for that statement. Regarding the commenter's claim that ACI increases D/F in MWC, our experience with the MWC source category has shown that this technology has been demonstrated to be effective at reducing D/F emissions from these sources and is being used extensively by MWC units. Furthermore, we have not been provided information from either the commenter or the MWC industry that substantiates the commenter's claim that ACI increases D/F emissions from these sources.

After the ACI system, a wet scrubber can be used for HCl and $SO_2$ control. We would expect the wet scrubber to be the downstream control because it creates a moisture laden exhaust that would require reheating to then apply ACI. Again, there is no technical impediment to adding a wet scrubber after the ACI system, and the two control devices should not interfere with each other's performance. If the facility required an RTO to meet the CO limit, the RTO would be installed downstream of the wet scrubber in order to protect the RTO from any acid gases in the kiln exhaust. The wet scrubber/RTO combination has been demonstrated in cement kiln applications.

In order to meet the PM and metals standards a facility could choose to modify their existing PM control to meet the revised limits, or design a new baghouse downstream of the ACI injection point to meet the PM and metals limits.

Though we have described some fairly complicated control scenarios, there are simpler applications of control technology that would likely be used successfully. One example would be simultaneous injection of alkaline materials (lime or sodium compounds) and activated carbon downstream of the existing PM control device followed by collection with a FF. This type of injection scheme would potentially control acid gases (HCl and $SO_2$), PCDD/PCDF, Hg, and PM.

Regarding the comment that EPA should consider work practice standards in lieu of emission limits for certain types of ERUs, we again point out that CAA section 129(a)(4) says that the standards promulgated under CAA section 129 shall specify numerical emissions limitations for each pollutant enumerated in that provision. Section 129(a)(4) requires MACT standards for, at a minimum, PM, $SO_2$, HCl, $NO_X$, CO, Pb, Cd, Hg, and PCDD/PCDF. Section 129 does not contain a work practice standard provision similar to that contained in CAA section 112(h) and applicable to NESHAP.

Finally, several commenters suggested that EPA must consider costs when establishing MACT standards. EPA is prohibited from considering costs when determining the minimum standards for each pollutant—the "MACT floor;" however, EPA is required to consider costs, among other things, when evaluating whether the MACT standards should be more stringent than the MACT floor, so called "beyond-the-floor" standards. See section 129(a)(2). EPA did consider costs in its beyond-the-floor analysis consistent with the statute.

2. MACT-on-MACT

*Comment:* Several commenters argued that EPA's recalculation of the 2000 MACT floors using post-MACT compliance data results in so-called "MACT-on-MACT" standards. They suggest that the limits are being set using a very small amount of data from a very small number of sources. The commenters argue that for the incinerator subcategory, the presumed reason a small number of units are being used to set the limits is that the existing standard caused many units to shut down. The commenters suggest that the remaining units likely installed or improved controls in order to comply with the original CISWI standards, effectively resulting in the new limits being set based on the top performers among the already top performers. One commenter asserted that these floors cannot be achieved and are contrary to the CAA and the intent of Congress. The commenter urged EPA to use the population of pre-2000 CISWI incinerators and their emissions data to establish the revised MACT floors. The commenter declares that the CAA never intended to impose technology every 5 years with no consideration of costs and risk, and that it is not reasonable to assume that Congress intended for existing sources subject to CAA section 129 to have their standards tightened up to levels comparable to those for new sources over time where their circumstances have not changed.

*Response:* We disagree with the commenters' assertions that we are employing a MACT-on-MACT approach to set limits that are not achievable by CISWI. The purpose of this action is not to force units who have complied with a lawfully adopted MACT standard to have to subsequently comply with another round of updated MACT standards, but to respond to the voluntary remand granted by the Court. As stated at proposal, we requested a voluntary remand of the 2000 CISWI standards after Sierra Club filed a petition for review of the final CISWI standards, and the Court issued its *Cement Kilns* decision which called into question EPA's procedures for establishing MACT floors for CISWI units. *Cement Kiln Recycling Coalition* v. *EPA*, 255 F.3d 855 (DC Cir. 2001). Specifically, EPA established the 2000 CISWI MACT floors by identifying the MACT floor control technology and calculating the MACT floor using emissions information from all units, not only best-performing units, that used the MACT floor technology. EPA

recognized that the Court rejected this methodology in the *Cement Kilns* case in which the Court rejected EPA's MACT floor approach under CAA section 112 and concluded that EPA may account for variability by setting the floor at a level that reasonably estimates the performance of the best controlled sources under the worst foreseeable conditions but not the worst foreseeable conditions faced by any unit in the source category. *Id.* at 865. The MACT processes under CAA sections 112 and 129 are essentially the same, thus the decision identified a flaw in EPA's 2000 CISWI standards.

CAA section 129 requires EPA to set the MACT floor based on emissions limitations *actually achieved* by the best-performing solid waste incineration units. In addition, the Court has made it abundantly clear that in issuing revised MACT standards pursuant to remand, EPA may not ignore this Court's intervening holdings:

> If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.

*Sierra Club* v. *EPA (Brick)*, 479 F.3d 875, 884 (DC Cir. 2007).

The best way to ascertain the actual emissions limitations achieved by the best-performing units, and thus comply with the Court's dictates, is to use data reflecting the actual emissions of operating units. For that reason, EPA collected data from solid waste incineration units, including the existing units in the incinerator subcategory, pursuant to a CAA section 114 ICR. In establishing the revised CISWI standards, we used the emissions information from the existing sources in each subcategory to set the MACT limits. For the incinerator subcategory, we determined that the information available from the 2000 rulemaking was insufficient and limited, and that it did not represent the current emissions limitations achieved by the sources in that subcategory since many of the units in that data set have since shut down.

Notwithstanding that clear statutory mandate to establish the MACT floors based on the emission limitations actually achieved by the best-performing sources, commenters assert that EPA's promulgation of the CISWI standards for the incinerators subcategory conflicts with the intent of the statute. Commenters use the term "MACT-on-MACT" to give the false impression that EPA's resetting of the MACT floors pursuant to CAA section 129(a)(2) somehow requires sources to constantly upgrade their control technologies. Commenters' MACT-on-MACT label is based on the faulty premise that the original MACT floors accurately reflected what the statute required. Although the units in the incinerators' subcategory had to comply with the 2000 MACT floors, the standards were not established based on the performance of the best-performing units as the statute requires and, therefore, the limitations are likely considerably higher than the limits being achieved by the then existing best controlled incinerator units. Accordingly, a more accurate label for the MACT standards as EPA re-proposed them in 2009 might be: "MACT-on-Unsupportable-Standards-Erroneously-Labeled-as-MACT."

We also disagree with commenters' assertion that we should not use the new emissions information from units in the incinerator subcategory, and instead base the MACT standards for the incinerator subcategory on the population of pre-2000 CISWI incinerators and their emissions data to establish the revised MACT floors. The first problem with this approach is that, as commenters note, many of the then existing incinerator units are no longer in operation. Section 129(a)(2) of the CAA requires EPA to establish standards for new units based on the "best controlled similar unit" and, for existing units, based on "the average emissions limitation achieved by the best-performing 12 percent of units in the category." We fail to see how the statute would allow us to consider emissions limitations from sources no longer in existence or ignore the emissions information on which we based the revised standards, and instead rely on information that does not reflect what sources are actually achieving today. Furthermore, even if we believed we had the authority to ignore the new data and establish the standards based on the inventory of units in existence before the 2000 CISWI standards, we do not have sufficient data from those units on which to base MACT standards based on that pre-2000 universe of sources. Specifically, EPA has data on only 17 units out of an estimated 112 units then in existence, and we have a complete data set for only 12 units. Because we do not have a complete data set, EPA cannot determine whether the then existing units for which we have data from that time period were best-performing units at that time, such that we could develop MACT standards consistent with the statute, and there is no mechanism by which EPA could reconstruct the category at this time.

Finally, we disagree with commenters' assertion that the units in the incinerator subcategory are unable to meet the revised CISWI standards. As stated above, the emissions data upon which the revised standards rely comes directly from CISWI units that have achieved the resulting levels, and we accounted for variability in establishing the standards to account for the performance of sources over a period time and different operating conditions. We believe that together this demonstrates that the incinerator units can achieve the individual standards, though admittedly units may have to take additional steps to comply with the validly established MACT standards.

3. Methodology (UL or UPL)

*Comment:* At proposal, EPA requested comment on whether an alternate statistical interval should be used, the 99 percent UPL. Some commenters supported the use of the 99 percent UPL, citing cases where this statistical interval had been used in other rulemakings for boilers and cement kilns. Several commenters stated that the statistical method used by EPA in setting the CISWI MACT floors is flawed due to the use of data sets that are not statistically significant. Commenters asserted that the 99 percent UL floor is calculated from data which 99 percent of units in MACT floor data population would fall below, which they argue sets up an automatic 1 percent failure rate for the top 12 percent sources. Commenters request that this be addressed by using a statistical approach which increases the allowance for variability of the data set.

One commenter stated that since EPA is using a limited data set that in some cases contains predominantly nondetect values to set floors that units must meet at all times, consideration of variability, and use of the appropriate statistical approach is crucial to ensuring units can achieve the emission limits. The commenter argues that in cases of severely limited or censored data sets, EPA should use either the 99.9 percent UL or use the UTL, which is meant for use in situations where the amount of data available does not represent the entire population. The commenter maintains that EPA is inappropriately using the 99 percent UL statistic to calculate the proposed CISWI emission limits because this does not capture enough variability in emissions to ensure the limits will be met by the top performers 100 percent of the time. They argue that the approach is flawed,

given that the number of units the limits are based on is very small, and the limits are being developed on a pollutant-by-pollutant basis in a way that does not account for variability of the fuels and wastes being burned. The commenter asserts that EPA does not justify the appropriateness of the use of the 99 percent UL over the use of other statistical procedures typically used for censored or limited data. Further, the commenter argues that although this calculation methodology was used in the HMIWI standard, it is not consistent with statistical procedures used to develop other emission standards. For example, the commenters explain that EPA used a complicated statistical approach in the development of the HWC NESHAP standard to account for intra-unit variability as well as inter-unit variability among the units in the MACT floor.

*Response:* In assessing sources' performance, EPA may consider variability both in identifying which performers are "best" and in assessing their level of performance. *Sierra Club* v. *EPA (Brick MACT),* 479 F.3d 875, 881–82 (D.C. Cir. 2007); see also *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (DC Cir 2004) (EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that has been achieved by the best-performing sources considering these sources' operating variability). The *Brick MACT* decision reiterated that EPA may account for variability in setting floors; however, the Court found that EPA erred in assessing variability because it relied on data from the worst performers to estimate best performers' variability. The Court held that "EPA may not use emission levels of the worst performers to estimate variability of the best performers without a demonstrated relationship between the two." 479 F.3d at 882.

In determining the MACT limits, we first determine the floor, which, for existing sources, is the emissions limitation achieved in practice by the average of the top 12 percent of existing sources, or the level achieved in practice by the best controlled similar source for new sources. In this rule, EPA is using lowest emissions limitation as the measure of best performance. We are then assessing variability of the best performers by using a statistical formula designed to estimate a MACT floor level that can be met by the average of the best-performing sources based on the expected distribution of future compliance tests (or calculated inputs in the case of Hg for waste-burning kilns). Specifically, for ERUs and waste-burning kilns, the MACT floor limit is an UPL, and for incinerators and small remote incinerators, the UL calculated with the student's t-test using the TINV function in Microsoft Excel®. The student's t-test has also been used in other EPA rulemakings (*e.g.,* NSPS for HMIWI, NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters) in accounting for variability.

As we discussed at proposal, the UL computation assumes that the data available represents the entire population of data from the best-performing CISWI units used to establish the standards. We have concluded that this statement applies to the incinerator and small remote incinerator subcategories, since we believe our inventory of these units is more certain than is our inventory of ERUs and waste-burning kilns for several reasons. In the 2000 CISWI rule, EPA only regulated solid waste incineration units that operated for the sole purpose of disposing of waste. Many incinerators subject to the 2000 CISWI rule ceased operation before the compliance date for those standards. Once the revised CISWI standards are finalized, these types of solid waste incineration units (i.e., incinerators and small remote incinerators) will either comply with the revised CISWI standards or cease operation, much as they did in response to the 2000 standards. The same is not necessarily correct for units in the ERUs and waste-burning kilns subcategories. For those sources, once the CISWI standards are promulgated, they will likely either comply with the CISWI standards or cease burning solid waste and comply with the applicable NESHAP. We think units in those subcategories will generally not cease operation. Furthermore, because incinerator and small remote incinerator unit's sole purpose is waste disposal, the only practical manner in which additional sources will be added to the inventory is through new construction. Again, this is different than for ERUs and waste-burning kilns because, for those subcategories, additional units may be added if existing boilers (and process heaters) and cement kilns begin combusting solid waste and thereby become ERUs and waste-burning kilns, respectively. For these reasons, we believe we have a complete inventory of units in the incinerators and small remote incinerators subcategories.

We sent Phase II testing requests to all incinerator and small remote incinerator units that are in our inventory. We required testing for all incinerator and small remote incinerator units, making allowances for identical units from a facility to only test one unit, and not each identical unit. Therefore, our data represent the entire population of data for these two subcategories. For this reason, we believe the UL is the appropriate statistical approach for the incinerators and small remote incinerators subcategories. The 99 percent UL represents a value that 99 percent of the data in the MACT floor population would fall below, and therefore accounts for the run-to-run and test-to-test variability observed in the MACT floor data set.

For ERUs and waste-burning kilns, however, we recognize that our data may not represent the entire population of units. As stated above, there is greater uncertainty involved in determining the universe of sources in these two source categories because we cannot be certain that we have identified all the units that would be considered to be burning solid waste, had the newly-adopted definition for solid waste been promulgated and effective at the time of testing. We also do not know whether the units we have identified will continue to burn waste after the final CISWI standards are issued. Unlike incinerators and small remote incinerators, the primary purpose of waste-burning kilns and ERUs is the production of a product or generation of energy, not the disposal of waste. Therefore, operators will decide whether it is economically feasible to continue or start combusting solid waste to support their industrial process and, if they decide that it is not, they will use traditional fuels or non-waste inputs instead of solid waste. For example, an ERU that is combusting solid waste that has little or no cost may decide that compliance with CISWI is an economically viable option compared to purchasing traditional fuels at market rates; but, if the costs of compliance with CISWI exceed the costs of traditional fuel, the source will likely cease burning solid waste. Conversely, a boiler that currently combusts only traditional fuels may be presented with a solid waste fuel option that makes it to their economic advantage to begin combusting solid waste. For these reasons, the population of units in the ERU and waste-burning kiln subcategories is inherently uncertain. We have for these reasons concluded that a prediction interval (e.g., UPL) is more appropriate for these two subcategories, and this approach is also consistent with the NESHAP statistical approach being used for the non-waste-burning counterparts of these units (i.e.,

boilers/process heaters and cement kilns).

A prediction interval for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what the upper bound of future values will be, based upon present or past background samples taken. The UPL consequently represents the value which we can expect the mean of future observations (3-run average) to fall below within a specified level of confidence, based upon the results of an independent sample from the same population. In other words, if we were to select at random a future test condition from any of the top 12 percent (MACT floor pool) of sources (average of 3 runs), we can be 99 percent confident that the reported level will fall at or below the UPL value. Use of the UPL is appropriate in this rulemaking for these two subcategories because it sets a limit any single or future source can meet based on the performance of members of the MACT floor pool.

The UPL is calculated as shown in Equation 1:

$$UPL = \bar{x} + t(0.99, n-1) \times \sqrt{s^2 \times \left(\frac{1}{n} + \frac{1}{m}\right)}$$

Where:

$\bar{x}$ = Mean of the sample data set
n = Number of test runs
m = Number of test runs in the compliance average
$s^2$ = Observed variance
t = Student t distribution statistic

This calculation was performed using the following spreadsheet functions:

Normal distribution: 99 percent UPL = AVERAGE (Test Runs in Top 12 percent) + [STDEV (Test Runs in Top 12 percent) × TINV (2 × probability, n-1 degrees of freedom) * SQRT ((1/n) + (1/m))], for a one-tailed t-value, probability of 0.01, and sample size of n. The value of "m" denotes the number of future observations, and it is used to calculate an estimate of the variance of the average of m-future observations.

This formula uses a pooled variance (in the $s^2$ term) that encompasses all the data-point to data-point variability of the best-performing sources comprising the MACT floor pool for each pollutant. Where variability was calculated using the UPL statistical approach, we used the average (or sample mean) and sample standard deviation, which are two statistical measures calculated from the data distributions for each pollutant. The average is a central value of a data set, and the standard deviation is the common measure of the dispersion of the data set around the average. We note here that the methodology accounts for both short-term and long-term variability and encompasses run-to-run and test-to-test variability. The formula also applies differently depending on how the underlying data set is distributed. To this end, EPA carefully evaluated the data sets for each HAP to ascertain whether the data were normally distributed, or distributed in some other manner (*i.e.,* lognormal). After applying standard and rigorous statistical tests (involving the degree of "skewness" of the data), we determined the distributions for each pollutant, which in turn determined the final form of the UPL equation. *See* "CISWI Emission Limit Calculations for Existing and New Sources" in the docket.

The results are floors that reasonably estimate the performance over time of the best-performing sources, as do the standards based on those floors. It is true that many sources will need to install controls to meet these standards, and that these controls have significant costs (although EPA estimates that the rule's costs are substantially outweighed by its benefits). See section VI of this preamble. This is part of the expected MACT process where, by definition, the averaged performance of the very best performers sets the minimum level of the standard. The EPA believes that it has followed the statute and applicable case law in developing its MACT floors. The summary of results of UL and UPL calculations and the MACT floor emission limits for each subcategory for existing and new sources are presented in Tables 4 through 9 of this preamble.

TABLE 4—SUMMARY OF MACT FLOOR RESULTS FOR EXISTING UNITS—PM, HG, CD AND PB

| Subcategory | Parameter | PM (mg/dscm) | Hg (mg/dscm) | Cd (mg/dscm) | Pb (mg/dscm) |
|---|---|---|---|---|---|
| Incinerators | No. of sources in subcategory = | 26 | 26 | 26 | 26 |
| | No. in MACT floor = | 4 | 4 | 4 | 4 |
| | Avg of top 12% | 4.571 | 0.0006 | 0.0004 | 0.0013 |
| | 99% UL of top% (test runs) = | 33.6004 | 0.00533 | 0.00256 | 0.00352 |
| | Limit = | 34 | 0.0054 | 0.0026 | 0.0036 |
| ERUs—Solids | No. of sources in subcategory = | 30 | 30 | 30 | 30 |
| | No. in MACT floor = | 4 | 4 | 4 | 4 |
| | Avg of top 12% | 2.85061 | 0.0000520 | 0.0001713 | 0.0012704 |
| | 99% UPL of top% (test runs) = | 246.9158 | 0.0003 | 0.0003(a) | 0.0035(a) |
| | Limit = | 250 | 0.00033 | 0.00051(a) | 0.0036(a) |
| ERUs—Liquid/Gas | No. of sources in subcategory = | 6 | 6 | 6 | 6 |
| | No. in MACT floor = | 1 | 1 | 1 | 1 |
| | Avg of top 12% | 18.588 | 0.001 | 0.001 | 0.005 |
| | 99% UPL of top% (test runs) = | 101.7548 | 1.313 | 0.023 | 0.096 |
| | Limit = | 110 | 0.0013 | 0.023 | 0.096 |
| Waste-burning kilns | No. of sources in subcategory = | 12 | 12 | 12 | 12 |
| | No. in MACT floor = | 2 | 2 | 2 | 2 |
| | Avg of top 12% | 2.8378 | N/A | 0.0002 | 0.0012 |
| | 99% UPL of top% (test runs) = | 6.1115 | 0.0079(b) | 0.0005 | 0.0026 |
| | Limit = | 6.2 | 0.0079(b) | 0.00048 | 0.0026 |
| Small, remote incinerators | No. of sources in subcategory = | 14 | 14 | 14 | 14 |
| | No. in MACT floor = | 2 | 2 | 2 | 2 |

TABLE 4—SUMMARY OF MACT FLOOR RESULTS FOR EXISTING UNITS—PM, HG, CD AND PB—Continued

| Subcategory | Parameter | PM (mg/dscm) | Hg (mg/dscm) | Cd (mg/dscm) | Pb (mg/dscm) |
|---|---|---|---|---|---|
| | Avg of top 12% | 84.052 | 0.0012 | 0.027 | 0.238 |
| | 99% UL of top% (test runs) = | 220.826 | 0.006 | 0.603 | 2.657 |
| | Limit = | 230 | 0.0057 | 0.61 | 2.7 |

[a] A calculated limit equal to three times the MDL was used in place of the calculated MACT floor emission limit. For further explanation, *see* section V. of the preamble.
[b] For details on this calculation, *see* the memorandum "CISWI Emission Limit Calculations for Existing and New Sources" in the Docket for this rulemaking.

TABLE 5—SUMMARY OF MACT FLOOR RESULTS FOR EXISTING UNITS—CO, $NO_X$ AND $SO_2$

| Subcategory | Parameter | CO (ppmvd) | $NO_X$ (ppmvd) | $SO_2$ (ppmvd) |
|---|---|---|---|---|
| Incinerators | No. of sources in subcategory = | 26 | 26 | 26 |
| | No. in MACT floor = | 4 | 4 | 4 |
| | Avg of top 12% | 16.800 | 14.7 | 0.733 |
| | 99% UL of top% (test runs) = | 32.378 | 52.419 | 10.418 |
| | Limit = | 36 | 53 | 11 |
| ERUs—Liquid/Gas | No. of sources in subcategory = | 6 | 6 | 6 |
| | No. in MACT floor = | 1 | 1 | 1 |
| | Avg of top 12% | 36.00 | 58.733 | 641.352 |
| | 99% UPL of top% (test runs) = | 36.00 | 75.6305 | 712.3156 |
| | Limit = | 36 | 76 | 720 |
| ERUs—Biomass | No. of sources in subcategory = | 21 | 21 | 21 |
| | No. in MACT floor = | 3 | 3 | 3 |
| | Avg of top 12% | 247.3333 | 86.7595 | 1.4039 |
| | 99% UPL of top% (test runs) = | 485.3681 | 287.9536 | 6.1751 |
| | Limit = | 490 | 290 | 6.2 |
| ERUs—Coal | No. of sources in subcategory = | 9 | 9 | 9 |
| | No. in MACT floor = | 2 | 2 | 2 |
| | Avg of top 12% | 40.3031 | 307.2352 | 624.0054 |
| | 99% UPL of top% (test runs) = | 58.0304 | 330.7464 | 641.9307 |
| | Limit = | 59 | 340 | 650 |
| Waste-burning kilns | No. of sources in subcategory = | 12 | 12 | 12 |
| | No. in MACT floor = | 2 | 2 | 2 |
| | Avg of top 12% | 70.4280 | 437.7682 | 15.6660 |
| | 99% UPL of top% (test runs) = | 105.0945 | 536.4268 | 37.9704 |
| | Limit = | 110 | 540 | 38 |
| Small, remote incinerators | No. of sources in subcategory = | 14 | 14 | 14 |
| | No. in MACT floor = | 2 | 2 | 2 |
| | Avg of top 12% | 12.756 | 67.212 | 1.403 |
| | 99% UL of top% (test runs) = | 19.104 | 237.326 | 410.006 |
| | Limit = | 20 | 240 | 420 |

[a] A calculated limit equal to three times the MDL was used in place of the calculated MACT floor emission limit.

TABLE 6—SUMMARY OF MACT FLOOR RESULTS FOR EXISTING UNITS—HCL AND D/F

| Subcategory | Parameter | HCl (ppmvd) | D/F (TMB) (ng/dscm) | D/F (total TEQ basis) (ng/dscm) [a] |
|---|---|---|---|---|
| Incinerators | No. of sources in subcategory = | 26 | 26 | 26 |
| | No. in MACT floor = | 4 | 4 | 4 |
| | Avg of top 12% | 0.181 | 0.238 | 0.004302537 |
| | 99% UL of top% (test runs) = | 28.045 | 4.504 | 0.1286 |
| | Limit = | 29 | 4.6 | 0.13 |
| ERUs—Solids | No. of sources in subcategory = | 30 | 30 | 30 |
| | No. in MACT floor = | 4 | 4 | 4 |
| | Avg of top 12% | 0.16719 | 0.093487 | .0088932 |
| | 99% UPL of top% (test runs) = | 0.4456 | 0.3443 | 0.0586 |
| | Limit = | 0.45 | 0.35 | 0.059 |
| ERUs—Liquid/Gas | No. of sources in subcategory = | 6 | 6 | 6 |
| | No. in MACT floor = | 1 | 1 | 1 |
| | Avg of top 12% | 4.440 | 1.110 | 0.0463 |
| | 99% UPL of top% (test runs) = | 4.927 | 13869.523 | 30.0133 |
| | Limit = | [(a)]14 | 14,000 | 31 |
| Waste-burning kilns | No. of sources in subcategory = | 12 | 12 | 12 |
| | No. in MACT floor = | 2 | 2 | 2 |
| | Avg of top 12% | 3.5665 | 0.0752 | 0.0005 |
| | 99% UPL of top% (test runs) = | 24.8634 | 0.1909 | 0.0070 |

TABLE 6—SUMMARY OF MACT FLOOR RESULTS FOR EXISTING UNITS—HCL AND D/F—Continued

| Subcategory | Parameter | HCl (ppmvd) | D/F (TMB) (ng/dscm) | D/F (total TEQ basis) (ng/dscm) [a] |
|---|---|---|---|---|
| | Limit = | 25 | 0.2 | 0.007 |
| Small, remote incinerators | No. of sources in subcategory = | 14 | 14 | 14 |
| | No. in MACT floor = | 2 | 2 | 2 |
| | Avg of top 12% | 35.289 | 333.080 | 7.288 |
| | 99% UL of top% (test runs) = | 214.233 | 1183.196 | 56.933 |
| | Limit = | 220 | 1,200 | 57 |

[a] A calculated limit equal to three times the MDL was used in place of the calculated MACT floor emission limit.

TABLE 7—SUMMARY OF MACT FLOOR RESULTS FOR PM AND METALS FOR NEW SOURCES

| Subcategory | Parameter | PM (mg/dscm) | Hg (mg/dscm) | Cd (mg/dscm) | Pb (mg/dscm) |
|---|---|---|---|---|---|
| Incinerators | Avg of top performer | 3.0608 | 0.0001 | 0.0002 | 0.0007 |
| | 99% UL of top (test runs) = | 17.7867 | 0.000151 | 0.0023 | [a]0.0015 |
| | Limit = | 18 | 0.00016 | 0.0023 | [a]0.0019 |
| ERUs—Solids | Avg of top performer | 2.640916 | 0.00003192 | 0.00013696 | 0.00045367 |
| | 99% UPL of top (test runs) = | 1094.5327 | 0.0028 | 2.8369 | 0.0030 |
| | Limit = | [b]250 | [b]0.00033 | [b]0.00051 | 0.0031 |
| ERUs—Liquid/Gas | Avg of top performer | 18.588 | 0.001 | 0.001 | 0.005 |
| | 99% UPL of top (test runs) = | 101.7548 | 1.313 | 0.023 | 0.096 |
| | Limit = | 110 | [d]0.00025 | 0.023 | 0.096 |
| Waste-burning kilns | Avg of top performer | 1.2173 | N/A | 0.0001 | 0.0011 |
| | 99% UPL of top (test runs) = | 2.3591 | [c]0.0062 | 0.0006 | 0.045852 |
| | Limit = | [a]2.5 | [c]0.0062 | [b]0.00048 | [b]0.0026 |
| Small, remote incinerators | Avg of top performer | 83.534 | 0.001 | 0.011 | 0.086 |
| | 99% UL of top (test runs) = | 733.5002 | 0.0013 | 0.6692 | 0.2589 |
| | Limit = | [b]230 | [a]0.0035 | [b]0.61 | 0.26 |

[a] A calculated limit equal to three times the MDL was used in place of the calculated MACT floor emission limit.
[b] The NSPS limit exceeds the EG limit. The EG limit was selected as the NSPS limit.
[c] Hg limit was developed using material input data from CISWI kilns identified within the Portland Cement NESHAP database. See the memorandum "CISWI Emission Limit Calculations for Existing and New Sources" for details on this calculation.
[d] Dioxin/furan TEQ and Hg limits for ERUs—liquid/gas were replaced with D/F TEQ limits for liquid fuel major source boilers. *See* "CISWI Emission Limit Calculations for Existing and New Sources" for details.

TABLE 8—SUMMARY OF MACT FLOOR RESULTS FOR NEW UNITS—CO, $NO_X$, $SO_2$

| Subcategory | Parameter | CO (ppmvd) | $NO_X$ (ppmvd) | $SO_2$ (ppmvd) |
|---|---|---|---|---|
| Incinerators | Avg of top performer | 12.000 | 9.0333 | 0.2233 |
| | 99% UL of top (test runs) = | 12.000 | 22.3685 | 39.5108 |
| | Limit = | 12 | 23 | [a]11 |
| ERUs—Liquid/Gas | Avg of top performer | 36.000 | 58.733 | 641.352 |
| | 99% UPL of top (test runs) = | 36.000 | 75.6305 | 712.3156 |
| | Limit = | 36 | 76 | 720 |
| ERUs—Biomass | Avg of top performer | 153.0000 | 62.3233 | 1.0492 |
| | 99% UPL of top (test runs) = | 153.0000 | 344.7699 | 20.8889 |
| | Limit = | 160 | [a]290 | [a]6.2 |
| ERUs—Coal | Avg of top performer | 35.4778 | 307.2352 | 624.0054 |
| | 99% UPL of top (test runs) = | 45.0280 | 330.7464 | 641.9307 |
| | Limit = | 46 | 340 | 650 |
| Waste-burning kilns | Avg of top performer | 58.57 | 1.4742 | 7.2187 |
| | 99% UPL of top (test runs) = | 89.7816 | 195.2522 | 124.3390 |
| | Limit = | 90 | 200 | [a]38 |
| Small, remote incinerators | Avg of top performer | 12.000 | 60.769 | 0.131 |
| | 99% UL of top (test runs) = | 12.000 | 77.283 | 1.164 |
| | Limit = | 12 | 78 | 1.2 |

[a] The NSPS limit exceeds the EG limit. The EG limit was selected as the NSPS limit.

TABLE 9—SUMMARY OF MACT FLOOR RESULTS FOR NEW UNITS—HCL AND DIOXINS/FURANS

| Subcategory | Parameter | HCl (ppmvd) | D/F (TMB) (ng/dscm) | D/F (Total TEQ basis) (ng/dscm) [a] |
|---|---|---|---|---|
| Incinerators | Avg of top performer | 0.0413 | 0.0176 | 0.001266667 |
| | 99% UL of top (test runs) = | 0.0901 | 0.0228 | 2.1464 |

TABLE 9—SUMMARY OF MACT FLOOR RESULTS FOR NEW UNITS—HCL AND DIOXINS/FURANS—Continued

| Subcategory | Parameter | HCl (ppmvd) | D/F (TMB) (ng/dscm) | D/F (Total TEQ basis) (ng/dscm) [a] |
|---|---|---|---|---|
| | Limit = | 0.091 | [a]0.052 | [b]0.13 |
| ERUs—Solids | Avg of top performer | 0.068133 | 0.0161 | 0.000501333 |
| | 99% UPL of top (test runs) = | 0.5435 | 0.0674 | 0.0103 |
| | Limit = | [b]0.45 | 0.068 | 0.011 |
| ERUs—Liquid/Gas | Avg of top performer | 4.440 | 1.110 | 0.046335368 |
| | 99% UPL of top (test runs) = | [a]13.2107 | 13869.5228 | 30.0133 |
| | Limit = | [a]14 | (no limit) | [c]0.002 |
| Waste-burning kilns | Avg of top performer | 0.3994 | 0.0562 | 0.000105 |
| | 99% UPL of top (test runs) = | 0.3994 | 0.0895 | 0.0029 |
| | Limit = | [a]3 | 0.09 | 0.003 |
| Small, remote incinerators | Avg of top performer | 27.678 | 299.827 | 4.868700057 |
| | 99% UL of top (test runs) = | 196.6311 | 1700.6082 | 30.0810 |
| | Limit = | 200 | [d]1,200 | 31 |

[a] A calculated limit equal to three times the MDL was used in place of the calculated MACT floor emission limit.
[b] The NSPS limit exceeds the EG limit. The EG limit was selected as the NSPS limit.
[c] Dioxin/furan TEQ and Hg limits for ERUs—liquid/gas were replaced with D/F TEQ limits for liquid fuel major source boilers. *See* "CISWI Emission Limit Calculations for Existing and New Sources" for details.

The measurements for HCl from waste-burning kilns are very close to the detection limit for analytic Method 321 actually calculated in the field for HCl. As discussed elsewhere, we have implemented a procedure for adjusting limits to account for measurement variability using data at the detection limit. This results in a floor of 3 ppmvd for the new waste-burning kilns for HCl, adjusted to a dry basis at 7 percent oxygen. This represents the lowest level that can be reliably measured using this test method, and we therefore believe that it is the lowest level we can set as the MACT limit taking the appropriate measurement variability into account.

The Hg standard for waste-burning kilns reflects 30 days of data for all Hg inputs, reasonable estimates of control device performance (for the few controlled sources), plus a reasonable statistical methodology to account for variability (including variability of Hg content of kiln inputs). EPA also used a pooled variability factor (pooling variability for all kilns in the MACT floor pool), which increased variability estimates. This analysis is based upon data collected for development of the final Portland Cement NESHAP, but screened such that the CISWI analysis used only the data from kilns that would have been identified as CISWI units had the newly-adopted solid waste definition been promulgated and effective at the time of performance testing, and converted to a concentration basis for consistency with the CISWI standards. *See* "CISWI Emission Limits Calculations for Existing and New Sources."

4. Statistical Analysis (Lognormal vs. Normal Distribution)

*Comment:* Several commenters suggested that EPA's data distribution designations are flawed and that EPA must default to non-normal distributions unless sufficient data are available to conduct robust analyses which unambiguously show the distribution can only be described by normal statistics. One commenter suggests that the non-normal distribution is consistent with both conventional wisdom and EPA's own guidance in "Guidance for Data Quality Assessment: Practical Methods for Data Analysis", EPA/600/R–96/084, July 2000, which holds that it is more likely that environmental data are distributed log-normally. Commenters state that where there is any uncertainty according to EPA's criteria using Excel skewness and kurtosis, EPA biases its findings on distributions in favor of normality, the opposite of EPA's own guidance. The commenter states that EPA's Guidance for Data Assessment provides that the lognormal distribution is "a commonly met distribution in environmental work," also stating "Environmental data commonly exhibit frequency distributions that are non-negative and skewed with heavy or long right tails," and "The lognormal distribution is a commonly used distribution for modeling environmental contaminant data."

*Response:* EPA has revised the methodology to use the lognormal distribution when the normal distribution is not clearly indicated based on the skewness and kurtosis tests to be more consistent with EPA's guidance in "Guidance for Data Quality Assessment: Practical Methods for Data Analysis" EPA/600/R–96/084, July 2000.

5. Treatment of Detection Levels

*Comment:* Many commenters argued that EPA should not use data below detection limits to set standards. They contend that EPA's use of data below MDLs to set standards invalidates EPA's analysis, creates emissions limits that are biased low, and sets emission standards that would not allow facilities to demonstrate compliance without taking undue risk of facing non-compliance. They suggested that no numerical emission standard for a pollutant should be set below the measurement ability of the reference test method. Some commenters stated that EPA does not appear to have systematically screened the emissions data for cases where a detection limit should be applied, and has erroneously recorded zero values for emissions where those are reported in the original test reports. The commenters further assert that in addition to failing to promulgate a method for measuring detection limits for air emission test methods, EPA has ignored the issue of errors associated with quantifying source emissions when they are low.

At proposal, EPA requested comment on calculating a three times method detection limit in cases where the floor emissions limit did not adequately account for variability. While one commenter supports this method, another argues that this approach is unlawful and inconsistent with the CAA's directive to set the MACT floor at the emissions level achieved by the best-performing sources because it allows for facilities to emit at far higher levels than the best-performing sources.

*Response:* Although we disagree with commenters on the use of nondetect values, we do agree that at very low emission levels where emissions tests result in nondetect values, the inherent imprecision in the pollutant measurement method has a large influence on the reliability of the data underlying the MACT floor emission limit. Because of sample and emission matrix effects, laboratory techniques, sample size, and other factors, MDLs normally vary from test to test for any specific test method and pollutant measurement. The confidence level that a value measured at the detection level is greater than zero is about 99 percent. The expected measurement imprecision for an emissions value occurring at or near the MDL is about 40 to 50 percent. Pollutant measurement imprecision decreases to a consistent level of 10 to 15 percent for values measured at a level about three times the MDL. The approach EPA has used to account for measurement variability begins by defining a MDL that is representative of the data used in the data pool. The first step in the approach is to identify the highest test specific MDL reported in a data set that is also equal to or less than the average emission calculated for the data set. This approach has the advantage of relying on the data collected to develop the MACT floor emission limit, while to some degree, minimizing the effect of a test(s) with an inordinately high MDL (*e.g.,* the sample volume was too small, the laboratory technique was insufficiently sensitive or the procedure for determining the detection level was other than that specified). The second step is to determine the value equal to three times the representative MDL and compare it to the calculated MACT floor emission limit. If three times the representative MDL were less than the calculated MACT floor emission limit, we concluded that measurement variability is adequately addressed, and we did not adjust the calculated MACT floor emission limit. If, on the other hand, the value equal to three times the representative MDL was greater than the calculated MACT floor emission limit, we concluded that the calculated MACT floor emission limit does not account entirely for measurement variability. We therefore used the value equal to three times the MDL in place of the calculated MACT floor emission limit to ensure that the MACT floor emission limit accounts for measurement variability and imprecision.

6. Use of CEMS Data

*Comment:* Several commenters stated that EPA did not include CO, $SO_2$, or $NO_X$ data from CEMS that was provided by companies and resides in EPA's databases. Commenters claimed that after discussions with EPA rule writers in which affected sources were encouraged to gather CEMS data as an alternative to stack test data, facilities purposefully submitted such data and these data should be used. Some commenters suggested that it is important that the MACT floor data represent the real-world variability of emissions and that CEMS data is clearly superior to stack test data in this regard. Commenters suggested that EPA may believe it is not feasible to incorporate CEMS data along with stack test data in its MACT floor analyses due to the method it chose to rank and statistically analyze the data. The commenters recommended using the UPL in the statistical analysis to allow CEMS data to be used along with stack test to set standards. Further, one commenter suggested that EPA obtain hourly average CEMS data over a suitable period of time (several months or as much data as can be readily obtained) from each source it can identify that either has a permanent CEMS installed on the unit or provided data in its response to the ICR survey or testing program.

*Response:* In response to the ICR survey, most facilities that reported CEMS data provided it as 24-hour block averages. We used these data to determine baseline emissions and to calculate costs and impacts of the final rule. EPA did not propose to use 24-hour block averages in setting emissions standards for $NO_X$, $SO_2$, and CO. We determined that to do so for these pollutants would be inconsistent with the sampling time for the stack test data and the test methods used to determine compliance with the final standards. For example, typical instrument stack test method test runs would be around 1 hour or less for $NO_X$, CO, or $SO_2$ stack tests representing essentially 3-hour average of emissions. A 3-hour average is not comparable to data obtained over a 24-hour sampling with a CEMS. In response to comments, EPA has incorporated into the database hourly CEMS data that were voluntarily submitted by some units that are best performers within their subcategory, and where no stack test data are available, and used these data in conjunction with stack test data from other best performers to calculate the MACT floor emission limits.

For a response to the comment on using the UPL in the statistical analysis to calculate emissions, see section V.B of this preamble.

*C. Control Technology Assumptions for the Floor and Beyond-the-Floor*

1. Control Technologies and Cost Assumptions

*Comment:* Many commenters argued that EPA underestimated the total cost of controls and monitoring equipment required to comply with the emissions standards. Several commenters stated that PM concentrations will increase with the addition of SNCR and ACI systems and will require facilities to invest in baghouse systems. Some commenters asserted that there is no documentation to support that LBMS can control CO emissions from boilers to achieve the emission levels. Commenters also argued that biomass-to-energy facilities required to install an oxidation catalyst to meet the CO emission limits may have space limitations or other engineering constraints and may not be able to achieve the emission limits. One commenter argued that packed bed scrubbers to control HCl and $SO_2$ from boilers is impractical on units with high flow rates, high PM loading, and high inlet pollutant concentration. Some commenters suggested that EPA does not have an adequate understanding of how to reduce or control D/F emissions from cement kilns. Some commenters asserted that the cost memorandum assumes that for units requiring less than 10 percent improvement in $NO_X$, "minor adjustments were considered sufficient." They stated that EPA further assumes that these adjustments (such as air handling and distribution adjustments in the firebox) could be made at no additional cost. The commenters contended however, that EPA provides no evidence in the record to support either of these assumptions and that there are no boiler adjustments of this type that are done at no cost.

*Response:* EPA first notes that the rule does not specify particular controls that sources must install and operate. Sources may evaluate the emissions from their source and the emission limits that apply, and then judge for themselves which controls may be best suited for their particular unit to meet the emission limits. The control technology assumptions and cost estimates are assumptions of controls which may be required and an estimate of costs to retrofit and operate these controls.

EPA has, however, revised the costing assumptions and methodology since proposal to address issues presented by commenters. For example, in cases where ACI is being required, we have assumed that FF will need to be installed to capture the spent carbon or,

if FF is already present, improvements will be required to the FF to ensure capture of the sorbent. For larger ERUs that require acid gas control, we have assumed that dry sorbent injection followed by DIFF will be the preferred technology rather than wet scrubbers. For $NO_X$ control, we acknowledge that small adjustments at no cost may not be feasible for all affected units to meet the limits and that sources may want to have some operational flexibility so that they have suitable margin of compliance with the emission limits. Therefore, we have used SNCR as the control technology if even small $NO_X$ reductions are required to meet the limit. We have not quantified PM increases due to SNCR addition. PM increases are a function of flue gas characteristics of each unit, and we do not have data for our units that would allow us to determine whether secondary particulate formation would occur in certain units that an additional PM control device would be required for the unit. We note, however, that the units that require an SNCR to meet the limits are also anticipated to need a PM control device to meet the limits for other pollutants. Therefore, we expect that affected sources would account for potential secondary PM formation in designing their overall air pollution control system.

2. Technology-Based Beyond-the-Floor Comments

*Comment:* Some commenters argued that EPA's decision to consider beyond-the-floor limits equal to the new source floors was arbitrary and unlawful. The commenters recommended that instead EPA should examine multiple control technologies to determine what level of emissions reductions are "achievable" based on cost and other factors. The commenters asserted that beyond-the-floor technologies should be evaluated for all pollutants in each subcategory of the CISWI rule.

*Response:* We have revised our beyond-the-floor analysis from that set forth in the proposed rule to consider the performance of available technology. For existing units, rather than considering as the only beyond-the-floor option the potential of existing sources to meet the new source limits, we have considered the technologies available to control the various HAP and the reasonable control efficiencies of those technologies. As discussed at proposal, EPA may adopt emissions limitations and requirements that are more stringent than the MACT floor (i.e., beyond-the-floor). Unlike the MACT floor methodology, however, EPA must consider costs, nonair-quality health and environmental impacts and energy requirements when considering beyond-the-floor alternatives.

In developing this final rule, EPA first analyzed the controls available and being used for each subcategory and compared this to the controls necessary for units to meet the MACT floor limits. We then evaluated the different combinations of available emission control technologies and practices, add-on controls different from those required to meet the MACT floor limits, that existing units would have to employ were we to require additional emissions reductions beyond-the-floor levels set forth above. If we determined that any of these additional control options were technically feasible for the units in a subcategory, we then analyzed the costs, nonair quality environmental impacts and benefits associated with adopting the identified control option to determine whether the beyond-the-floor control was reasonable. The following discussions detail this analysis for each subcategory.

*Incinerators.* Existing units in this subcategory are equipped with afterburners, FFs, and wet scrubbers. We estimate that to comply with the existing source MACT floor limits units in this subcategory may require the addition of or improvement of an existing FF for the control of PM, Cd and Pb; wet scrubbers for the control of HCl and $SO_2$ for many of the units that currently do not have wet scrubbers; ACI system with a FF for the control of D/F and Hg; and in several cases, afterburner retrofits for the control of CO; and SNCR for $NO_X$ in certain instances. These controls are effective and demonstrated on this subcategory of units for the pollutants they are intended to control (*see* "Revised CISWI Control Costs Memorandum" in the docket). We estimate that some incinerator units in this category will require retrofits of existing control or installation of additional control technologies as set forth above to comply with the MACT floor limits.

Furthermore, as part of our costing and impacts analysis (discussed in section VI of this preamble), we evaluated whether existing facilities would choose to cease burning solid waste in incineration units after promulgation of the final CISWI standards if alternative disposal options, primarily diverting waste to a landfill, were less costly. Based on the analysis, we expect that all but three facilities with units in the incinerators subcategory will choose to cease operations once the proposed MACT floor limits are promulgated. The three units that we estimate to remain open will likely add ACI system/FF and one will add SNCR for $NO_X$ control to meet the MACT floor limits. There is no better control beyond the ACI system/FF for D/F, Hg, PM, Cd, and Pb control. The reductions these units will require for meeting the metals emissions will typically need to be greater than 95 percent, therefore necessitating very efficient FF systems. One unit that is not currently meeting the $NO_X$ MACT floor limit must install SNCR to comply with the $NO_X$ floor limit. To achieve further reductions for $NO_X$, the unit would require another control device, such as SCR, to comply with a beyond-the-floor limit, and would require the other remaining units to also install either SNCR or SCR. The cost of installing and operating the SCR is typically four to five times higher than a comparable SNCR (*see* "Revised CISWI Control Cost Memorandum"), and would force this unit to close. In addition to cost considerations, SCR is typically used in combustion units such as industrial boilers and process heaters, gas turbines, and reciprocating internal combustion engines (Air Pollution Control Technology Fact Sheet, SCR, EPA–452/F–03–032), and we are not currently aware of any successful application of SCR technology to a waste-combustion unit. We therefore question whether SCR could be successfully applied to incineration units in any case. For acid gas performance, all three units are well below the MACT floor with their existing controls, and addition of wet scrubbers would only offer small incremental improvements in emissions. From a cost perspective, the likely result of requiring wet scrubbers on these units would be closure of these units and diversion of waste to a landfill. Considering these factors, we concluded that beyond-the-floor limits are unreasonable for the incinerator subcategory.

*Small remote incinerators.* Existing units in this subcategory are typically equipped with an afterburner as the control device, with the facility sometimes employing waste segregation practices to a certain degree, usually to screen out recyclable materials and hazardous waste materials. We received several comments stating that this subcategory has unique climactic, geographic, and wildlife considerations that influence the applicable controls that are available, and commenters also stated that these small remote incinerators are the only viable waste disposal option in certain regions of Alaska. See section V of this preamble for more discussion from commenters

on these units. Of primary concern from a technical standpoint are controls that require water to operate or those that have a large space footprint. Water-based controls such as wet scrubbers, SNCR, and even the evaporative cooling section of dry sorbent injection followed by DIFF may pose ice fogging and equipment freezing concerns that could prevent the use of the incinerator.

To achieve the MACT floor limits, more than half of the units in this subcategory will require afterburner upgrades, about two-thirds of the units will require ACI system/FF or FF alone, and most will require a more robust materials segregation plan that removes chlorinated and non-ferrous metal components from the waste stream at these facilities. These controls are the best demonstrated technologies that are technologically feasible at these facilities, and they are sufficient to meet the MACT floor limits. One technology that is beyond-the-floor that is technically feasible would be higher efficiency FF or perhaps the addition of a second FF. However, considering the small amount of emissions that would remain after meeting the MACT floor, we expect the incremental cost effectiveness for a second FF or higher efficiency FF could be extraordinarily high, approaching $500,000/ton.

We have also considered the costs of alternative disposal, and, based on new information obtained during the comment period, we have adjusted our estimates of those costs to be much higher than those we estimated at proposal. Based on the adjusted cost estimates, we have determined that the alternative disposal options exceed the costs of controls necessary to meet the MACT floor limits. In addition, there is still some uncertainty whether alternative disposal is an available option during severe climate events. Our assessment indicates that a beyond-the-floor limit would not be achievable to some facilities due to aforementioned technical issues associated with available controls and would significantly increase costs for others. In either case, we conclude that establishing beyond-the-floor standards would likely result in forced closure of some of the units in this subcategory, but we also believe that some units that would otherwise close due to cost related issues would be forced to operate at a loss because closure may not be an option due to other nonair quality environmental regulations aimed at protecting human health and wildlife. For both the technological and cost related issue discussed above, and because of nonair quality environmental issues, we conclude that there are no reasonable beyond-the-floor alternatives for the small remote incinerator subcategory.

Waste-burning kilns. Existing kilns are currently equipped with various combinations of ESPs, FF, SNCR and DIFF controls. We estimate that kilns may need to add new controls or improve existing controls to meet the MACT floor limits. These include improved FFs to meet the reductions necessary to meet the Cd and Pb limits, activated carbon for D/F and Hg control, and some kilns may need to add RTO to meet the CO limits.

As previously discussed, ACI system/FF are the best technologies available for control of D/F, Hg, PM, Cd and Pb. To meet the floor, the FF will need to be high efficiency, 99 percent in some cases, to meet the MACT floor limit for Cd and Pb. The only further control available would be a second FF, which would result in less than an additional 1 percent reduction of these pollutants. We estimate the cost effectiveness for this to be in the $500,000 per ton range at a minimum. Therefore, there are no further controls to consider as beyond-the-floor options for these pollutants.

For waste-burning kilns, a significant amount of CO emissions can result from the presence of organic compounds in the raw materials (and not only from incomplete combustion). Therefore, good combustion controls and practices are not as effective for waste-burning kilns as for other types of combustion units, and may not be enough for units to meet the MACT floor CO limits. Oxidation catalysts have not been installed on waste-burning kilns, and we believe they may not be as effective on waste-burning kilns as they are on other sources due to plugging problems. Specifically, the catalyst bed can become plugged or blinded with dust, thereby covering up catalyst reactive sites necessary to oxidize CO, which reduces the effectiveness of the unit. To maintain the effectiveness of the catalyst, the unit may require shutting down more frequently to replace the catalyst, which reduces productivity of the unit and increases catalyst costs. To make an oxidation catalyst feasible, it may be necessary to also use multiple FF in series upstream of the catalyst which, as described above, is a very costly measure. The only effective CO control for significant CO reductions we could identify for waste-burning kilns is a RTO, and we expect over half of the units will need to install a RTO to meet the MACT floor limits. As a beyond-the-floor option, setting a CO limit at a level that most of the remaining waste-burning kilns would also require RTO could be considered, although we doubt that some of the units requiring RTO to meet the MACT floor emission limit for CO would be able to further reduce their emissions to that same extent. Furthermore, the cost and energy consumption for these additional RTO make this an impractical choice. Therefore, as there are no other controls which could be applied to further reduce CO emissions from these units and additional RTOs would be ineffective from a cost and energy impacts perspective, we could not identify a beyond-the-floor option for CO.

We expect that waste-burning kilns will install scrubbers to meet the MACT floor emission limits for HCl and $SO_2$. The floor limits for HCl are at the levels of quantification of the test method used to determine compliance. Therefore, there are no additional measures that could be employed to quantify any further reductions in HCl emissions beyond that of the MACT floor limit. The only other option for further HCl and $SO_2$ control would be addition of a dry sorbent injection system in series with the wet scrubber. However, this would approximately double the costs for acid gas control, with only about a 30 percent incremental reduction in $SO_2$ emissions and no measurable reduction in HCl emissions. As a result, no beyond-the-floor options for acid gases from waste-burning kilns exist because we cannot quantify further HCl reductions, and the beyond-the-floor options for $SO_2$ reductions are unreasonable due to the cost of the additional controls in conjunction with the limited benefits of such controls.

The demonstrated control technology for $NO_X$ control on waste-burning kilns is SNCR. In fact, several of the kilns are already equipped with this technology and are able to comply with the $NO_X$ MACT floor limit. We estimate that other kilns may require the addition of SNCR to meet the MACT floor limits for $NO_X$. One kiln will require an SNCR that is optimized to the capabilities of the technology to meet the MACT floor limits for $NO_X$. For this unit to be able to achieve an even lower $NO_X$ limit would likely require another technology. As discussed above, SCR is another technology that is used by some combustion sources to reduce $NO_X$ emissions; however, SCR is a catalyst technology that has not been demonstrated to work effectively on cement kilns (or waste-burning kilns) in the United States. We believe that SCR is not effective on waste-burning kilns due to difficulties operating SCR in applications where there is significant PM or sulfur loading in the gas stream. These two gas stream constituents can

reduce catalyst activity, and lower the resulting effectiveness of the SCR, through catalyst poisoning and blinding/plugging of active sites by ammonia sulfur salts (formed from sulfur in the flue gas with the ammonia reagent) and PM (Air Pollution Control Technology Fact Sheet, SCR, EPA–452/F–03–032). We could not identify any other controls beyond SCR and SNCR, alone or in tandem, to reduce $NO_X$ emissions from waste-burning kilns. We believe that SCR is not technically demonstrated on kilns currently and may not be technically feasible. For these reasons, we are not selecting a limit for $NO_X$ that is beyond-the-floor for the waste-burning kiln subcategory.

*Liquid waste ERUs.* Existing units in this subcategory are equipped with flue gas recirculation in a couple cases, and some settling chambers for particulate control in a couple other units. We anticipate units within this subcategory may need to install FF, CO catalyst, and SNCR to meet the MACT floor limits. As discussed earlier, FFs are the best control available for PM, Cd, and Pb control. The only further control available would be a second FF or a very high efficiency FF. The metals emissions from these units are very low to begin with, so the only incremental reductions would be in PM. This would result in perhaps an additional 10 percent reduction in emissions at almost double the cost of current particulate controls. As mentioned before, we anticipate cost effectiveness for this to be in the $500,000 per ton range at a minimum. Likewise, SNCR is the best demonstrated technology being applied to waste combustion units for $NO_X$ control. As discussed earlier, SCR has been used in some boiler applications, but SCR costs are approximately four to five times those of SNCR, for only an additional 30 percent reduction from the baseline. Furthermore, we observe that SCR has not been demonstrated to work effectively on waste combustion units in the United States. Carbon monoxide control for liquid waste ERUs could also be achieved by using a RTO, but at a far greater energy requirement, notably in natural gas consumption, with comparable control efficiency as the CO catalysts that we expect some units will need to install to meet the MACT floor CO limits. Therefore, we conclude that additional beyond-the-floor CO control would be unreasonable for this subcategory.

Additional D/F and Hg control could be achieved using ACI with another FF. However, the baseline emissions for these pollutants are already very small, with only marginal additional emissions reductions available if additional controls were being used. Therefore, beyond-the-floor limits for these pollutants will not be reasonable from a cost effectiveness perspective.

We also considered whether it is reasonable to go beyond-the-floor with respect to $SO_2$ for this subcategory. In this case, the DIFF control technology could be applied to these units to reduce $SO_2$ emissions by about 70 percent with co-control of HCl (90 percent) as well as PM, Cd, and Pb. Most of these units will already require the addition of a FF to meet the MACT floor limits, so the cost of going beyond-the-floor for these units would entail the dry sorbent injection components of the control device. For the units that do not require FF to meet the floor, the additional costs would involve the entire DIFF control device. The total cost for applying the relevant controls to all the units is approximately $4.8 million per year in annualized capital and operating costs for $SO_2$ control beyond-the-floor. The reduction in emissions of $SO_2$ is approximately 2,300 tpy, based on the baseline emissions estimate and a 70 percent reduction and accounting for $SO_2$ emissions from electricity generation needed to power the controls. It is worth noting that the baseline estimates and MACT floor calculations for this subcategory are based on data from the only unit for which we have $SO_2$ data in this subcategory. This unit has a baseline $SO_2$ concentration of 641 ppm, which has been applied to the other five liquid ERUs as an estimated baseline concentration. The HCl concentration for this unit is about 4 ppm, so co-benefit emission reductions are significantly less than the $SO_2$ emission reductions. Because we are basing these analyses off of data from a single unit within the subcategory, we realize that there is a large margin of uncertainty on the control requirements within this source category and the potential for $SO_2$ emissions reductions at the beyond-the-floor level.

To get a better idea of the potential cost effectiveness for a beyond-the-floor limit for $SO_2$, we also looked at the costs and emissions reductions solely for the unit which we have data for to determine the cost effectiveness of control for this unit. In this case, the additional cost of the dry injection system (the unit already requires a FF to meet the MACT floor limits) is about $567,000 per year, with an estimated emissions reduction of 103 tpy of $SO_2$ (and minor HCl reduction) adjusted for $SO_2$ emissions from electricity generated to power the controls. This results in an incremental cost effectiveness of $5,500 per ton of $SO_2$ control beyond-the-floor. While this number is generally within the cost effective range we find reasonable, we are not adopting a beyond-the-floor limit for $SO_2$ given the uncertainty associated with this number, the fact that we cannot adequately estimate the costs for other units in the subcategory, and because the controls required for HCl may actually reduce $SO_2$ more than is required based on the $SO_2$ standard alone such that the actual cost effectiveness of the beyond-the-floor option is not in line with the estimate.

Regarding co-control for PM, the fact that four of the six liquid waste ERUs will likely require FF to meet MACT floor limits for Cd and Pb means that going beyond-the-floor using DIFF controls would only net additional PM control on the two remaining units. The FF portion of the control costs for these two units is approximately $1.1 million per year with an estimated PM reduction of fewer than five tpy, which translates into an incremental cost-effectiveness of about $230,000 per ton for additional PM control. Based on our analysis and realizing the high degree of uncertainty regarding costs, emissions reductions and resulting cost-effectiveness for this particular CISWI subcategory, we have concluded that requiring beyond-the-floor controls on these units is unreasonable.

*Solid waste ERUs.* Existing units in this subcategory are equipped with various combinations of ESPs, FF, scrubbers, SNCR spray towers, and DIFF. We anticipate units within this subcategory may need to install or improve different combinations of ACI system/FF, DIFF, FF, LBMS, CO catalysts, and wet scrubber control technologies to meet the MACT floor limits. As discussed earlier, a FF is the best control available for PM, Cd, and Pb control. The Cd and Pb reductions necessary are greater than 90 percent in many cases, indicating that units will likely require highly efficient FF to meet the limits for these pollutants and PM. Therefore, beyond-the-floor limits for PM, Cd, and Pb would likely necessitate a second FF, essentially doubling the cost for little additional reduction in emissions. Furthermore, the ACI system is the BAT for reducing D/F and Hg emissions. The D/F reduction necessary for some of these units approaches 99 percent, indicating that beyond-the-floor limits that are more stringent than the MACT floor limits may not be achievable by the control technology.

In certain cases, units may require DIFF and wet scrubbers in series to meet acid gas limits. There are no additional controls that could be implemented in these cases to further reduce acid gas

emissions. Carbon monoxide control for solid waste ERUs could also be achieved by using a RTO, but likely at a far greater energy requirement (specifically natural gas) with comparable control efficiency as the CO catalysts that we expect some units will need to install to meet the MACT floor CO limits. Therefore, we conclude that additional beyond-the-floor CO control would be unreasonable for this subcategory due to additional cost and energy impacts.

The demonstrated control technology for $NO_X$ control on ERUs is SNCR. In fact, some of the ERUs are already equipped with this technology. A couple of the units appear to comply with the $NO_X$ MACT limit because they already have a SNCR in place. As mentioned earlier, SCR is another technology that is used by some combustion sources to reduce $NO_X$ emissions. However, SCR costs can be about four to five times more costly than SNCR. Furthermore, we observe that SCR has not been demonstrated to work effectively on waste combustion units in the United States. We realize that the industrial sectors that use units within this CISWI subcategory are typically wood and forest product industries, sectors that have suffered particular economic hardship. We are attempting to make sure that the regulatory requirements are being satisfied, while minimizing adverse economic impact wherever possible. Since there remain some questions about a demonstrated control beyond the control used to meet the MACT floor limits, and some units are already utilizing SNCR to meet the MACT limit, coupled with the fact that the potential beyond-the-floor technology is significantly more expensive, we are not selecting a limit for $NO_X$ that is beyond-the-floor for the solid waste ERU subcategory.

*New Units.* As discussed elsewhere, we have concluded that only two of the CISWI subcategories may see any new units within the immediate future, primarily due to replacement of old units. These two subcategories are the incinerator subcategory and the small remote incinerator subcategory. While facilities may find alternative disposal options are available, we are cognizant of the fact that, for these subcategories, there may be instances where alternative disposal options are unavailable, and a new incineration unit may be required. For incinerators, we estimate units may require a combination of the ACI system/FF, SNCR, and wet scrubbers to achieve the new source MACT floor limits. As discussed above for existing incinerators, there are no control technologies demonstrated or reasonably cost-effective that we could consider at this time that would perform better or be more cost-effective than those being used to meet the new source MACT floor limits. Therefore, we have concluded that no beyond-the-floor emission limits should be selected for new incinerators. For small remote incinerators, we anticipate new sources will have an afterburner installed to achieve the CO limit and that the afterburner will also be equipped with low $NO_X$ burners, require waste segregation for ferrous and non-ferrous metals and chlorinated plastics, and likely require ACI system/FF to meet the new source MACT floor limits. As discussed above for existing small remote incinerators, there are technical issues with any control technologies that require water for operation for this subcategory of unit. As a result, there are no additional or better control technologies available other than those being used to meet the new source MACT floor limits for the small remote incinerator subcategory.

*D. Rationale for Subcategories*

1. Incinerators

*Comment:* Some commenters argue that EPA wrongly concluded that all incinerators are sufficiently similar to meet one emission limit. The commenters suggest that the variability of combusted materials necessarily means variability in emissions concentrations and that variability cannot be masked exclusively by emissions control performance or statistical analysis. One commenter claims that it will be extremely difficult for incinerators combusting materials other than what the best-performing incinerators are combusting to comply with the limits in the proposed rule if EPA does not refine the overly-broad incinerator subcategory.

*Response:* EPA disagrees that incinerators should be further subcategorized. As stated at proposal, "incinerators, which are the units currently regulated by the 2000 CISWI rule, are used to dispose of solid waste materials, and emissions are a function of the types of materials burned. Incinerators are designed without integral heat recovery (but may include waste heat recovery). While there are different designs, they all serve the same purpose: reduction in the volume of solid waste materials. Incinerators can be operated on a batch or continuous basis." We note that the MACT floor pool of incinerators represents a wide variety of industrial sources, from pharmaceuticals to heavy equipment manufacturers. From the data available, these best-performing units also combust a wide variety of materials, including liquid waste streams, expired pharmaceutical products, and spent paint booth filters. Therefore, contrary to commenters' arguments, there is a wide variety of materials being combusted in the best-performing units. As we also explained at proposal, the same types of add-on controls, including FF, wet scrubbers, SNCR and ACI, can be applied to most incinerators. Our estimates indicate that the reductions achieved by these controls will allow incinerator units to comply with the emission limits.

Furthermore, the commenters have provided no information that indicates that the units in the incinerators subcategory are unable to retrofit and/or take other actions (*e.g.*, waste segregation) to satisfy the standards in the final rule. Even if it were true that some sources will be unable to meet the final standards, which we dispute, we still believe it would not be reasonable to further subcategorize incinerators based on the waste stream because such subcategorization, taken to its logical conclusion, would lead to many subcategories with one or only a few sources. We presume that Congress recognized when it enacted CAA section 129 that solid waste incineration units would be combusting a variety of waste and, in fact, CAA section 129 requires different standards based on the potential waste streams: MSW; HMI waste; and commercial and industrial waste. Congress provided additional discretion to further subcategorize solid waste incineration units, however, commenters have not provided compelling information that indicates these units, which are already complying with the 2000 CISWI standards, should be further subcategorized. For these reasons, we decline to further subcategorize the incinerators subcategory.

2. Energy Recovery Units

*Comment:* Many commenters suggested that the ERU subcategory is overly broad and should be subcategorized. The commenters stated that EPA has broad authority to distinguish among groups of sources within a source category or subcategory in setting a MACT standard. The commenters maintained that the statute provides that EPA "may distinguish among classes, types, and sizes of sources within a category or subcategory" when establishing MACT standards. Several commenters believed that Congress' use of the broad terms "class," "type," and "size" show that EPA is intended to have broad discretion in

the appropriate factors that warrant distinguishing among sources, and EPA's proposed subcategories fall squarely within the meaning of "types" and "sizes." The commenters argued that to the extent that EPA may distinguish among sources within a category or subcategory on the basis of "any [reasonable] criterion of classification whatsoever," and may create subcategories as appropriate, the CAA clearly grants EPA authority to create additional subcategories for ERUs.

Many commenters suggested that the subcategorization of ERUs, where differences among sources affect the applicability of control technology, is consistent with MACT precedent. Commenters argued that EPA's proposed inclusion of all types of ERUs (coal units, biomass units, combination boilers, liquid boilers, and even gas fired units) into one subcategory is inadequate. Several commenters suggested that EPA create separate subcategories as it proposed in the Boiler and Process Heater MACT. The commenters supported their suggestion by offering the following rationale: (1) Since the CAA requires EPA to set $SO_2$ limits for CISWI units, and since coal contains significant concentrations of sulfur, and biomass generally would contain little or no sulfur, a subcategory for coal-fired boilers should be established; expensive control devices such as a spray dryer absorber could not reduce the outlet concentrations of $SO_2$ to the single ppm levels equivalent to those of a biomass boiler; (2) observation of the proposed Boiler MACT floor standards proposed for biomass and coal units shows that there are significant differences in outlet emissions of HCl, Hg, and CO; (3) likewise, the $NO_x$x emissions from the top performing biomass, coal, liquid, and gas-fired units would all be significantly different due to inherent differences in the design of these units.

*Response:* The CAA allows EPA to divide source categories into subcategories based on differences in class, type, or size. For example, differences between given types of units can lead to corresponding differences in the nature of emissions and the technical feasibility of applying emission control techniques. The design, operating, and emissions information that EPA has reviewed indicates differences in unit design that distinguish different types of ERUs. Data indicate that there are generally significant design and operational differences between units that burn coal, biomass, liquid, and gaseous fuels. Energy Recovery Units are therefore designed for specific fuel types and will encounter problems if a fuel with characteristics other than those originally specified is fired. Many ERUs in the database are indicated to co-fire liquids or gases with solid fuels, but, in actuality, most of these boilers commonly use fuel oil or natural gas as a startup fuel only and then operate on solid fuel during the remainder of their operation. In contrast, some co-fired units are specifically designed to fire combinations of solids, liquids, and gases. Changes to the fuel type would generally require extensive changes to the fuel handling and feeding system (*e.g.*, a stoker using wood as fuel would need to be redesigned to handle fuel oil or liquid wastes). Additionally, the burners and combustion chamber would need to be redesigned and modified to handle different fuel types and account for increases or decreases in the fuel volume. In some cases, the changes may reduce the capacity and efficiency of the ERU. An additional effect of these changes would be extensive retrofitting needed to operate using a different fuel; therefore, the design of the ERU impacts the degree of combustion.

In our investigations resulting from commenters' statements, we concluded that the data were sufficient for determining that a distinguishable difference in performance exists based on unit design type. Therefore, because different types of units have different emission characteristics which may influence the feasibility or effectiveness of emission control, they should be regulated separately (*i.e.,* subcategorized) for affected pollutants. Accordingly, we have subcategorized ERUs based on unit design in order to account for these differences in emissions and applicable controls. The two primary ERU subcategories are units designed to burn solid wastes (solids) with other solid fuels, and units designed to burn liquid wastes with liquid or gaseous fuel (liquid/gas). The ERU solids subcategory is further subcategorized into units designed to burn coal and units designed to burn biomass for CO, $NO_X$ and $SO_2$ to address design differences and feasibility or effectiveness of emission control between these types of units as commenters have suggested. The subcategorization for these pollutants is also compelled by the data available for the solid fuel sources. Specifically, coal fired ERUs submitted exclusively CEMS data for CO, $NO_X$, and $SO_2$, and biomass fired ERUs submitted almost exclusively stack test data for these pollutants. We are unable to convert the vast majority of CEMS data into equivalent stack test data and the converse is true as well. Pursuant to CAA section 129(a)(2), EPA must establish emission standards for existing sources based on the average emissions limitation achieved by the best-performing 12 percent of sources. Because the data for CO, $NO_X$, and $SO_2$ from the biomass and coal fired ERUs are not in consistent formats, we would have to ignore a subset of the available data in establishing the floors for these pollutants if we did not further subcategorize solid fuel ERUs. We therefore think it is reasonable to further subcategorize these units for CO, $NO_X$, and $SO_2$ so the standards are reflective of the data available to EPA, and we are properly accounting for the different emissions characteristics associated with the different types of fuels.

These subcategories are based on the primary fuel that the ERU is designed to burn. We are aware that some ERUs burn a combination of fuel types or burn a different fuel type as a backup fuel if the primary fuel supply is curtailed. However, ERUs are designed based on the primary fuel type (and perhaps to burn a backup fuel) and can encounter operational problems if another fuel type that was not considered in its design is fired at more than 10 percent of the heat input to the unit. Therefore, we subcategorized ERUs that burn at least 10 percent coal (on an annual heat input basis) as being in solid fuel/coal subcategory, with the remaining solid ERUs being in the biomass subcategory for ERUs.

3. Cement Kilns

*Comment:* One commenter states that waste-burning cement kilns differ among themselves significantly in terms of type, size, configuration, and other relevant factors that can influence emissions, and EPA should consider the further sub-categorization of kilns on this basis. The commenters provide the example that in its evaluation of organic emissions from kilns in support of the Portland Cement rulemaking, they found significant differences due to configuration and raw materials. The commenter did not develop specific recommendations for sub-categorization of cement kilns under the proposed CISWI rule citing the limited data and the limited time EPA has allowed for comment in this rulemaking.

*Response:* The authority to subcategorize is discretionary, even where sources can otherwise be distinguished as a different class, type, or size. In evaluating the population of kilns that may be subject to CISWI and estimates of control technologies that may be required to meet the limits, we realize that most of the kilns in the

CISWI population at proposal were subject to the standard solely due to tire combustion. Further investigation indicated that all of these kilns obtained the tires from established tire recycling programs. Based on the new definition in Section 241.3, these tires would not be considered to be solid wastes. Therefore, kilns that we considered as CISWI units at proposal solely due to tire combustion are not part of the CISWI category, and we removed them from the CISWI inventory. In addition, we obtained information on used oil, biomass, and wood waste being combusted by cement kilns. Based on the definition in 241.3, we determined which of these materials would be considered to be solid waste and removed any kilns from the CISWI inventory where we determined none of the fuels were solid waste. This resulted in the inventory of CISWI kilns being reduced to 12 kilns total. Of the 12 kilns in the current CISWI inventory, one is a wet kiln, four are preheater kilns, and the remainder are preheater/precalciner kilns. We recognize that differences in kiln design and configuration can effect emissions. These effects are most evident on emissions of $NO_X$, CO, and $SO_2$. However; all of these pollutants are also affected by the site specific raw materials fed to the kiln. We have insufficient data to differentiate between the raw material affects and the kiln design affects. Therefore, we decided not to develop separate subcategories for cement kilns. However, all of our information indicates that $NO_X$, $SO_2$ and CO are controllable to the level of the standard whether a kiln is wet or dry. The control devices that may be necessary to comply with the CISWI limits (including the standards for $NO_X$, $SO_2$ and CO) may be applied to both types of kiln, and there do not appear to be any feasibility or effectiveness issues that would necessitate subcategorization in order for units to achieve the limits. For example, the controls we estimate the wet kiln units may require in order to meet the CISWI limits, such as SNCR, wet scrubbers, and RTO, may be applied to all types of kilns. We are unaware of any design considerations that prevent FF or RTO use for either the wet type or preheater type of kiln. Therefore, EPA disagrees with this comment and is not subcategorizing among waste-burning kilns.

4. Small Remote Incinerators

*Comment:* Several commenters requested that EPA revise the definition of small remote incinerator. Some commenters suggested that the proposed definition would inadvertently exclude those incinerators that are within the spirit of the definition, but are located within 50 miles of a MSW landfill or units that burn more than 1 ton of waste per day. Other commenters specifically requested an exemption for small remote incinerators that are not accessible by the Federal Highway System. Several commenters explained that not all units are accessible by vehicle, the affected units may or may not be within 50 miles of a MSW landfill, and road access can be seasonal in Alaska.

Commenters expressed particular concerns about small remote units operating in remote locations of Alaska. Commenters explained that waste accumulation due to unavoidable transportation delays could attract animals, in potential violation of state law and policy and the Federal Endangered Species Act. Several commenters explained that due to the location of facilities, increased fog conditions and harsh winters, it is unlikely that food waste can be transported off-site on a daily basis. In these circumstances, stored waste may attract wildlife to facility operations, which could in turn result in potentially dangerous interactions with personnel. Commenters argued that longer term on-site storage is not a safe option for either the wildlife or humans. Further commenters explained that operational areas, and areas where they can accumulate solid waste, are very small, such that the ability to store multiple days of solid waste could be problematic. The commenters asserted that the use of incinerators to manage food waste has proven to be a valuable tool for preventing human/wildlife interactions.

*Response:* EPA has revised the definition of small, remote incinerator to apply to a unit combusting less than 3 tons of waste per day and located more than 25 miles from the nearest landfill. The change to 25 miles and 3 tons of waste combusted per day, instead of the parameters that were proposed, will help address the commenters' concerns about applicability for intended units within this subcategory.

5. Burn-Off Ovens

*Comment:* Many commenters are opposed to regulating burn-off ovens under CISWI. They assert that EPA severely underestimated the universe of burn-off ovens and did not consider the potential subcategories of burn-off ovens (*e.g.,* metal parts recovery, drum reclamation, and electric motor rewinding ovens). Several commenters argue that the units do not use incineration or combustion processes and instead play a vital role in the reclaiming and recycling process. Many commenters claim that regulation of these units will result in job loss and closure of businesses.

*Response:* At proposal, we combined part, rack, and drum reclamation units into one burn-off oven subcategory. We estimated that there were approximately 36 units in the burn-off oven subcategory. We received comments during the comment period that indicated that there may be more than 15,000 units in the burn-off oven subcategory as we have defined it. Furthermore, we have no data on drum reclamation units. We also do not have data on all CAA section 129 pollutants for the burn-off ovens we identified at proposal. For all these reasons, and because we are not required to finalize standards for burn-off ovens to comply with our CAA section 112(c)(6) obligation, we have determined that this final action will not subject burn-off ovens to this standard.

6. Soil Treatment Units

*Comment:* EPA received a comment that soil treatment units are unique units and do not belong in the floor determination for kilns. The commenter stated that soil treatment units are "treating" and not "combusting" soil and therefore should be considered in an alternative floor analysis.

*Response:* Based on the information received during the comment period, EPA agrees that soil treatment units and kilns should be separate subcategories. In addition, information we have obtained since proposal indicates that there may be many more soil treatment units than the two we have identified; and, therefore, we do not have sufficient data to set emissions standards for soil treatment units. For these reasons, we have determined that this final action will not subject soil treatment units to this standard. We do not need to regulate soil treatment units at this time in order to comply with our CAA section 112(c)(6) obligation.

*E. Emission Limits*

1. Consistency Between Other Applicable NESHAP Limits

*Comment:* Many commenters stated that EPA should adopt MACT limitations of similar stringency for similar units, irrespective of whether the source is regulated as a kiln or ERU under CAA section 112 or a CISWI unit under CAA section 129. Commenters stated that for some emissions, the two rules apply to similar equipment burning similar fuels for similar

purposes, but the emission limits are clearly different. They suggested that efforts be made by the EPA either to explain the differences or to develop more adequate and consistent limits in the regulations. One commenter stated that EPA should express standards for waste-burning cement kilns in a production-based form for a direct comparison of standards with the Portland Cement NESHAP.

*Response:* As commenters note, we have subcategorized units to the extent we determined appropriate within the CISWI population, to reflect similar design considerations as subcategories for non-CISWI units, however, the fact that units are similar does not authorize EPA to set similar standards under CAA section 112 and section 129. As we have discussed elsewhere in our descriptions of the MACT floor analysis, we are calculating emission limits based on data from units that we believe are CISWI units based on the definition of solid waste and the currently available information. Solid waste incineration units may not be regulated under CAA section 112 once we have established CAA section 129 performance standards for the category or subcategory, and solid waste incineration units should not be included in the floor calculations for CAA section 112 standards once the units are identified as solid waste incineration units. The converse is also true. The requirements for setting CAA section 129 standards are different for new and existing units. For new units, EPA must base the standards on the best-performing similar unit for each subcategory, and, for existing units, we must base the standards on the average emissions limitation achieved in practice for the best-performing 12 percent of units in the subcategory. *See* CAA section 129(a)(2). The statute, therefore, provides some discretion for EPA to establish new source standards based on the best controlled similar source, instead of the best controlled source in the subcategory. For this reason, EPA may consider CAA section 112 sources to the extent they are similar to the CAA section 129 units when establishing the MACT floor for new sources. For existing units, however, EPA is required to use information from sources in the subcategory when establishing the MACT standards. Section 112 of the CAA contains similar requirements for establishing the MACT floors. *See* CAA section 112(d)(3). Because the existing sources subject to CAA section 112 will have different emissions information than the sources subject to CAA section 129, we may not harmonize the existing source standards for similar units regulated under both CAA section 112 and section 129.

As to the comment that EPA should establish production based standards for waste-burning kilns to coincide with the Portland Cement NESHAP, we note that CAA section 129 solid waste incineration rules, including the 2000 CISWI standards, have consistently presented numeric limits in stack gas concentration bases. We are maintaining in the final CISWI standards emission limits as stack gas concentrations; however, in response to the comments on this issue, we note that the kiln limits in Tables 1 and 2 of the preamble can be converted to lb/ton clinker or lb/ton raw feed bases assuming 100,000 dscf/ton clinker and 1.65 ton raw feed/ton clinker.

2. Opacity Limits

*Comment:* Several commenters opposed the setting of opacity limits for CISWI units. Commenters argued that opacity has long been considered a surrogate monitoring methodology for demonstrating continuous compliance with PM standards and that the proposed controls and monitoring techniques eliminate the need for opacity monitoring. Many commenters also suggested that a certified reader is only able to distinguish opacity in increments of 5 percent and that the proposed single digit limits are beyond the capabilities of Method 9. Commenters also asserted that the correlation between PM and opacity is not demonstrated based on a review of the data available at proposal. Several commenters stated that it is not appropriate to apply a ratio of PM to opacity based only on data from one facility in the incinerator category and apply it to all types of units regulated under this rule.

*Response:* At proposal, we had opacity data for only one unit in the incinerator subcategory. We developed opacity standards for the CISWI subcategories by establishing a ratio of PM to opacity for the one incinerator and multiplying that ratio by the PM MACT standards for each of the subcategories to establish the opacity standards for the different subcategories. 75 FR 31956. We requested comment on this approach. We also requested comment on whether it was appropriate to establish opacity standards for CISWI units at all. EPA is not required to establish opacity standards for incineration units pursuant to CAA section 129(a)(4), which requires EPA to set numeric emission limitations for nine pollutants plus "opacity (as appropriate)."

EPA is not promulgating opacity limits for CISWI units at this time. As commenters note, opacity is often required in CAA rules as a surrogate for PM to assure compliance with PM standards when continuous PM monitoring is not required under the applicable standard. In this case, we are requiring PM stack testing in conjunction with continuous parametric monitoring; therefore, the need for an opacity limit is diminished with regards to CISWI units. In addition, we have determined it is not appropriate to set opacity standards given the lack of opacity data from all but one of the CISWI units. However, we continue to maintain that opacity serves as an indicator of PM, and we may in the future determine that it is appropriate to establish opacity limits for CISWI units; therefore, EPA is requiring opacity testing for units as part of their annual testing requirements. Opacity also serves as an indicator of good air pollution control practices, and as such, is a valuable tool for EPA in determining compliance with the general provision at 40 CFR 60.11(d) that sources maintain and operate their affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions.

3. Limits for TMB and TEQ for D/F

*Comment:* Some commenters suggest that EPA arbitrarily set floors for TEQ based on a 0.078 ratio between total mass and TEQ D/F data. Commenters believe that the data EPA used to calculate the multiplier was not limited to the best-performing 12 percent of sources and thus, the approach does not conform to the statute, which requires MACT floors to be set on the basis of the average of the emissions levels actually achieved by the best-performing 12 percent of sources.

One commenter asserts that nondetected target compounds (*i.e.,* the 17 2,3,7,8-substituted PCDD/PCDF TEF congeners) were treated with a zero concentration in all of the stack test reports and that target compounds reported by the laboratory as an EMPC were treated with a zero concentration for TEQ calculations. The commenter further states that EPA used TEQs which treated both nondetected target compounds, as well as those reported as an EMPC, with a zero concentration (*i.e.,* ND=0; EMPC=0).

*Response:* EPA is no longer using a ratio of TMB to TEQ to calculate limits for D/F TEQ. EPA further reviewed the data, including data corrections submitted after proposal, and used

individual and total mass congener data to establish TEQ limits for all subcategories. The commenter's assertion that EMPC and ND values were treated as zero concentration is incorrect. Estimated maximum possible concentration and ND values were not incorporated into the analysis unless a facility reported an actual value, including a reported value of zero. The TEQ limits were calculated using the same statistical approach used for the other regulated pollutants. *See* section V.B of this preamble for discussions on establishing MACT floors, incorporating nondetect values, and changes in the statistical approach used to set limits.

*F. New Data/Corrections to Existing Data*

1. Discussion of EPA Data Validation and Inclusion of New Data Received Since Proposal

*Comment:* EPA received several comments on suggested data corrections or new data to incorporate into the analysis.

*Response:* See "Data Amendments and Corrections Following Proposal" memorandum in the docket for a discussion on how data were incorporated to address comments.

*G. Testing and Monitoring*

1. Monitoring Alternatives (CEMS in Lieu of Testing or Parametric Monitoring, Decisions on PM CEMS and CO CEMS)

*Comment:* While some commenters supported the use of CO and PM CEMS to monitor emissions, others argued that CEMS should not be required for all units due to unreasonable costs and impracticality. Several commenters suggested that EPA evaluate the feasibility and measurement capabilities of CEMS before requiring their use. Commenters stated that multi-metals and PM CEMS can be inadequate in indicating the complex nature of emissions and urged EPA not to remove any of the parametric monitoring requirements in lieu of CEMS. Further, some commenters suggested that compliance testing is not needed if CEMS is used to monitor emissions.

*Response:* For the operations and facilities subject to the rule, we believe that the combination of periodic compliance emissions testing and continuous monitoring of operational and parametric control measure conditions is appropriate for assuring ongoing compliance. The rule allows a source owner or operator to install and operate CEMS in lieu of some testing and parametric monitoring requirements. This process requires source owners to propose site-specific monitoring plans for approval. These plans would include CEMS PS and periodic QA/QC steps to assure the quality of the alternative monitoring data. Currently, EPA has the requisite CEMS PS for Hg monitoring systems and not for multiple metals CEMS.

The final rule will not require CO CEMS for existing ERUs, as proposed. The rule will require operational parametric monitoring, as the commenter suggests, for most units affected by the rule, with CO CEMS allowed as an option at the source owner's discretion.

We agree that a PM CEMS installed and operated in accordance with PS 11 and the associated QA procedures can provide assurance of ongoing compliance without the need for additional periodic compliance testing. The final rule authorized the optional use of PM CEMS. We have retained the requirement for PM CEMS on existing ERUs greater than 250 mmBtu/hr to measure continuous compliance for these larger units.

2. CEMS Data To Set Standards

*Comment:* Several commenters suggested that any limit where CEMS are required, CEMS data must be used to develop the emission limits. The commenters discussed their experience with CEMS that shows variability is much higher than what a periodic stack test will show. The commenters suggested that 30 days of continuous emission monitoring is insufficient. They stated that biomass boilers have seasonal variability that would only be seen over the course of a year or more. Commenters also requested that EPA be aware that there may be sources that have installed for criteria pollutants under other permit requirements, particularly for $NO_X$, CO, and $SO_2$, and that sources would prefer to use the CEMS to demonstrate compliance but for the fact that the standards are established using stack test data. The commenters suggested that even if the standard only requires a stack test, there are sources that will be using continuous emission monitors for compliance purposes.

*Response:* As noted earlier, we are not requiring CEMS for compliance for existing units, other than PM CEMS for ERUs greater than 250 mmBtu/hr. No ERUs submitted PM CEMS data for us to evaluate in our development of emission limits. Therefore, we were unable to establish limits based on CEMS data as the commenter suggests; however, we have included a longer averaging period to account for the variability in PM emissions for these sources. In any case, given the controls available for PM, we do not believe that the PM emissions should vary as much as they may for other pollutants.

Also, as stated above, the rule allows sources to install and operate CEMS in lieu of some testing and parametric monitoring requirements at their discretion. This process requires source owners to propose site-specific monitoring plans for approval. These plans would include CEMS PS and periodic QA/QC steps to assure the quality of the alternative monitoring data. In allowing optional CEMS usage, we are providing facilities with compliance flexibility in case they wish to use existing CEMS to demonstrate compliance with the standards. Facilities that are concerned that they will not be able to continuously comply with the emissions limitations if they use CEMS for those limitations established based on stack test data should not avail themselves of the CEMS alternative.

3. Reduced Testing Provisions

*Comment:* Commenters contended that the proposed performance testing requirements are excessive and should be reduced to a reasonable and appropriate level. EPA proposed at 40 CFR 63.2710(b) that all units conduct performance tests for PM, HCl, fugitive emissions, and opacity on an annual basis. EPA further proposed for ERUs that annual performance tests be conducted for PM, HCl, Cd, lead, Hg, dioxins/furans, opacity, fugitive emissions, $NO_X$, and $SO_2$ (unless a CEMS is used for either PM, HCl, Hg, $NO_X$, and/or $SO_2$). Thereafter, EPA proposed to reduce the frequency to 3 years if there had been three tests in a row that had results of less than 75 percent of the emission standard. Commenters recognized EPA has included a provision to skip to a 3-year frequency provided a source passes three tests in a row with at least a 25 percent margin. However, commenters contended that with the very stringent limits EPA had proposed, very few units would likely to qualify for this provision and, therefore, they were not sure of its value.

*Response:* We disagree with the commenters' assertions that the performance testing requirements are excessive. As discussed earlier, the combination of periodic compliance emissions testing and continuous monitoring of operational and parametric control measure conditions is appropriate for assuring continuous compliance with the emissions limitations. Without recurring testing, we would have no way to know if

parameter ranges established during initial performance testing remained viable in the future. The commenter correctly notes that CEMS may be used as an option and, if so, annual performance testing is not required for the pollutant being measured by a CEMS.

Regarding the assertion that the margin for reduced testing is too high to be effective, we disagree and note that the intent of this provision is to provide an incentive for better performers. By specifying the less than 75 percent of the emission standard margin, we are providing such an incentive for good performance, and not rewarding units that just barely meet the standard for a pollutant. Performance testing is required for all pollutants rather than PM and HCl only.

In addition, EPA is maintaining the reduced testing option for units that demonstrate emissions a specified percentage below the limits for 3 years. We have clarified and modified this option to state that performance testing for a given pollutant may be performed every 3 years, instead of annually, if measured emissions during 2 consecutive annual performance tests are less than 75 percent of the applicable emission limit.

Also note that sources that switch fuels during the year following a performance test will not qualify for reduced testing.

*H. Start-Up, Shutdown, and Malfunction Requirements*

*Comment:* Several commenters argued that emissions limits should not apply during SSM events while other commenters stated that SSM emissions should be included in calculations of emissions and standards. Several commenters suggested that in order to assure that SSM are appropriately accommodated, EPA must either assure that the data on which the standard is based include representative data from such periods or, alternatively, set a separate work practice standard to properly accommodate SSM. Several commenters contended that EPA did not consider enough data to adequately characterize emissions variability, as the standards were set based only on 3-run stack test data obtained under the best of operating conditions (and typically only one operating condition), no long-term CEMS data were used, no adjustment was made for fuel or feed pollutant content variability, and no data collected during periods of startup or shutdown were analyzed. Some commenters suggested that certain control devices take several hours to warm-up and that emissions during these startup periods will exceed the emissions standards and would never be able to recover to meet the average limitations. Further, several commenters stated that compliance with emissions standards during malfunction events will be difficult to gauge since emissions testing during such events is near impossible given the sporadic and unpredictable nature of malfunctions. The commenters contended that the rule could have the effect of forcing units to choose between safety and compliance with emissions requirements. The commenters stated that for some affected units, malfunctions by their very nature create unsafe conditions which can lead to excessive combustible mixtures that can result in explosions, equipment damage and personnel hazards.

*Response:* The Court vacated portions of two provisions in EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), *cert. denied, 130 S. Ct. 1735 (U.S. 2010).* Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the "General Provisions Rule," that EPA promulgated under section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

While the Court's ruling in *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), directly affects only the subset of CAA section 112(d) rules that incorporate 40 CFR 63.6(f)(1) and (h)(1) by reference and that contain no other regulatory text exempting or excusing compliance during SSM events, the legality of source category-specific SSM provisions such as those adopted in the 2000 CISWI rule is questionable.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner * * *" (40 CFR 60.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and therefore, any emissions that occur at such times do not need to be factored into development of CAA section 129 standards, which, once promulgated, apply at all times. In *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1242 (DC Cir. 2004), the court upheld as reasonable standards that had factored in variability of emissions under all operating conditions. However, nothing in section 129 or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards. *See Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (DC Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.").

It is reasonable to interpret section 129 as not requiring EPA to account for malfunctions in setting performance standards. For example, we note that section 129 uses the concept of "best controlled" and "best-performing" unit in defining MACT, the level of stringency that section 129 performance standards must meet. Applying the concept of "best controlled" and "best-performing" to a unit that is malfunctioning presents significant difficulties. The goal of a best controlled or best-performing unit is to operate in such a way as to avoid malfunctions of the unit.

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 129 standards for CISWI units. As noted above, by definition, malfunctions are sudden and unexpected events, and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

In light of the *Sierra Club* decision, EPA proposed to require that sources be in continuous compliance with emissions limits at all times, even during SSM. 75 FR 31964. We proposed that these sources meet the same standards at all times. *Id.* We concluded that CISWI units would be able to meet the emissions limitations during periods of startup because most units used natural gas or clean distillate oil to start their incinerators and only add waste after the incinerator has reached

combustion temperatures. *Id.* We proposed that emissions from burning natural gas or distillate fuel oil would generally be significantly lower than from burning solid waste. *Id.* We further proposed that emissions during shutdown would also be generally significantly lower because the waste would be almost fully combusted before the unit began shutting down. *Id.* We proposed that these factors, in conjunction with the variability built into the MACT standards and the longer averaging periods, meant that sources would be able to comply with the standards during periods of startup and shutdown. *Id.* For violations caused by malfunction events, EPA stated at proposal that we would consider relevant factors in determining the appropriate action to take.

We have eliminated the SSM exemption in this rule. Consistent with *Sierra Club* v. *EPA,* EPA has established standards in this rule that apply at all times. We have eliminated or revised certain recordkeeping and reporting related to the SSM exemption. EPA has attempted to ensure that we have not included in the regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption.

In establishing the standards in this final rule, EPA has taken into account startup and shutdown periods and have not established different standards for those periods. The standards that we are finalizing are based on short term stack tests for pollutants that generally are not expected to vary significantly at startup and shutdown. The possible exception here is CO, which in some subcategories such as ERUs, could vary at startup and shutdown. However, the percent oxygen operating limits will ensure that combustion conditions are optimized and the CO is minimized. Solid waste and fuel-fired ERUs do not normally startup and shutdown more the once per day. Thus, we are not establishing a separate emission standard for these periods because startup and shutdown are part of their routine operations and, therefore, are already addressed by the standards. Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operation. We have evaluated whether it is appropriate to have the same standards apply during startup and shutdown as applied to normal operations, and as the rule is structured, well operated and controlled units should be able to meet the standards at all times.

In the event that a source fails to comply with the applicable CAA section 129 standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 129 standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 60.2 (definition of malfunction).

Finally, EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. (*See, e.g.,* State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983)). EPA is therefore adding to the final rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. *See* 40 CFR 60.2265 and 60.2875 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.). We also have added other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 60.2120 and 60.2685. *See* 40 CFR 22.24. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 60.2 (sudden, infrequent, not reasonable preventable and not caused by poor maintenance and/or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *" The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with section § 60.11(d) and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that "[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *" and that "[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *" In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA. *See* also 40 CFR part 22.77.

*I. Notification, Recordkeeping and Reporting Requirements*

1. Electronic Reporting Tool

*Comment:* Several commenters requested that EPA remove the mandatory requirement to use the ERT for submitting test results. They also suggest that EPA revise the provision for test reports, such that these reports be due no sooner than 90 days following completion of testing. One commenter stated that sources had requested in the ICR proposal stage that EPA not use the ERT, which was going through Beta testing, and informed EPA that the ERT had serious flaws including difficulty of use, content problems, and inaccessibility. Several commenters suggested that data submitted through the ERT is error-prone and imposes additional burdens on reporting sources. Some commenters asserted that EPA provides no insight or justification in the preamble or otherwise for requiring this form of data submittal and that the cost of this requirement, as compared to conventional reporting, is not evaluated or disclosed in discussion of the cost and impact of the proposed rule. Commenters state that many of the affected facilities have not had to participate in such reporting procedures in the past, and that these facilities will require additional staff time, equipment, and training to accomplish this requirement. Several commenters argue that it is also likely that implementation of the initial testing and most subsequent testing will be done under state authority and that unless state agencies are willing to use this same ERT, facilities will have a dual requirement for reporting. Further, commenters declare that the ERT bypasses the state, creating data quality issues. Commenters maintain that it is

important to look at the qualifiers, the test methods, the QA/QC plans, and the justifications before making any decisions on the validity of the numbers. The commenters explain that test results from testing companies can incorporate a number of "qualifiers" in their data reporting, and if the electronic tool cannot accommodate the use of textual explanation to explain "qualifiers" for reported data, then the tool's usefulness and accuracy is suspect and could cause additional burden on the facility to explain.

*Response:* EPA disagrees that the use of ERT should not be required. The primary purpose of the emissions test is the demonstration that the facility meets the requirements of the rule. The ERT is designed to streamline, standardize, and incorporate QA/QC information for all the test reports and facilitate their submittal to EPA. The ERT will also make the process of developing emissions factors for rulemaking much more transparent. All the steps taken and data used to develop emissions factors for rulemaking will be much clearer with our new system. We understand that there will be little or no reduction in the effort needed to produce the test report initially, but as users gain expertise with the system and it improves over time, the time, resources, and consistency for review and evaluation will be improved.

EPA agrees with the commenter on the length of time required to submit the ERT data. We plan to extend the period for entering data into the ERT and submitting these data to 90 days.

EPA recognizes that there have been some issues with the use of the ERT, and we have worked closely with stakeholders to identify and correct these issues. As with all new systems, there are always transition problems as changes to those systems are implemented. EPA also disagrees with comments regarding the error-prone data resulting from the use of the ERT. Use of the ERT will help ensure that QA/QC requirements in the test methods are addressed. There are data fields in the ERT that clearly indicate to all users what information and data are required for each performance test. Thus, we believe that the ERT will improve data quality rather than provide "error-prone" data. The ERT was established to facilitate performance data collection. There are many performance tests conducted each year and, along with the associated pertinent data, it would be very time-consuming and resource-intensive to compile, transfer, store, and analyze the tests and resultant data using a manual method. Electronic compilation, transfer, storage, and analysis are now our preferred ways to handle this amount and kind of information. EPA is committed to electronic compilation and submittal of data as demonstrated by the requirement to report data electronically in the TRI program. Other EPA programs, such as the acid rain and greenhouse gas reporting already also require electronic submittal of data. The ERT supplements the time-intensive manual preparation and transcription of stationary source emissions test plans and reports for emissions sources testing with an electronic alternative where the resulting data can be transmitted more easily and quickly to EPA and state, local, or tribal agencies who choose to use this system. The ERT provides a format and a process that: (1) Documents the key information and procedures required by the existing EPA Test Methods; (2) facilitates coordination among the source, the test contractor, and the regulatory agency in planning and preparing for the emissions test; (3) provides for consistent criteria to characterize quantitatively the quality of the data collected during the emissions test; (4) standardizes the form and content of test reports; and (5) calculates the emissions factor, and exports the emissions factor and associated data to WebFIRE. We expect the ERT to significantly reduce the monitoring and testing burden for testers, source owners or operators, state, local or tribal agencies, EPA, and other interested stakeholders in collecting, reviewing, storing, and accessing test data and reports. In addition, the ERT will produce a final report that we believe will satisfy test report requirements.

Although the effort required to compile the performance test information using the ERT and submitting it to EPA is different from the existing procedures, we believe that once the test contractors and reviewers have experience with the ERT, the burden will be comparable to the existing cost and resources required for performance testing and reporting. As stated above, we worked closely with stack testing companies to set up the ERT and have the ERT process mimic most of their work when producing a final performance test report. We believe that there is a learning curve for using the ERT, and it will take a few tests and reports to become proficient in its use. However, as users continue to employ the ERT, the time, effort, and subsequent costs needed to produce, review, process, and extract information from the report will decrease. In addition, we are working on a fix for the ERT that would allow the ERT to extract data directly into the ERT data fields by "tagging" the data from stack sampling or industry performance test spreadsheets.

Regarding the assertion that potential lack of state acceptance, EPA agrees that states provide an important function in verifying the accuracy of performance tests. EPA has developed the ERT to include a module for an independent "third party" review of test reports and data. In this third party review, EPA envisions an independent reviewer would evaluate the test reports and perhaps observe the performance test to provide an extra level of QA for the resultant data. EPA believes this step will help ensure quality tests are conducted and accurate data are obtained. State personnel would perform these reviews for each performance test before they submit the test reports to EPA. State personnel are more familiar with the sources and often observe the testing. EPA has attempted to address this issue by providing a third party review module to the ERT. In this ERT module, an independent reviewer would be given some questions to respond to regarding how the test was conducted and the quality of the resultant data. Where the third party reviewer provides negative responses to the conduct of a performance test, points will be deducted from the overall rating of the performance test. This, in turn, will impact the overall rating of the test. Thus, we believe that having an objective third party reviewer will improve performance tests and the resultant data by providing the incentive to conduct better performance tests. As mentioned above, states can be the third party reviewers, if they so choose. States routinely review performance tests conducted for permitting and compliance purposes, so they would be better suited to review the tests. EPA also recognizes the states as having an important role to play in ensuring that performance tests are conducted properly and provide quality data. EPA encourages states to continue to ensure that performance tests are conducted properly and subsequently provide the test reports and data to EPA.

Where stack testers need to deviate from the test methods, there are narrative fields that allow the submittal of this type of information. We understand that there are conditions that warrant minor changes or deviations from the test methods, and in these cases, there are fields in the ERT to include this kind of information and, at the discretion of the responsible agency, approval of these minor changes to test methods may be approved in the

course of approving the test plan. Major changes to test methods, however, must be approved in writing by official letter from the EPA.

2. Records of Non-Waste Materials

*Comment:* One commenter recommended that EPA require facilities to notify appropriate regulatory agencies once they have determined that they comply with the requirements of the non-hazardous secondary materials legitimacy criteria and/or the processing requirements in the solid waste definition rule. The commenter suggested that notifications should include information on how the determination of a homogeneous fuel was made, and what methods will be employed to ensure that the fuel used will continue to comply with the "homogeneous" requirements. The commenter suggested that clear recordkeeping and reporting requirements must be put in place to ensure that enforcement staff can determine compliance status. Several commenters suggested that regulating the use of recyclable nonhazardous secondary materials such as tires will encourage greater use of landfilling which they asserted is counter to long-standing EPA policy that promotes such activities.

*Response:* EPA has added recordkeeping provisions for units that burn materials other than traditional fuels that document how each of those materials meet the non-waste criteria in the Solid Waste Definition Rule. The newly promulgated procedures for identification of non-hazardous secondary materials that are solid wastes when used as fuels in combustion units at 40 CFR 241.3 are self-implementing provisions that require each source owner or operator to determine whether the materials they are combusting meet certain legitimacy criteria, and/or whether the materials have been processed from a discarded non-hazardous secondary material. Materials that remain within the control of the generator and that meet the legitimacy criteria specified in § 241.3(d), as well as materials that are produced from the processing of discarded non-hazardous secondary materials, and that meet the legitimacy are not considered solid wastes (*see* § 241.3(b)). Traditional fuels are defined in the Solid Waste Definition Rule, and the rule exempts traditional fuels from being solid waste.

To ensure that owners or operators of units combusting materials review and apply the non-waste provisions in the Solid Waste Definition Rule, EPA is requiring owners or operators that combust materials that are not clearly listed as traditional fuels document how the materials meet the legitimacy criteria and/or the processing requirements in the Solid Waste Definition Rule. Failure of a source owner or operator to correctly apply the non-waste criteria would result in incorrect self-assessments as to whether their combustion units are subject to CISWI. Requiring sources to document how the non-waste criteria apply to the materials combusted will both improve self-assessments of applicability, and will assist EPA and states in the proper identification of sources subject to CISWI. The definition of CISWI unit is amended to require that any material combusted that is not a traditional fuel will be treated as a solid waste unless the source makes and keeps the record documenting how the material meets non-waste criteria in the Solid Waste Definition Rule.

If the material being combusted has received a non-waste determination pursuant to the petition process in the Solid Waste Definition Rule at 40 CFR 241.3(c), the source owner or operator must keep a copy of the non-waste determination granted by EPA. If the combustion unit is being regulated under CAA section 112 regulations for boilers and process heaters at major sources (Subpart DDDDD National Emission Standards for Hazardous Air Pollutants at Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters) or for boilers at area sources (Subpart JJJJJJ—National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers Area Sources), the recordkeeping requirements in those rules that require documentation of non-waste criteria meet the non-waste recordkeeping requirements in CISWI.

EPA has similarly added a recordkeeping requirement and amended the definition of CISWI unit to require that sources burning tires make and keep a certification that confirms that the tire is part of an established tire collection program. The Solid Waste Definition Rule does not include tires from established tire collection programs as solid waste. An established tire collection program is defined in the solid waste rule as a comprehensive collection system that ensures scrap tires are not discarded and are handled as valuable commodities in accordance with 40 CFR 241.3(b)(2)(i) from the point of removal from the automobile through arrival at the combustion facility.

The source owner or operator combusting tires, who is not treating their tires as solid waste and is not subject to the CISWI emission limits, must keep a record which identifies the name, owner, and location of the tire collection program from which they obtained the tires, the quantity of tires received from that program and the date received, and they must document how the program handles the tires as valuable commodities consistent with 40 CFR 241.3(b)(2)(i) from the point of removal from the automobile through arrival at the combustion facility. The record may be generated and certified (signed) by the established tire collection program, or by the owner or operator of the unit combusting tires. A copy of the record must be retained by the owner or operator of the tire combustion unit, and produced upon request. The record must include a signed certification by either the owner or operator of the tire collection program, or the owner or operator of the combustion unit, that the tires from the program meet the EPA definition of an established tire collection program in 40 CFR 241. All tires on-site will be treated as solid waste, unless this record is retained, and it is clear as to which tires each certification pertains. If tires on-site are from more than one collection program or generator, there must be a separate certification for each generator or collection program from which the tires were obtained, and the owner or operator of the combustion unit must keep records which clearly identify the on-site location of tires associated with each certification

*J. Air Curtain Incinerators*

*Comment:* Commenters requested that EPA remove the requirement for air curtain incinerators regulated under CISWI to obtain a Title V permit. They suggested that EPA instead require only those units at major sources or sources that took federally enforceable limits to become minor sources to obtain a Title V permit under CISWI. Some argued that an air curtain incinerator is excluded from the statutory definition of "solid waste incineration unit." Commenters stated that although CAA section 129(e) requires a "solid waste incineration unit" to obtain a Title V permit, they suggested that the requirement does not extend to units that are excluded from the definition of "solid waste incineration unit," of which an air curtain incinerator is only one of several types of excluded units. One commenter suggested that that EPA allow permitting agencies flexibility in addressing the ACI system opacity limitation. This opacity requirement can be addressed through minor source permits, federally enforceable state

operating permits, registration permits or Title V general permits.

*Response:* We are not exempting air curtain incinerators located at area/minor source facilities from the requirement to obtain a Title V permit in this final rule. Commenters appear to allege that the requirement to obtain a Title V requirement does not apply to them because they are not solid waste incineration units and the requirement in CAA section 129(e) applies only to solid waste incineration units. Commenters are correct that air curtain incinerators are not solid waste incineration units pursuant to CAA section 129(g)(1)(C), but that is only correct if the units "only burn wood wastes, yard wastes and clean lumber and [they] * * * comply with opacity limitations to be established by the Administrator by rule." EPA has established opacity limitations for air curtain incinerators pursuant to sections 111 and 129.

Pursuant to CAA section 502(a), sources subject to standards or regulations under CAA section 111 must obtain a Title V permit; therefore, air curtain incinerators are required to obtain a Title V permit. As commenters note, EPA may exempt minor and area sources from the requirement to obtain a Title V permit, but EPA must first determine that compliance with Title V requirements is "impracticable, infeasible, or unnecessarily burdensome" on the sources before exempting them (CAA section 502(a)). EPA has not made the necessary finding pursuant to CAA section 502(a) for air curtain incinerators in any of the CAA section 129 rulemakings, and we believe that air curtain incinerators exist at CAA section 129 facilities other than at the commercial and industrial facilities subject to this final rule. Because we think it is important to treat all air curtain incinerators in the same manner, we decline to consider a Title V exemption for minor and area source air curtain incinerators at commercial and industrial facilities.

*K. Role of States*

*Comment:* Several commenters believe that the states should retain as much authority as possible to implement and enforce the standards. Other commenters suggest that EPA allow states and local regulatory authorities an option for case-by-case determinations. Some commenters believe that the local permitting agency should retain the authority to approve alternate compliance approaches under CISWI rules. The commenters argue that the states are responsible for incorporating the EG into their own rules, for permitting and inspecting sources, for enforcing compliance with the rules, and can apply appropriate discretion when needed. Commenters assert that facilities have more frequent communication with their local permitting agency, and the permitting staff have been to the facility and have knowledge about how the facilities operate. They suggest that the local permitting agency can also be more timely in responding to facilities' requests, due to their knowledge of the facility and the limited number of sources they cover, as opposed to the larger number of sources under an EPA regional office.

*Response:* For previous rules, there has been some confusion about what authority can be delegated to and exercised by state, local, and tribal air pollution control agencies and what authority must be retained by EPA. In some cases, state, local, and tribal air pollution control agencies were making decisions, such as allowing waivers of some provisions of this subpart, which cannot be delegated to those agencies. We clarify the authorities retained by EPA in 40 CFR 60.2030(c), applicable to the EG and the NSPS. The following authorities, among others, must be retained by EPA for all NSPS and EG: Approval of alternatives to the emission limits; approval of major alternatives to test methods or monitoring; and approval of major alternatives to recordkeeping and reporting. The list also specifically includes establishment of operating limits for control devices other than those listed in the rule and review of status reports submitted when no qualified operators are available. EPA also retains sole authority for approval of performance test and data reduction waivers under 40 CFR 60.8(b), and preconstruction siting analyses. These authorities may affect the stringency of the emission standards or limitations, which can only be amended by federal rulemaking; EPA may not transfer these authorities to state, local, or tribal air pollution control agencies.

*L. Biased Data Collection From Phase II ICR Testing*

*Comment:* Many commenters suggested that EPA "cherry picked" the best data in setting each standard. Several commenters believe the data that EPA gathered to support the CISWI rule reflects bias, is incomplete, fundamentally flawed, and that the standards are arbitrary and capricious. Some commenters argued that EPA's data collection efforts were biased toward so-called "top performing facilities" because EPA directed its information requests to units that it had reason to believe were the better performing units in each subcategory. The commenters suggested that the sample population is tainted and has resulted in proposed standards that are inordinately stringent, are not representative of the overall performance of the sources in subcategories to which they apply, and are not in accord with the legal standards. One commenter suggested that EPA based the standards on a relatively minute pool of relevant data despite the decade and a half long process that lead to the proposed rules.

*Response:* EPA disagrees with the commenters' assertions that we obtained skewed data and that data collection efforts to support the CISWI rule were biased toward "top performing facilities." EPA documents the procedures used for identifying CISWI units and collecting information in the CISWI Test Data Database memo for the proposed rule dated April 26, 2010. As explained in the memo, the initial database of CISWI units operating in the United States as of 1998 was obtained from the information collected to support EPA's ICR and promulgate the 2000 CISWI rule. In the 2000 CISWI rule, EPA only regulated solid waste incineration units at commercial and industrial facilities that combusted solid waste solely for the purpose of destroying the waste. Energy recovery units (*i.e.,* boilers and process heaters) and waste-burning kilns (*i.e.,* cement kilns) were exempt from the 2000 CISWI rule. In 2005, EPA issued the CISWI Definitions Rule, which confirmed that ERUs were exempt from CISWI and maintained the exemption for cement kilns. In 2006, the list of CISWI incinerator units initially identified based on the CISWI Definitions Rule was distributed to the 10 EPA Regional offices to confirm whether the units were operational. Based on the information supplied by the EPA regions, the initial CISWI database was revised to reflect the unit deletions/additions provided by the regional contacts. In 2007, the Court vacated the CISWI Definitions Rule, concluding that the rule was flawed because CAA section 129 unambiguously regulates any commercial or industrial combustion unit combusting any solid waste and the CISWI Definitions Rule exempted units that combust waste if the units also recover energy in the process. *NRDC* v. *EPA,* 489 F.3d at 1260. While not explicitly addressed in the decision, the implication of the holding extended beyond ERUs to other commercial or industrial units

combusting solid waste, *e.g.,* cement kilns.

EPA developed a two phase information collection process to collect information from units that may be subject to CISWI in light of the vacatur of the CISWI Definitions Rule. "Phase I" survey requests were sent to all commercial and industrial facilities that we determined may have solid waste incineration units and for which EPA did not already have information. The Phase I surveys were reviewed and used to update the CISWI inventory for incinerators or ERUs. "Phase II" surveys were then sent out to all CISWI units where emissions test data was missing from the Phase I database, requesting these units test and report for the missing pollutants. Through this process, EPA requested information from all known CISWI units, not solely the best performers as commenters assert, and we used the data to determine the best-performing sources to set the standards for this rule.

## VI. Impacts of the Action

### *A. What are the primary air impacts?*

We have estimated the potential emissions reductions from existing sources that may be achieved through implementation of the emission limits. However, we realize that some CISWI owners and operators are likely to determine that alternatives to waste incineration are viable, such as further waste segregation or sending the waste to a landfill or MWC, if available. In fact, sources operating incinerators, where energy recovery is not a goal, may find it cost-effective to discontinue use of their CISWI unit altogether. Therefore, we have estimated emissions reductions attributable to existing sources complying with the limits, as well as those reductions that would occur if the facilities with incinerators and small, remote incinerators decide to discontinue the use of their CISWI unit and use alternative waste disposal options.

For units combusting wastes for energy production, such as ERUs and waste-burning kilns, the decision to combust or not to combust waste will depend on several factors. One factor is the cost to replace the energy provided by the waste material with a traditional fuel, such as natural gas. Another factor would be whether the owner or operator is purchasing the waste or obtaining it at no cost from other generators, or if they are generating the waste on-site and will have to dispose of the materials in another fashion, such as landfills. Lastly, these units would have to compare the control requirements needed to meet the CISWI emission limits with those needed if they stop burning solid waste and are then subject to a NESHAP instead. As mentioned before, we have attempted to align the monitoring requirements for similar non-waste-burning sources as closely as possible in an effort to make them consistent and to help sources make the cross-walk between waste and non-waste regulatory requirements as simple as possible.

The emissions reductions that would be achieved under this rule using the definition of solid waste under RCRA are presented in Table 10 of this preamble.

TABLE 10—EMISSIONS REDUCTIONS FOR MACT COMPLIANCE AND ALTERNATIVE DISPOSAL OPTIONS FOR EXISTING CISWI USING THE EMISSION LIMITS

| Pollutant | Reductions achieved through meeting MACT (ton/yr) | Reductions achieved assuming incinerators and small, remote incinerators use alternative disposal (ton/yr) [a] |
|---|---|---|
| HCl | 431.2 | 443.3 |
| CO | 23,449 | 23,414 |
| Pb | 4.52 | 4.53 |
| Cd | 0.902 | 0.903 |
| Hg | 0.106 | 0.109 |
| PM (filterable) | 1,671 | 1,674 |
| dioxin, furans | 0.000125 | 0.000127 |
| $NO_X$ | 5,627 | 5,734 |
| $SO_2$ | 5,208 | 5,259 |
| Total | 36,392 | 36,530 |

[a] The estimated emission reduction does not account for any secondary impacts associated with alternate disposal of diverted ERU fuel.

EPA expects that many existing CISWI owners and operators may find that alternate disposal options are preferable to complying with the standards for the incinerator and small, remote incinerator subcategories. Our experience with regulations for MWC, HMIWI and, in fact, CISWI, has shown that negative growth in the source category historically occurs upon implementation of CAA section 129 standards. Since CISWI rules were promulgated in 2000 and have been in effect for existing sources since 2005, many existing units have closed. At promulgation in 2000, EPA estimated 122 units in the CISWI population. In comparison, the incinerator subcategory in this rule, which contains any such units subject to the 2000 CISWI rule, has 28 units. EPA is not aware of any construction of new units since 2000, so we do not believe there are any units that are currently subject to the 2000 CISWI NSPS. The revised CISWI rule is more stringent, so we expect this trend to continue. However, EPA does recognize that some facilities may opt to replace aging incinerator units with new units where it is cost effective or alternative disposal options are not feasible, as may be the case with some incinerators, or in very remote locations. We estimate that there could be one new incineration unit within the next 5 years, and possibly five new small remote incinerators within that time. In these cases, we have developed model CISWI unit emissions reduction estimates for these subcategories using the existing unit baseline and the new source emission limits. Table 11 of this preamble presents the model plant emissions reductions that would be expected for new sources.

TABLE 11—EMISSIONS REDUCTIONS ON A MODEL PLANT BASIS

| Pollutant | Emission reduction for CISWI subcategory model units (tpy unless otherwise noted) | |
|---|---|---|
| | Incinerator | Small, remote incinerator |
| HCl | 3.67 | 0.0 |
| CO | 1.23 | 0.25 |
| Pb | 0.83 | 0.0037 |
| Cd | 0.022 | 0.0007 |
| Hg | 0.004 | 0.000012 |
| PM (filterable) | 148 | 0.5 |
| D/F (total mass) [a] | 0.0018 | 0.0 |
| $NO_X$ | 16.3 | 0.15 |
| $SO_2$ | 7.6 | 0.15 |
| Total | 178 | 1.05 |

[a] D/F estimates are given in lb/yr.

We do not anticipate that any new energy recovery or waste-burning kiln units will be constructed and will instead use alternative waste disposal methods or alternative fuels that will not subject them to the CISWI rule. For example, whole tires obtained from approved tire management programs and tire-derived fuel from which the metal has been removed is not considered solid waste under the definition of solid waste. Consequently, new cement kiln owners will assess their regulatory requirements under CISWI for burning whole tires or tire-derived fuel that does not have metals removed against the costs associated with removing the metal or obtaining tires from an approved source and complying with the applicable NESHAP instead of the CISWI rule. Our research suggests that metal removal is routinely practiced and that several state waste tire management programs are already in place, and would most likely be a viable option for new kiln owners so that they would not be subject to the CISWI regulations. Indeed, we expect that all existing cement kilns that are classified as being waste-burning solely due to whole tires will, by the compliance date for the CISWI standards, find a way to obtain their tires through an approved tire management plan. Likewise, new sources could engineer their process to minimize waste generation in the first place, or to separate wastes so that the materials sent to a combustion unit would not meet the definition of solid waste to begin with. For waste that is generated, cost analyses have found that alternative waste disposal is generally available and less expensive.

*B. What are the water and solid waste impacts?*

In our analysis, we have selected the lowest cost alternative (*i.e.,* compliance or alternative disposal) for each facility. We anticipate affected sources will need to apply additional controls to meet the emission limits. These controls may use water, such as wet scrubbers, which would need to be treated. We estimate an annual requirement of 103 billion gallons per year of additional water would be required as a result of operating additional controls or increased sorbent use.

Likewise, the addition of PM controls or improvements to controls already in place will increase the amount of particulate collected that will require disposal. Furthermore, ACI may be used by some sources, which will result in additional solid waste needing disposal. The annual amounts of solid waste that would require disposal are anticipated to be approximately 19,23733,526 tpy from PM capture and 14,289,078 tpy from ACI.

Perhaps the largest impact on solid waste would come from owners and operators who decide to discontinue the use of their CISWI unit and instead send waste to the landfill or MWC for disposal. Based on tipping fees and availability, we would expect most, if not all, of this diverted waste to be sent to a local landfill. As we discuss above, it may be that a good portion of the incinerators would determine that alternative disposal is a better choice than compliance with the standards. We estimate that approximately 110,417 tpy of waste would be diverted to a landfill.

For new CISWI units, we estimate an annual requirement of 9102 million gallons per year of additional water would be required as a result of operating additional controls. The annual amounts of solid waste that would require disposal are anticipated to be approximately 7275.0 tpy from PM capture and 8173.0 tpy from ACI.

*C. What are the energy impacts?*

The energy impacts associated with meeting the emission limits would consist primarily of additional electricity needs to run added or improved air pollution control devices. For example, increased scrubber pump horsepower may cause slight increases in electricity consumption and sorbent injection controls would likewise require electricity to power pumps and motors. In our analysis, we have selected the lowest cost alternative (*i.e.,* compliance or alternative disposal) for each facility. By our estimate, we anticipate that an additional 214,356 MW-hours per year would be required for the additional and improved control devices.

As discussed earlier, there could be instances where owners and operators of ERUs and waste-burning kilns decide to cease burning waste materials. In these cases, the energy provided by the burning of waste would need to be replaced with a traditional fuel, such as natural gas. Assuming an estimate that 50 percent of the energy input to ERUs and kilns are from waste materials, an estimate of the energy that would be replaced with a traditional fuel if all existing units stopped burning waste materials, is approximately 56 TBtu/yr.

For new CISWI units, we anticipate that 511 MW-hours per year would be required for additional and improved control devices. Since we do not anticipate any new energy recovery or waste-burning kiln units to be constructed, there would be no additional estimate for energy that would be replaced with a traditional fuel.

*D. What are the secondary air impacts?*

For CISWI units adding controls to meet the emission limits, we anticipate minor secondary air impacts. The combustion of fuel needed to generate additional electricity and to operate RTO controls would yield slight increases in emissions, including $NO_X$, CO, PM, and $SO_2$ and an increase in $CO_2$ emissions. Since $NO_X$ and $SO_2$ are covered by capped emissions trading programs, and methodological limitations prevent us from quantifying the change in CO and PM, we do not estimate an increase in secondary air impacts for this rule from additional electricity demand.

We believe it likely that the incinerators may elect to discontinue the use of their CISWI unit and send the waste to the landfill or other disposal means. As we discussed in the solid waste impacts above, this could result in approximately 110,417 tpy of waste going to landfills. By using EPA's Landfill Gas Estimation Model, we estimate that, over the 20-year expected life of a CISWI unit, the resulting methane generated by a landfill receiving the waste would be about 96,300 tons. If this landfill gas were combusted in a flare, assuming typical flare emission factors and landfill gas chlorine, Hg, and sulfur concentrations, the following emissions would be expected: 20 tons of PM; 8 tons of HCl; 16 tons of $SO_2$; 890 tons of CO; 46 tons of $NO_X$; and 1.4 lbs of Hg.

Similar to existing units, we anticipate minor secondary air impacts for new CISWI units adding controls as discussed above.

*E. What are the cost and economic impacts?*

We have estimated compliance costs for all existing units to add the necessary controls and monitoring equipment, and to implement the inspections, recordkeeping and reporting requirements to comply with the CISWI standards. We have also analyzed the costs of alternative disposal for the subcategories that may have alternative options to burning waste, specifically for the incinerators and the small, remote incinerators that may have an alternative to incineration. In our analysis, we have selected the lowest cost alternative (*i.e.,* compliance or alternative disposal) for each facility. Based on this analysis, we anticipate an overall total capital investment of $652 million with an associated total annual cost of $232 million ($2008).

Under the rule, EPA's economic model suggests the average national market-level variables (prices, production-levels, consumption, international trade) will not change significantly (e.g., are less than 0.02 percent).

EPA performed a screening analysis for impacts on small entities by comparing compliance costs to sales/revenues (*e.g.,* sales and revenue tests). EPA's analysis found the tests were below 3 percent for five of the nine small entities included in the screening analysis.

In addition to estimating this rule's social costs and benefits, EPA has estimated the employment impacts of the final rule. We expect that the rule's direct impact on employment will be small. We have not quantified the rule's indirect or induced impacts. For further explanation and discussion of our analysis, see Chapter 4 of the RIA.

For new CISWI units, we have estimated compliance costs for units coming online in the next 5 years. This analysis is based on the assumption that one new incinerator will come online over 5 years and one new small, remote incinerator will come online each year over the next 5 years. Additionally, it was assumed that each model unit will add the necessary controls, monitoring equipment, inspections, recordkeeping, and reporting requirements to comply with NSPS limits. Based on our analysis, we anticipate an overall total capital investment of $8.4 million over 5 years with an associated total annual cost (for 2015) of $2.6 million.

*F. What are the benefits?*

We estimate the monetized benefits of this regulatory action to be $340 million to $830 million (2008$), 3 percent discount rate) in the implementation year (2015). The monetized benefits of the regulatory action at a 7 percent discount rate are $310 million to $750 million (2008$). These estimates reflect energy disbenefits valued at $3.8 million. Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.[4] A summary of the monetized benefits estimates at discount rates of 3 percent and 7 percent is in Table 12 of this preamble.

TABLE 12—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE CISWI NSPS AND EG IN 2015

[Millions of 2008$] [1] [2]

| Pollutant | Estimated emission reductions (tpy) | Total monetized benefits (3% discount rate) | Total monetized benefits (7% discount rate) |
|---|---|---|---|
| $PM_{2.5}$ | 710 | $160 to $400 | $150 to $360. |
| $PM_{2.5}$ Precursors: | | | |
| $SO_2$ | 5,170 | $150 to $370 | $140 to $340. |
| $NO_X$ | 5,544 | $27 to $66 | $24 to $59. |
| Total | | $340 to $830 | $310 to $750. |

[1] All estimates are for the implementation year (2015) and are rounded to two significant figures so numbers may not sum across rows. All fine particles are assumed to have equivalent health effects, but the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. Benefits from reducing HAP are not included. These estimates do not include the energy disbenefits valued at $3.8 million, but the rounded totals do not change. $CO_2$-related disbenefits were calculated using the social cost of carbon, which is discussed further in the RIA.

[2] The estimates in this table reflect the estimates in the RIA. Due to last minute changes, we were unable to incorporate the final engineering costs and emission reductions into the RIA, which would decrease the costs by approximately 22% and increase the monetized benefits by approximately 4% from those shown here.

[4] Roman, *et al.,* 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268–2274.

These benefits estimates represent the total monetized human health benefits for populations exposed to less $PM_{2.5}$ in 2015 from controls installed to reduce air pollutants in order to meet these standards. These estimates are calculated as the sum of the monetized value of avoided premature mortality and morbidity associated with reducing a ton of $PM_{2.5}$ and $PM_{2.5}$ precursor emissions. To estimate human health benefits derived from reducing $PM_{2.5}$ and $PM_{2.5}$ precursor emissions, we used the general approach and methodology laid out in Fann, Fulcher, and Hubbell (2009).[5]

To generate the benefit-per-ton estimates, we used a model to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and another model to estimate the changes in human health associated with that change in air quality. Finally, the monetized health benefits were divided by the emission reductions to create the benefit-per-ton estimates. These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. Directly emitted $PM_{2.5}$, $SO_2$, and $NO_X$ are the primary precursors affected by this rule. Even though we assume that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. For example, $SO_2$ has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not directly transform into $PM_{2.5}$, and because sulfate particles formed from $SO_2$ emissions can transport many miles, including over areas with low populations. Direct $PM_{2.5}$ emissions convert directly into ambient $PM_{2.5}$, thus, to the extent that emissions occur in population areas, exposures to direct $PM_{2.5}$ will tend to be higher, and monetized health benefits will be higher than for $SO_2$ emissions.

For context, it is important to note that the magnitude of the PM benefits is largely driven by the concentration response function for premature mortality. Experts have advised EPA to consider a variety of assumptions, including estimates based on both empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this rule, we cite two key empirical studies, the American Cancer Society cohort study[6] and the extended Six Cities cohort study.[7] In the RIA for this rule, which is available in the docket, we also include benefits estimates derived from expert judgments and other assumptions.

EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature and recent scientific advice, we have determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this recent advice, we are replacing the previous threshold sensitivity analysis with a new "LML" assessment. While an LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related benefits in this rule would accrue to populations exposed to higher levels of $PM_{2.5}$. Using the Pope, et al., (2002) study, 85 percent of the population is exposed at or above the LML of 7.5 $\mu g/m^3$. Using the Laden, *et al.,* (2006) study, 40 percent of the population is exposed above the LML of 10 $\mu g/m^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because as we estimate PM-related mortality among populations exposed to levels of $PM_{2.5}$ that are successively lower, our confidence in the results diminishes. However, our analysis shows that the great majority of the impacts occur at higher exposures.

This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA because we lack the necessary air quality input and monitoring data to run the benefits model. In addition, we have not conducted any air quality modeling for this rule. The 2006 $PM_{2.5}$ NAAQS benefits analysis[8] provides an indication of the sensitivity of our results to various assumptions.

It should be emphasized that the monetized benefits estimates provided above do not include benefits from several important benefit categories, including reducing other air pollutants, ecosystem effects, and visibility impairment. The benefits from reducing HAP have not been monetized in this analysis, including reducing 25,000 tons of CO, 470 tons of HCl, 4.1 tons of Pb, 0.95 tons of Cd, 260 pounds of Hg and 92 grams of total D/F each year. Although we do not have sufficient information or modeling available to provide monetized estimates for this rulemaking, we include a qualitative assessment of the health effects of these air pollutants in the RIA for this rule, which is available in the docket.

In addition, the monetized benefits estimates provided in Table 12 of this preamble do not reflect the disbenefits associated with increased electricity and fuel consumption to operate the control devices. We estimate that the increases in emissions of $CO_2$ would have disbenefits valued at $3.8M at a 3 percent discount rate. Carbon Dioxide-related disbenefits were calculated using the social cost of carbon, which is discussed further in the RIA. However, these disbenefits do not change the rounded total monetized benefits. In the RIA, we also provide the monetized $CO_2$ disbenefits using discount rates of 5 percent (average), 2.5 percent (average), and 3 percent (95th percentile).

## VII. Statutory and Executive Order Reviews

### *A. Executive Order 12866 and 13563: Regulatory Planning and Review*

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735; October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is a "significant regulatory action" because it will have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the OMB for review under Executive Orders 12866 and 13563, and any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in

[5] Fann, N., C.M. Fulcher, B.J. Hubbell. 2009. "The influence of location, source, and emission type in estimates of the human health benefits of reducing a ton of air pollution." Air Qual Atmos Health (2009) 2:169–176.

[6] Pope, *et al.,* 2002. "Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution." Journal of the American Medical Association 287:1132–1141.

[7] Laden, *et al.,* 2006. "Reduction in Fine Particulate Air Pollution and Mortality." *American Journal of Respiratory and Critical Care Medicine.* 173: 667–672.

[8] U.S. Environmental Protection Agency, 2006. Final Regulatory Impact Analysis: $PM_{2.5}$ NAAQS. Prepared by Office of Air and Radiation. October. Available on the Internet at *http://www.epa.gov/ttn/ecas/ria.html.*

"Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units." A copy of the analysis is available in the Docket EPA–HQ–OAR–2003–0119 and the analysis is briefly summarized in section VI of this preamble. The net benefits table is also provided here.

TABLE 13—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE CISWI NSPS AND EMISSIONS GUIDELINES IN 2015

[Millions of 2008$] [a d]

| | 3% Discount rate | 7% Discount rate |
|---|---|---|
| Option 1: MACT Floor: | | |
| Total Monetized Benefits [b] | $340 to $830 | $310 to $750. |
| Total Social Costs [c] | $280 | $280. |
| Net Benefits | $60 to $550 | $30 to $470. |
| Non-monetized Benefits | 25,000 tons of CO.<br>470 tons of HCl.<br>260 pounds of Hg.<br>0.95 tons of Cd.<br>4.1 tons of lead.<br>92 grams of dioxins/furans.<br>Health effects from $NO_2$ and $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |
| Option 2: Beyond-the-Floor: | | |
| Total Monetized Benefits [b] | $430 to $1,100 | $390 to $960. |
| Total Social Costs [c] | $300 | $300. |
| Net Benefits | $130 to $770 | $90 to $660. |
| Non-monetized Benefits | 25,000 tons of CO.<br>470 tons of HCl.<br>260 pounds of Hg.<br>0.95 tons of Cd.<br>4.1 tons of lead.<br>92 grams of dioxins/furans.<br>Health effects from $NO_2$ and $SO_2$ exposure.<br>Ecosystem effects.<br>Visibility impairment. | |

[a] All estimates are for the implementation year (2015), and are rounded to two significant figures. These results include units anticipated to come online and the lowest cost disposal assumption.

[b] The total monetized benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$ and $PM_{2.5}$ precursors such as $NO_X$ and $SO_2$. It is important to note that the monetized benefits include many but not all health effects associated with $PM_{2.5}$ exposure. Benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because there is no clear scientific evidence that would support the development of differential effects estimates by particle type. These estimates include energy disbenefits valued at $3.8 million.

[c] The methodology used to estimate social costs for 1 year in the multimarket model using surplus changes results in the same social costs for both discount rates.

[d] The estimates in this table reflect the estimates in the RIA. Due to last minute changes, we were unable to incorporate the final engineering costs and emission reductions into the RIA, which would decrease the costs by approximately 22% and increase the monetized benefits by approximately 4% from those shown here.

*B. Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to the OMB under the PRA, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The ICR documents prepared by EPA have been assigned EPA ICR number 2384.02 for subpart CCCC, 40 CFR part 60 and 2385.02 for subpart DDDD, 40 CFR part 60.

When a malfunction occurs, sources must report them according to the applicable reporting requirements of these Subparts. An affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions is available to a source if it can demonstrate that certain criteria and requirements are satisfied. The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation) and where the source took necessary actions to minimize emissions. In addition, the source must meet certain notification and reporting requirements. For example, the source must prepare a written root cause analysis and submit a written report to the Administrator documenting that it has met the conditions and requirements for assertion of the affirmative defense.

To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, EPA provides an administrative adjustment to this ICR that shows what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. EPA's estimate for the required notification, reports and records, including the root cause analysis, totals $3,141 and is based on the time and effort required of a source to review relevant data, interview plant employees, and document the events surrounding a malfunction that has caused an exceedance of an emission limit. The estimate also includes time to produce and retain the record and reports for submission to EPA. EPA provides this illustrative estimate of this burden because these costs are only

incurred if there has been a violation and a source chooses to take advantage of the affirmative defense.

The requirements in this final rule result in industry recordkeeping and reporting burden associated with review of the amendments for all CISWI, and inspections of scrubbers, FFs, and other air pollution control devices that may be used to meet the emission limits for all CISWI. Ongoing parametric monitoring requirements for ESPs, SNCR, and ACI are also required of all CISWI units. Stack testing and development of new parameter limits would be necessary for CISWI that need to make performance improvements in order to meet the emission limits and for CISWI that, prior to this action, have not been required to demonstrate compliance with certain pollutants. Visual emissions tests would be required for all subcategories except waste-burning kilns on an annual basis. Energy recovery units would be required to continuously monitor percent oxygen, and units larger than 250 mmBtu/hr would be required to monitor PM emissions using a PM CEMS. Waste-burning kilns would be required to continuously monitor Hg emissions using a Hg CEMS and PM emissions using a PM CEMS. Any new CISWI would also be required to continuously monitor CO emissions. The annual average burden associated with recordkeeping and reporting requirements for the EG over the first 3 years following promulgation is estimated to be 14,672 hours at a total annual labor cost of $522,323. The total capital and startup plus the O&M costs with the EG monitoring requirements, EPA Method 22 at 40 CFR part 60, appendix A–7 testing, initial stack testing, annual stack testing, storage of data and reports and photocopying and postage over the 3-year period of the ICR are estimated at $18,592,079 total and $6,197,360 per year. (The annual inspection costs are included under the recordkeeping and reporting labor costs.) The annual average burden associated with the NSPS over the first 3 years following promulgation of this final rule is estimated to be 858 hours at a total annual labor cost of $30,527, since we anticipate only one new small remote incineration unit to be constructed per year. Burden is defined at 5 CFR 1320.3(b).

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it currently displays a valid OMB control number. The OMB control numbers for EPA's regulations 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 RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures 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 government organizations and small government jurisdictions.

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

After considering the economic impacts of the rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that there are 88 entities subject to this regulation, of which 10 of them are considered to be small companies. The small entities directly regulated by the rule are facilities engaged in industrial or commercial operations, such as paper and paperboard manufacturing and utility providers. The average cost-to-sales ratios for small companies are below 3.5 percent. The median ratio is 2.2 percent. Only four entities, which are in 3 different industries, have a sales test that exceeds 3 percent. For the purposes of this rulemaking, four is not considered a "substantial number" of small entities.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities.

*D. Unfunded Mandates Reform Act*

Title II of the UMRA of 1995, 2 U.S.C. 1531–1538, requires federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains 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 1 year. Accordingly, EPA has prepared under section 202 of the UMRA a written statement, which is summarized below.

1. Statutory Authority

As discussed in section II.A of this preamble, the statutory authority for the final rule is CAA sections 129 and 111. CAA section 129 CISWI standards include numeric emissions limitations for the nine pollutants specified in CAA section 129(a)(4), and may include emission limitations for opacity. Section 129(a)(2) of the CAA directs EPA to develop standards based on MACT, which require existing and new major sources to control emissions of the nine pollutants.

In compliance with section 205(a) of the UMRA, we identified and considered a reasonable number of regulatory alternatives. The regulatory alternative upon which the rule is based is the least costly, most cost-effective alternative to achieve the statutory requirements of CAA section 129.

2. Social Costs and Benefits

The RIA prepared for the final rule, including the EPA's assessment of costs and benefits, is detailed in the "Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" in the docket. Based on estimated compliance costs on all sources associated with the final rule and the predicted change in prices and production in the affected industries, the estimated social costs of the final rule are $218 million (2008 dollars). In the year of full implementation (2015), EPA estimates the monetized $PM_{2.5}$ benefits of the NSPS and EG are $340 million to $830 million and $310 million to $750 million, at 3 percent and 7 percent discount rates respectively. All estimates are in 2008$. Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these estimates. The benefits from reducing other air pollutants have not been monetized in this analysis, including reducing 23,450 tons of CO, 431 tons of HCl, 4.5 tons of Pb, 0.9 tons of Cd, 210 pounds of Hg, and 110 grams of total dioxins and furans each year. In addition, ecosystem benefits and visibility benefits have not been monetized in this analysis.

Exposure to CO can affect the cardiovascular system and the central nervous system. Emissions of $NO_X$ can transform into PM, which can result in fatalities and many respiratory problems (such as asthma or bronchitis); and $NO_X$ can also transform into ozone causing several respiratory problems to affected populations.

The net benefits for the NSPS and EG are $60 million to $550 million and $30 million to $470 million, at 3 percent and 7 percent discount rates respectively. All estimates are in 2008$.

3. Future and Disproportionate Costs

The UMRA requires that we estimate, where accurate estimation is reasonably feasible, future compliance costs imposed by the rule and any disproportionate budgetary effects. Our estimates of the future compliance costs of the final rule are discussed previously in this preamble. We do not believe that there will be any disproportionate budgetary effects of the proposed rule on any particular areas of the country, state, or local governments, types of communities (*e.g.,* urban, rural), or particular industry segments.

4. Effects on the National Economy

The UMRA requires that we estimate the effect of the final rule on the national economy. To the extent feasible, we must estimate the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of the United States goods and services if we determine that accurate estimates are reasonably feasible and that such effect is relevant and material. The nationwide economic impact of the rule is presented in the "Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" in the docket. This analysis provides estimates of the effect of the rule on most of the categories mentioned above. The results of the economic impact analysis are summarized in section VI of this preamble.

5. Consultation With Government Officials

The UMRA requires that we describe the extent of EPA's prior consultation with affected state, local, and tribal officials, summarize the officials' comments or concerns and summarize our response to those comments or concerns. We have determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, this final rule is not subject to the requirements of section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Under Executive Order 13132, EPA may not issue an action that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed action.

EPA's proposed action estimated expenditures of greater than $100 million to state and local governments and therefore as specified by the Executive Order, EPA consulted with elected state and local government officials, or their representative national organizations, when developing regulations and policies that impose substantial compliance costs on state and local governments. Pursuant to Agency policy, EPA conducted a briefing for the "Big 10" intergovernmental organizations representing elected state and local government officials, as discussed in section VIII.D of the proposal preamble (75 FR 63260) to formally request their comments and input on the action. The Big 10 provided EPA with feedback on the proposed standards and EG for SSI units.

EPA has concluded that this final rule will not have federalism implications, as defined by Agency guidance for implementing the Executive Order, due to the final rule's direct compliance costs on state or local governments resulting in expenditures of less than $100 million.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175, (65 FR 67249; November 9, 2000). EPA is not aware of any CISWI in Indian country or owned or operated by Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885; April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (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. EPA estimates that the requirements in this final rule would cause most CISWI in the ERU and waste-burning kiln subcategories to modify existing air pollution control devices (*e.g.,* increase the horsepower of their wet scrubbers) or install and operate new control devices, resulting in approximately 233,018 MW-hours per year of additional electricity being used.

Given the negligible change in energy consumption resulting from this final rule, EPA does not expect any significant price increase for any energy type. The cost of energy distribution should not be affected by this final rule at all since the rule would not affect energy distribution facilities. We also expect that any impacts on the import of foreign energy supplies, or any other adverse outcomes that may occur with regards to energy supplies, would not be significant. We, therefore, conclude that if there were to be any adverse energy effects associated with this final rule, they would be minimal.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the NTTAA of 1995), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use VCS in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or

adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

EPA conducted searches for the "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" through the Enhanced NSSN database, which is a search engine that is defined as a National Resource for Global Standards, managed by the ANSI. We also contacted VCS organizations and accessed and searched their databases.

This rulemaking involves technical standards. EPA has decided to use ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]," for its manual methods of measuring the oxygen or $CO_2$ content of the exhaust gas. These parts of ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus] are acceptable alternatives to EPA Methods 3B, 6, 7 and 7C. This standard is available from the ASME, 3 Park Avenue, New York, NY 10016–5990.

Another VCS, ASTM D6735–01, "Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method," is an acceptable alternative to EPA Method 26A.

Another VCS, ASTM D6784–02, "Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)" is an acceptable alternative to EPA Method 29.

During the search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to EPA's reference method, EPA ordered a copy of the standard and reviewed it as a potential equivalent method. All potential standards were reviewed to determine the practicality of the VCS for this rule. This review requires significant method validation data which meets the requirements of EPA Method 301 for accepting alternative methods or scientific, engineering and policy equivalence to procedures in EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

The search identified 24 other VCS that were potentially applicable to this rule in lieu of EPA reference methods. After reviewing the available standards, EPA determined that 22 candidate VCS (ASTM D3154–00 (2006), ASME B133.9–1994 (2001), ISO10396:1993 (2007), ISO12039:2001, ASTM D5835–95 (2007), ASTM D6522–00 (2005), CAN/CSA Z223.2–M86 (1999), ISO 9096:1992 (2003), ANSI/ASME PTC 38–1980 (1985), ASTM D3685/D3685M–98 (2005), ISO 7934:1998, ISO 11632:1998, ASTM D1608–98 (2003), ISO11564:1998, CAN/CSA Z223.24–M1983, CAN/CSA Z223.21–M1978, ASTM D3162–94 (2005), EN 1948–3 (1996), EN 1911–1,2,3 (1998), EN 13211:2001, CAN/CSA Z223.26–M1987), ASTM D6735–01 (2009) identified for measuring emissions of pollutants or their surrogates subject to emission standards in the rule would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations.

Under 40 CFR 60.13(i) of the NSPS General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, PS, or procedures in the final rule and any amendments.

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

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

This final action establishes national emission standards for new and existing CISWI units. Based on data amendments and corrections that were incorporated following public comment on the proposed rule, the EPA estimates that there are approximately 100 such units, including incinerators, cement kilns, and ERUs, covered by this rule. The final rule will reduce emissions of all the listed HAP emitted from this source. This includes emissions of Cd, HC1, lead, Hg, and chlorinated D/F. Adverse health effects from these pollutants include cancer, irritation of the lungs, skin, and mucus membranes; effects on the central nervous system, and damage to the kidneys), and acute health disorders. The rule will also result in substantial reductions of criteria pollutants such as CO, $NO_X$, PM, and $SO_2$. Sulfur dioxide and NO2 are precursors for the formation of $PM_{2.5}$ and ozone. Reducing these emissions will reduce ozone and $PM_{2.5}$ formation and associated health effects, such as adult premature mortality, chronic and acute bronchitis, asthma, and other respiratory and cardiovascular diseases. The results of the demographic analysis are presented in RIA, a copy of which is available in the docket.

Based on the fact that the rule does not allow emission increases, the EPA has determined that the rule will not have disproportionately high and adverse human health or environmental effects on minority, low-income, or tribal populations. However, to the extent that any minority, low income, or tribal subpopulation is disproportionately impacted by the current emissions as a result of the proximity of their homes to these sources, that subpopulation also stands to see increased environmental and health benefit from the emissions reductions called for by this rule.

EPA defines "Environmental Justice" to include meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. To promote meaningful involvement, EPA developed a communication and outreach strategy to ensure that interested communities had access to the proposed rule, were aware of its content, and had an opportunity to comment during the comment period. During the comment period, EPA publicized the rulemaking via EJ newsletters, tribal newsletters, EJ listservs, and the Internet, including the Office of Policy's Rulemaking Gateway Web site (*http://yosemite.epa.gov/opei/RuleGate.nsf/*). EPA also provided general rulemaking fact sheets (*e.g.,* why is this important for my community) for EJ community groups and conducted conference calls with interested communities. In addition, in implementing the final rule, state and federal permitting requirements will provide state and local governments and members of affected communities the opportunity to provide comments on the permit conditions associated with permitting the sources affected by this rulemaking.

### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the

agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective May 20, 2011.

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 21, 2011.

**Lisa Jackson,**

*Administrator.*

For the reasons stated in the preamble, Title 40, chapter I, of the Code of Federal Regulations is amended as follows:

## PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

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

■ 2. Section 60.17 is amended by:
■ a. Adding paragraph (a)(93).
■ b. Revising paragraph (h)(4).
■ c. Adding paragraph (o).

### § 60.17 Incorporations by reference.

* * * * *

(a) * * *

(93) ASTM D6784–02 (Reapproved 2008) Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008, IBR approved for §§ 60.2165(j), 60.2730(j), tables 1, 5, 6 and 8 to subpart CCCC, and tables 2, 6, 7, and 9 to subpart DDDD, §§ 60.4900(b)(4)(v), 60.5220(b)(4)(v), tables 1 and 2 to subpart LLLL, and tables 2 and 3 to subpart MMMM.

* * * * *

(h) * * *

(4) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], IBR approved for § 60.56c(b)(4), § 60.63(f)(2) and (f)(4), § 60.106(e)(2), §§ 60.104a(d)(3), (d)(5), (d)(6), (h)(3), (h)(4), (h)(5), (i)(3), (i)(4), (i)(5), (j)(3), and (j)(4), § 60.105a(d)(4), (f)(2), (f)(4), (g)(2), and (g)(4), § 60.106a(a)(1)(iii), (a)(2)(iii), (a)(2)(v), (a)(2)(viii), (a)(3)(ii), and (a)(3)(v), and § 60.107a(a)(1)(ii), (a)(1)(iv), (a)(2)(ii), (c)(2), (c)(4), and (d)(2), tables 1 and 3 of subpart EEEE, tables 2 and 4 of subpart FFFF, table 2 of subpart JJJJ, §§ 60.4415(a)(2) and (a)(3), 60.2145(s)(1)(i) and (ii), 60.2145(t)(1)(ii), 60.2145(t)(5)(i), 60.2710(s)(1)(i) and (ii), 60.2710(t)(1)(ii), 60.2710(t)(5)(i), 60.2710(w)(3), 60.2730(q)(3), 60.4900(b)(4)(vii) and (viii), 60.4900(b)(5)(i), 60.5220(b)(4)(vii) and (viii), 60.5220(b)(5)(i), tables 1 and 2 to subpart LLLL, and tables 2 and 3 to subpart MMMM.

* * * * *

(o) The following material is available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 272–0167, *http://www.epa.gov*.

(1) Office of Air Quality Planning and Standards (OAQPS) Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, IBR approved for §§ 60.2145(r)(2), 60.2710(r)(2), 60.4905(b)(3)(i)(B), and 60.5225(b)(3)(i)(B).

(2) [Reserved]

■ 3. Revise the heading for subpart CCCC to read as follows:

## Subpart CCCC—Standards of Performance for Commercial and Industrial Solid Waste Incineration Units

* * * * *

■ 4. Section 60.2005 is revised to read as follows:

### § 60.2005 When does this subpart become effective?

This subpart takes effect on September 21, 2011. Some of the requirements in this subpart apply to planning the CISWI unit (*i.e.,* the preconstruction requirements in §§ 60.2045 and 60.2050). Other requirements such as the emission limitations and operating limits apply after the CISWI unit begins operation.

■ 5. Section 60.2015 is revised to read as follows:

### § 60.2015 What is a new incineration unit?

(a) A new incineration unit is an incineration unit that meets any of the criteria specified in paragraph (a)(1) through (a)(2) of this section.

(1) A commercial and industrial solid waste incineration unit that commenced construction after May 20, 2011.

(2) A commercial and industrial solid waste incineration unit that commenced reconstruction or modification after September 21, 2011.

(b) This subpart does not affect your CISWI unit if you make physical or operational changes to your incineration unit primarily to comply with the EG in subpart DDDD of this part (Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incineration Units). Such changes do not qualify as reconstruction or modification under this subpart.

■ 6. Section 60.2020 is amended by:
■ a. Revising the introductory text.
■ b. Removing and reserving paragraph (b).
■ c. Revising paragraph (c).
■ d. Revising paragraphs (e)(3), (f)(3), (g), (m) and (n).
■ e. Removing and reserving paragraphs (j), (k), and (l).
■ f. Removing paragraph (o).

### § 60.2020 What combustion units are exempt from this subpart?

This subpart exempts the types of units described in paragraphs (a), (c) through (i) and (n) of this section, but some units are required to provide notifications. Air curtain incinerators are exempt from the requirements in this subpart except for the provisions in §§ 60.2242, 60.2250, and 60.2260.

* * * * *

(b) [Reserved]

(c) *Municipal waste combustion units.* Incineration units that are regulated under subpart Ea of this part (Standards of Performance for Municipal Waste Combustors); subpart Eb of this part (Standards of Performance for Large Municipal Waste Combustors); subpart Cb of this part (Emission Guidelines and Compliance Time for Large Municipal Combustors); subpart AAAA of this part (Standards of Performance for Small Municipal Waste Combustion Units); or subpart BBBB of this part (Emission Guidelines for Small Municipal Waste Combustion Units).

* * * * *

(e) * * *

(3) You submit a request to the Administrator for a determination that the qualifying cogeneration facility is combusting homogenous waste as that term is defined in § 60.2265. The request must include information sufficient to document that the unit meets the criteria of the definition of a small power production facility and that the waste material the unit is proposed to burn is homogeneous.

* * * * *

(f) * * *

(3) You submit a request to the Administrator for a determination that the qualifying cogeneration facility is combusting homogenous waste as that term is defined in § 60.2265. The

request must include information sufficient to document that the unit meets the criteria of the definition of a cogeneration facility and that the waste material the unit is combusting is homogeneous.

(g) *Hazardous waste combustion units.* Units for which you are required to get a permit under section 3005 of the Solid Waste Disposal Act.

* * * * *

(j) [Reserved]

(k) [Reserved]

(l) [Reserved]

(m) *Sewage treatment plants.* Incineration units regulated under subpart O of this part (Standards of Performance for Sewage Treatment Plants).

(n) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to subpart LLLL of this part (Standards of Performance for Sewage Sludge Incineration Units) or subpart MMMM of this part (Emission Guidelines for Sewage Sludge Incineration Units). Sewage sludge incineration unit designs include fluidized bed and multiple hearth.

**§ 60.2025 [Removed]**

■ 7. Section 60.2025 is removed.

■ 8. Section 60.2030 is amended by:

■ a. Revising paragraph (c) introductory text.

■ b. Removing and reserving paragraph (c)(5).

■ c. Adding paragraphs (c)(8) through (c)(10).

**§ 60.2030 Who implements and enforces this subpart?**

* * * * *

(c) The authorities that will not be delegated to state, local, or tribal agencies are specified in paragraphs (c)(1) through (4) and (c)(6) through (10) of this section.

* * * * *

(5) [Reserved]

* * * * *

(8) Approval of alternative opacity emission limits in § 60.2105 under § 60.11(e)(6) through (e)(8).

(9) Performance test and data reduction waivers under § 60.2125(j), 60.8(b)(4) and (5).

(10) Determination of whether a qualifying small power production facility or cogeneration facility under § 60.2020(e) or (f) is combusting homogenous waste as that term is defined in § 60.2265.

■ 9. Section 60.2045 is revised to read as follows:

**§ 60.2045 Who must prepare a siting analysis?**

(a) You must prepare a siting analysis if you plan to commence construction of an incinerator after December 1, 2000.

(b) You must prepare a siting analysis for CISWI units that commenced construction after June 4, 2010, or that commenced reconstruction or modification after September 21, 2011.

(c) You must prepare a siting analysis if you are required to submit an initial application for a construction permit under 40 CFR part 51, subpart I, or 40 CFR part 52, as applicable, for the reconstruction or modification of your CISWI unit.

■ 10. Section 60.2070 is amended by revising paragraph (c)(1)(vii) to read as follows:

**§ 60.2070 What are the operator training and qualification requirements?**

* * * * *

(c) * * *

(1) * * *

(vii) Actions to prevent and correct malfunctions or to prevent conditions that may lead to malfunctions.

* * * * *

■ 11. Section 60.2085 is amended by revising paragraph (d) to read as follows:

**§ 60.2085 How do I maintain my operator qualification?**

* * * * *

(d) Prevention and correction of malfunctions or conditions that may lead to malfunction.

* * * * *

■ 12. Section 60.2105 is revised to read as follows:.

**§ 60.2105 What emission limitations must I meet and by when?**

(a) You must meet the emission limitations for each CISWI unit, including bypass stack or vent, specified in table 1 of this subpart or tables 5 through 8 of this subpart by the applicable date in § 60.2140. You must be in compliance with the emission limitations of this subpart that apply to you at all times.

(b) An incinerator unit that commenced construction after November 30, 1999, but no later than June 4, 2010, or that commenced reconstruction or modification on or after June 1, 2001, but no later than September 21, 2011 must meet the more stringent emission limit for the respective pollutant in table 1 of this subpart or table 6 of subpart DDDD.

■ 13. Section 60.2110 is amended by:

■ a. Revising paragraph (a) introductory text.

■ b. Revising paragraphs (a)(2) through (a)(4).

■ c. Adding paragraphs (d) through (g).

**§ 60.2110 What operating limits must I meet and by when?**

(a) If you use a wet scrubber(s) to comply with the emission limitations, you must establish operating limits for up to four operating parameters (as specified in table 2 of this subpart) as described in paragraphs (a)(1) through (4) of this section during the initial performance test.

* * * * *

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the fan for the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(3) Minimum scrubber liquid flow rate, which is calculated as the lowest 1-hour average liquid flow rate at the inlet to the wet acid gas or particulate matter scrubber measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(4) Minimum scrubber liquor pH, which is calculated as the lowest 1-hour average liquor pH at the inlet to the wet acid gas scrubber measured during the most recent performance test demonstrating compliance with the HCl emission limitation.

* * * * *

(d) If you use an electrostatic precipitator to comply with the emission limitations, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage × secondary current = secondary electric power) for each test run. The operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(e) If you use activated carbon sorbent injection to comply with the emission limitations, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average

sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations.

(f) If you use selective noncatalytic reduction to comply with the emission limitations, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI unit), and the reagent flow rate during the nitrogen oxides performance testing. The operating limits for the selective noncatalytic reduction are calculated as the lowest 1-hour average charge rate, secondary chamber temperature, and reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations, and if you do not determine compliance with your particulate matter emission limitation with a particulate matter continuous emission monitoring system, you must maintain opacity to less than or equal to 10 percent opacity (1-hour block average).

■ 14. Section 60.2115 is revised to read as follows:

**§ 60.2115 What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, or an electrostatic precipitator to comply with the emission limitations?**

If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, or an electrostatic precipitator or limit emissions in some other manner, including material balances, to comply with the emission limitations under § 60.2105, you must petition the EPA Administrator for specific operating limits to be established during the initial performance test and continuously monitored thereafter. You must not conduct the initial performance test until after the petition has been approved by the Administrator. Your petition must include the five items listed in paragraphs (a) through (e) of this section.

(a) Identification of the specific parameters you propose to use as additional operating limits.

(b) A discussion of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters and how limits on these parameters will serve to limit emissions of regulated pollutants.

(c) A discussion of how you will establish the upper and/or lower values for these parameters which will establish the operating limits on these parameters.

(d) A discussion identifying the methods you will use to measure and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments.

(e) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

■ 15. Section 60.2120 is revised to read as follows:

**§ 60.2120 Affirmative Defense for Exceedance of an Emission Limit During Malfunction.**

In response to an action to enforce the standards set forth in paragraph § 60.2105, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 60.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions and/or parameter monitoring and systems, as well as control systems, were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 60.2105 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedance.

■ 16. Section 60.2125 is amended by:

■ a. Revising paragraph (c).

■ b. Revising paragraphs (g)(1) and (g)(2).

■ c. Adding paragraphs (h) and (i) to read as follows:

**§ 60.2125 How do I conduct the initial and annual performance test?**

* * * * *

(c) All performance tests must be conducted using the minimum run duration specified in table 1 of this subpart or tables 5 through 8 of this subpart.

* * * * *

(g) * * *

(1) Measure the concentration of each dioxin/furan tetra-through octa-chlorinated isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A–7.

(2) For each dioxin/furan (tetra-through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 3 of this subpart.

* * * * *

(h) Method 22 at 40 CFR part 60, appendix A–7 of this part must be used to determine compliance with the fugitive ash emission limit in table 1 of this subpart or tables 5 through 8 of this subpart.

(i) If you have an applicable opacity operating limit, you must determine compliance with the opacity limit using Method 9 at 40 CFR part 60, appendix A–4 of this part, based on three 1-hour blocks consisting of ten 6-minute average opacity values, unless you are required to install a continuous opacity monitoring system, consistent with §§ 60.2145 and 60.2165.

■ 17. Section 60.2130 is revised to read as follows:

**§ 60.2130 How are the performance test data used?**

You use results of performance tests to demonstrate compliance with the emission limitations in table 1 of this subpart or tables 5 through 8 of this subpart.

■ 18. Section 60.2135 is revised to read as follows:

**§ 60.2135 How do I demonstrate initial compliance with the emission limitations and establish the operating limits?**

You must conduct a performance test, as required under §§ 60.2125 and 60.2105 to determine compliance with the emission limitations in table 1 of this subpart or tables 5 through 8 of this subpart, to establish compliance with any opacity operating limit in § 60.2110,and to establish operating limits using the procedures in §§ 60.2110 or 60.2115. The performance test must be conducted using the test methods listed in table 1 of this subpart or tables 5 through 8 of this subpart and the procedures in § 60.2125. The use of the bypass stack during a performance test shall invalidate the performance test. You must conduct a performance evaluation of each continuous monitoring system within 60 days of installation of the monitoring system.

■ 19. Section 60.2140 is amended by designating the existing text as paragraph (a) and adding paragraphs (b) and (c) to read as follows:

**§ 60.2140 By what date must I conduct the initial performance test?**

* * * * *

(b) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility, and you conducted a test consistent with the provisions of this subpart while combusting the solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you do not need to retest until 6 months from the date you reintroduce that solid waste.

(c) If you commence combusting or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you have not conducted a performance test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you must conduct a performance test within 60 days commencing or recommencing solid waste combustion.

■ 20. Section 60.2141 is added to read as follows:

**§ 60.2141 By what date must I conduct the initial air pollution control device inspection?**

(a) The initial air pollution control device inspection must be conducted within 60 days after installation of the control device and the associated CISWI unit reaches the charge rate at which it will operate, but no later than 180 days after the device's initial startup.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless the owner or operator obtains written approval from the state agency establishing a date whereby all necessary repairs of the designated facility must be completed.

■ 21. Section 60.2145 is revised to read as follows:

**§ 60.2145 How do I demonstrate continuous compliance with the emission limitations and the operating limits?**

(a) Compliance with standards.

(1) The emission standards and operating requirements set forth in this subpart apply at all times.

(2) If you cease combusting solid waste, you may opt to remain subject to the provisions of this subpart. Consistent with the definition of CISWI unit, you are subject to the requirements of this subpart at least 6 months following the last date of solid waste combustion. Solid waste combustion is ceased when solid waste is not in the combustion chamber (*i.e.,* the solid waste feed to the combustor has been cut off for a period of time not less than the solid waste residence time).

(3) If you cease combusting solid waste, you must be in compliance with any newly applicable standards on the effective date of the waste-to-fuel switch. The effective date of the waste-to-fuel switch is a date selected by you, that must be at least 6 months from the date that you ceased combusting solid waste, consistent with § 60.2145(a)(2). Your source must remain in compliance with this subpart until the effective date of the waste-to-fuel switch.

(4) If you own or operate an existing commercial or industrial combustion unit that combusted a fuel or non-waste material, and you commence or recommence combustion of solid waste, you are subject to the provisions of this subpart as of the first day you introduce or reintroduce solid waste to the combustion chamber, and this date constitutes the effective date of the fuel-to-waste switch. You must complete all initial compliance demonstrations for any section 112 standards that are applicable to your facility before you commence or recommence combustion of solid waste. You must provide 30 days prior notice of the effective date of the waste-to-fuel switch. The notification must identify:

(i) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(ii) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(iii) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(iv) The date on which you became subject to the currently applicable emission limits;

(v) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.,* the effective date of the waste-to-

fuel switch), consistent with paragraphs (a)(2) and (3)of this section.

(5) All air pollution control equipment necessary for compliance with any newly applicable emissions limits which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch.

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS. Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with Clean Air Act section 112 monitoring requirements or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in table 1 of this subpart or tables 5 through 8 of this subpart and opacity for each CISWI unit as required under § 60.2125. The annual performance test must be conducted using the test methods listed in table 1 of this subpart or tables 5 through 8 of this subpart and the procedures in § 60.2125. Annual performance tests are not required if you use continuous emission monitoring systems or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 60.2110 or established under § 60.2115 and as specified in § 60.2170. Use three-hour block average values to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 60.2115. Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste used to establish operating limits during the performance test.

(e) For energy recovery units, incinerators, and small remote units, you must perform an annual visual emissions test for ash handling.

(f) For energy recovery units, you must conduct an annual performance test for opacity (except where particulate matter continuous emission monitoring system or continuous opacity monitoring systems are used are used) and the pollutants listed in table 6 of this subpart.

(g) You must demonstrate continuous compliance with the carbon monoxide emission limit using a carbon monoxide continuous emission monitoring system according to the following requirements:

(1) You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen. You must demonstrate initial compliance with the carbon monoxide emissions limit using a 30-day rolling average of these 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part.

(2) Operate the carbon monoxide continuous emission monitoring system in accordance with the requirements of performance specification 4A of appendix B of this part and quality assurance procedure 1 of appendix F of this part.

(h) For energy recovery units with design capacities greater than or equal to 250 MMBtu/hr and waste-burning kilns, demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter continuous emission monitoring system according to the procedures in § 60.2165(n).

(i) For energy recovery units with design capacities greater than or equal to 10 MMBtu/hour, if you have an opacity operating limit, you must install, operate, certify and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 60.2165.

(j) For waste-burning kilns, you must conduct an annual performance test for cadmium, lead, dioxins/furans and hydrogen chloride as listed in table 7 of this subpart. You must determine compliance with hydrogen chloride using a hydrogen chloride continuous emission monitoring system if you do not use an acid gas wet scrubber. You must determine compliance with nitrogen oxides, sulfur dioxide, carbon monoxide, and particulate matter using continuous emission monitoring systems. You must determine compliance with the mercury emissions limit using a mercury continuous emission monitoring system according to the following requirements:

(1) Operate a continuous emission monitoring system in accordance with performance specification 12A of 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with performance specification 12B of 40 CFR part 60, appendix B. The duration of the performance test must be a calendar month. For each calendar month in which the waste-burning kiln operates, hourly mercury concentration data, and stack gas volumetric flow rate data must be obtained.

(2) Owners or operators using a mercury continuous emission monitoring system must install, operate, calibrate, and maintain an instrument for continuously measuring and recording the mercury mass emissions rate to the atmosphere according to the requirements of performance specifications 6 and 12A of 40 CFR part 60, appendix B, and quality assurance procedure 6 of 40 CFR part 60, appendix F.

(3) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury continuous emission monitoring system while the raw mill of the in-line kiln/raw mill is operating under normal conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(k) If you use an air pollution control device to meet the emission limitations in this subpart, you must conduct an initial and annual inspection of the air pollution control device. The inspection must include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation.

(2) Develop a site-specific monitoring plan according to the requirements in paragraph (l) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i).

(l) For each continuous monitoring system required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan according to the requirements of this paragraph (l) that addresses paragraphs (l)(1)(i) through (vi) of this section.

(1) You must submit this site-specific monitoring plan at least 60 days before your initial performance evaluation of your continuous monitoring system.

(i) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device).

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems.

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(iv) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d).

(v) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13.

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b), (c), (c)(1), (c)(4), (d), (e), (f), and (g).

(2) You must conduct a performance evaluation of each continuous monitoring system in accordance with your site-specific monitoring plan.

(3) You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(m) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (l) and (m)(1) through (4) of this section.

(1) Install the flow sensor and other necessary equipment in a position that provides a representative flow.

(2) Use a flow sensor with a measurement sensitivity of no greater than 2 percent of the expected process flow rate.

(3) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(4) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(n) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (l) and (n)(1) through (6) of this section.

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.,* PM scrubber pressure drop).

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(4) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.,* check for pressure tap pluggage daily).

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(o) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (l) and (o)(1) through (4) of this section.

(1) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day.

(4) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(p) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the requirements in paragraphs (l) and (p)(1) through (2) of this section.

(1) Install sensors to measure (secondary) voltage and current to the precipitator collection plates.

(2) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(q) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (*e.g.,* weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (l) and (q)(1) and (2) of this section.

(1) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate.

(2) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(r) If you elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (l) and (r)(1) through (5) of this section.

(1) Install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (*e.g.,* for a positive pressure fabric filter) of the fabric filter.

(2) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(3) Conduct a performance evaluation of the bag leak detection system in accordance with your monitoring plan and consistent with the guidance provided in EPA–454/R–98–015 (incorporated by reference, *see* § 60.17).

(4) Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor.

(5) Use a bag leak detection system equipped with a system that will sound an alarm when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed readily by plant operating personnel.

(s) For facilities using a continuous emission monitoring system to demonstrate compliance with the sulfur dioxide emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the continuous emission monitoring system specified in § 60.2165 to measure sulfur dioxide and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, Appendix A–7 of this part. The sulfur dioxide continuous emission monitoring system must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in this paragraph(s). For sources that have actual inlet emissions

less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide continuous emission monitoring systems should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the continuous emission monitoring systems, whichever is greater.

(1) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 2 in appendix B of this part, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the continuous emission monitors and the test methods specified in paragraphs (s)(1)(i) and (s)(1)(ii) of this section.

(i) For sulfur dioxide, EPA Reference Method 6 or 6C, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, *see* § 60.17) must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, *see* § 60.17), must be used.

(2) The span value of the continuous emission monitoring system at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule. The span value of the continuous emission monitoring system at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of this part.

(t) For facilities using a continuous emission monitoring system to demonstrate continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the continuous emission monitoring system specified in § 60.2165 to measure nitrogen oxides and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part. The nitrogen oxides continuous emission monitoring system must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in paragraphs (t)(1) through (t)(5) of this section.

(1) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 2 of appendix B of this part, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the continuous emission monitoring systems and the test methods specified in paragraphs (t)(1)(i) and (t)(1)(ii) of this section.

(i) For nitrogen oxides, EPA Reference Method 7 or 7E at 40 CFR part 60, appendix A–4 must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B at 40 CFR part 60, appendix A–3, or as an alternative ANSI/ASME PTC 19–10.1981 (incorporated by reference, *see* § 60.17), as applicable, must be used.

(2) The span value of the continuous emission monitoring system must be 125 percent of the maximum estimated hourly potential nitrogen oxide emissions of the unit.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of this part.

(4) The owner or operator of an affected facility may request that compliance with the nitrogen oxides emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (t)(4)(i) through (t)(4)(iv) of this section. This relationship may be re-established during performance compliance tests.

(i) The fuel factor equation in Method 3B must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, *see* § 60.17), as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor.

(ii) Samples must be taken for at least 30 minutes in each hour.

(iii) Each sample must represent a 1-hour average.

(iv) A minimum of three runs must be performed.

(u) For facilities using a continuous emission monitoring system to demonstrate continuous compliance with any of the emission limits of this subpart, you must complete the following:

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part.

(2) Operate all continuous emission monitoring systems in accordance with the applicable procedures under appendices B and F of this part.

(v) Use of the bypass stack at any time is an emissions standards deviation for particulate matter, HCl, Pb, Cd, Hg, $NO_X$, $SO_2$, and dioxin/furans.

■ 22. Section 60.2150 is revised to read as follows:

**§ 60.2150 By what date must I conduct the annual performance test?**

You must conduct annual performance tests between 11 and 13 months of the previous performance test.

■ 23. Section 60.2151 is added to read as follows:

**§ 60.2151 By what date must I conduct the annual air pollution control device inspection?**

On an annual basis (no more than 12 months following the previous annual air pollution control device inspection), you must complete the air pollution control device inspection as described in § 60.2141.

■ 24. Section 60.2155 is revised to read as follows:

**§ 60.2155 May I conduct performance testing less often?**

(a) You must conduct annual performance tests according to the schedule specified in § 60.2150, with the following exceptions:

(1) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward, as specified in § 60.2160. The Administrator may request a repeat performance test at any time.

(2) You must repeat the performance test within 60 days of a process change, as defined in § 60.2265.

(3) If the initial or any subsequent performance test for any pollutant in table 1 or tables 5 through 8 of this subpart, as applicable, demonstrates that the emission level for the pollutant is no greater than the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, and you are not required to conduct a performance test for the pollutant in response to a request by the Administrator in paragraph (a)(1) of this section or a process change in paragraph

(a)(2) of this section, you may elect to skip conducting a performance test for the pollutant for the next 2 years. You must conduct a performance test for the pollutant during the third year and no more than 37 months following the previous performance test for the pollutant. For cadmium and lead, both cadmium and lead must be emitted at emission levels no greater than their respective emission levels specified in paragraph (a)(3)(i) of this section for you to qualify for less frequent testing under this paragraph.

(i) For particulate matter, hydrogen chloride, mercury, nitrogen oxides, sulfur dioxide, cadmium, lead and dioxins/furans, the emission level equal to 75 percent of the applicable emission limit in table 1 or tables 5 through 8 of this subpart, as applicable, to this subpart.

(ii) For fugitive emissions, visible emissions (of combustion ash from the ash conveying system) for 2 percent of the time during each of the three 1-hour observations periods.

(4) If you are conducting less frequent testing for a pollutant as provided in paragraph (a)(3) of this section and a subsequent performance test for the pollutant indicates that your CISWI unit does not meet the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, you must conduct annual performance tests for the pollutant according to the schedule specified in paragraph (a) of this section until you qualify for less frequent testing for the pollutant as specified in paragraph (a)(3) of this section.

(b) [Reserved]

■ 25. Section 60.2165 is amended by:
■ a. Revising paragraph (b)(6).
■ b. Revising paragraph (c).
■ c. Adding paragraphs (d) through (p) to read as follows:

**§ 60.2165 What monitoring equipment must I install and what parameters must I monitor?**

* * * * *

(b) * * *

(6) The bag leak detection system must be equipped with an alarm system that will alert automatically an operator when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel.

* * * * *

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, or an electrostatic precipitator to comply with the emission limitations under § 60.2105, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.2115.

(d) If you use activated carbon injection to comply with the emission limitations in this subpart, you must measure the minimum mercury sorbent flow rate once per hour.

(e) If you use selective noncatalytic reduction to comply with the emission limitations, you must complete the following:

(1) Following the date on which the initial performance test is completed or is required to be completed under § 60.2125, whichever date comes first, ensure that the affected facility does not operate above the maximum charge rate, or below the minimum secondary chamber temperature (if applicable to your CISWI unit) or the minimum reagent flow rate measured as 3-hour block averages at all times.

(2) Operation of the affected facility above the maximum charge rate, below the minimum secondary chamber temperature and below the minimum reagent flow rate simultaneously constitute a violation of the nitrogen oxides emissions limit.

(f) If you use an electrostatic precipitator to comply with the emission limits of this subpart, you must monitor the secondary power to the electrostatic precipitator collection plates and maintain the 3-hour block averages at or above the operating limits established during the mercury or particulate matter performance test.

(g) For waste-burning kilns not equipped with a wet scrubber, in place of hydrogen chloride testing with EPA Method 321 at 40 CFR part 63, appendix A, an owner or operator must install, calibrate, maintain, and operate a continuous emission monitoring system for monitoring hydrogen chloride emissions discharged to the atmosphere and record the output of the system. To demonstrate continuous compliance with the hydrogen chloride emissions limit for units other than waste-burning kilns not equipped with a wet scrubber, a facility may substitute use of a hydrogen chloride continuous emission monitoring system for conducting the hydrogen chloride annual performance test, monitoring the minimum hydrogen chloride sorbent flow rate, and monitoring the minimum scrubber liquor pH.

(h) To demonstrate continuous compliance with the particulate matter emissions limit, a facility may substitute use of a particulate matter continuous emission monitoring system for conducting the particulate matter annual performance test and monitoring the minimum pressure drop across the wet scrubber, if applicable.

(i) To demonstrate continuous compliance with the dioxin/furan emissions limit, a facility may substitute use of a continuous automated sampling system for the dioxin/furan annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 at 40 CFR part 60, appendix A–7 of this part. You may propose alternative continuous monitoring consistent with the requirements in § 60.13(i). The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 at 40 CFR part 60, appendix A–7 must install, calibrate, maintain, and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q).

(j) To demonstrate continuous compliance with the mercury emissions limit, a facility may substitute use of a continuous automated sampling system for the mercury annual performance test. You must record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet performance specification 12B. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Reference Method 29 or 30B at 40 CFR part 60, appendix A–8 of this part, ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain, and operate a continuous automated sampling system and must comply with performance specification 12A and quality assurance procedure 5, as well as the requirements specified in § 60.58b(p) and (q).

(k) To demonstrate continuous compliance with the nitrogen oxides emissions limit, a facility may substitute use of a continuous emission monitoring system for the nitrogen oxides annual performance test to demonstrate compliance with the nitrogen oxides emissions limits.

(1) Install, calibrate, maintain, and operate a continuous emission monitoring system for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance procedure one of appendix F of this part and the procedures under § 60.13 must

be followed for installation, evaluation, and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for nitrogen oxides is completed or is required to be completed under § 60.2125, compliance with the emission limit for nitrogen oxides required under § 60.52b(d) must be determined based on the 30-day rolling average of the hourly emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million by volume (dry basis) and used to calculate the 30-day rolling average concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(l) To demonstrate continuous compliance with the sulfur dioxide emissions limit, a facility may substitute use of a continuous automated sampling system for the sulfur dioxide annual performance test to demonstrate compliance with the sulfur dioxide emissions limits.

(1) Install, calibrate, maintain, and operate a continuous emission monitoring system for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance requirements of procedure one of appendix F of this part and procedures under § 60.13 must be followed for installation, evaluation, and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for sulfur dioxide is completed or is required to be completed under § 60.2125, compliance with the sulfur dioxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations and daily geometric average emission percent reductions. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(m) For energy recovery units over 10 MMBtu/hr design heat input that do not use a wet scrubber, fabric filter with bag leak detection system, or particulate matter continuous emission monitoring system, you must install, operate, certify, and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 60.2105. Energy recovery units that use a particulate matter continuous emission monitoring system to demonstrate initial and continuing compliance according to the procedures in § 60.2165(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for the opacity consistent with § 60.2145(f).

(1) Install, operate, and maintain each continuous opacity monitoring system according to performance specification 1 of 40 CFR part 60, appendix B.

(2) Conduct a performance evaluation of each continuous opacity monitoring system according to the requirements in § 60.13 and according to PS–1 of 40 CFR part 60, appendix B.

(3) As specified in § 60.13(e)(1), each continuous opacity monitoring system must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) Reduce the continuous opacity monitoring system data as specified in § 60.13(h)(1).

(5) Determine and record all the 6-minute averages (and 1-hour block averages as applicable) collected.

(n) For energy recovery units with design capacities greater than 250 MMBtu/hr, in place of particulate matter testing with EPA Method 5 at 40 CFR part 60, appendix A–3, an owner or operator must install, calibrate, maintain, and operate a continuous emission monitoring system for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 at 40 CFR part 60, appendix A–3 must install, calibrate, maintain, and operate a continuous emission monitoring system and must comply with the requirements specified in paragraphs (n)(1) through (n)(14) of this section.

(1) Notify the Administrator 1 month before starting use of the system.

(2) Notify the Administrator 1 month before stopping use of the system.

(3) The monitor must be installed, evaluated, and operated in accordance with the requirements of performance specification 11 of appendix B of this part and quality assurance requirements of procedure two of appendix F of this part and § 60.13. Use Method 5 or Method 5I of Appendix A of this part for the PM CEMS correlation testing.

(4) The initial performance evaluation must be completed no later than 180 days after the date of initial startup of the affected facility, as specified under § 60.2125 or within 180 days of notification to the Administrator of use of the continuous monitoring system if the owner or operator was previously determining compliance by Method 5 performance tests, whichever is later.

(5) The owner or operator of an affected facility may request that compliance with the particulate matter emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. The relationship between oxygen and carbon dioxide levels for the affected facility must be established according to the procedures and methods specified in § 60.2145(s)(5)(i) through (s)(5)(iv).

(6) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions as required under § 60.2125. Compliance with the particulate matter emission limit must be determined by using the continuous emission monitoring system specified in paragraph (n) of this section to measure particulate matter and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

(7) Compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 from the 1-hour arithmetic average continuous emission monitoring system outlet data.

(8) At a minimum, valid continuous monitoring system hourly averages must be obtained as specified in § 60.2170(e).

(9) The 1-hour arithmetic averages required under paragraph (n)(7) of this section must be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (dry basis) and must be used to calculate the 30-day rolling average emission concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(10) All valid continuous emission monitoring system data must be used in calculating average emission concentrations even if the minimum continuous emission monitoring system data requirements of paragraph (n)(8) of this section are not met.

(11) The continuous emission monitoring system must be operated according to performance specification 11 in appendix B of this part.

(12) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 11 in appendix B of this part, particulate matter and oxygen (or carbon dioxide) data must be collected concurrently (or within a 30- to 60-minute period) by both the continuous emission monitors and the following test methods.

(i) For particulate matter, EPA Reference Method 5 must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, as applicable, must be used.

(13) Quarterly accuracy determinations and daily calibration drift tests must be performed in accordance with procedure 2 in appendix F of this part.

(14) When particulate matter emissions data are not obtained because of continuous emission monitoring system breakdowns, repairs, calibration checks, and zero and span adjustments, emissions data must be obtained by using other monitoring systems as approved by the Administrator or EPA Reference Method 19 at 40 CFR part 60, appendix A–7 to provide, as necessary, valid emissions data for a minimum of 85 percent of the hours per day, 90 percent of the hours per calendar quarter, and 95 percent of the hours per calendar year that the affected facility is operated and combusting waste.

(o) To demonstrate continuous compliance with the carbon monoxide emissions limit, you must use a continuous automated sampling system.

(1) Install, calibrate, maintain, and operate a continuous emission monitoring system for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 4B of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for carbon monoxide is completed or is required to be completed under § 60.2140, compliance with the carbon monoxide emission limit must be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(p) The owner/operator of an affected source with a bypass stack shall install, calibrate (to manufacturers' specifications), maintain, and operate a device or method for measuring the use of the bypass stack including date, time and duration.

■ 26. Section 60.2170 is revised to read as follows:

**§ 60.2170 Is there a minimum amount of monitoring data I must obtain?**

For each continuous monitoring system required or optionally allowed under § 60.2165, you must collect data according to this section:

(a) You must operate the monitoring system and collect data at all required intervals at all times compliance is required except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods (as specified in 60.2210(o) of this part), and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments). A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(b) You may not use data recorded during monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(c) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments, failure to collect required data is a deviation of the monitoring requirements.

■ 27. Section 60.2175 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraphs (b)(5) and (e).

■ c. Removing and reserving paragraphs (c) and (d).

■ d. Adding paragraphs (o) through (w).

**§ 60.2175 What records must I keep?**

You must maintain the items (as applicable) as specified in paragraphs (a), (b), and (e) through (u) of this section for a period of at least 5 years:

* * * * *

(b) * * *

(5) For affected CISWI units that establish operating limits for controls other than wet scrubbers under § 60.2110(d) through (f) or § 60.2115, you must maintain data collected for all operating parameters used to determine compliance with the operating limits.

* * * * *

(c) [Reserved]

(d) [Reserved]

(e) Identification of calendar dates and times for which data show a deviation from the operating limits in table 2 of this subpart or a deviation from other operating limits established under § 60.2110(d) through (f) or § 60.2115 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

* * * * *

(o) Maintain records of the annual air pollution control device inspections that are required for each CISWI unit subject to the emissions limits in table 1 of this subpart or tables 5 through 8 of this subpart, any required maintenance, and any repairs not completed within 10 days of an inspection or the timeframe established by the state regulatory agency.

(p) For continuously monitored pollutants or parameters, you must document and keep a record of the following parameters measured using continuous monitoring systems.

(1) All 6-minute average levels of opacity.

(2) All 1-hour average concentrations of sulfur dioxide emissions.

(3) All 1-hour average concentrations of nitrogen oxides emissions.

(4) All 1-hour average concentrations of carbon monoxide emissions.

(5) All 1-hour average concentrations of particulate matter emissions.

(6) All 1-hour average concentrations of mercury emissions.

(7) All 1-hour average concentrations of hydrogen chloride emissions.

(q) Records indicating use of the bypass stack, including dates, times, and durations.

(r) If you choose to stack test less frequently than annually, consistent

with § 60.2155(a) through (c), you must keep annual records that document that your emissions in the previous stack test(s) were less than 75 percent of the applicable emission limit and document that there was no change in source operations including fuel composition and operation of air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past year.

(s) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment.

(t) Records of all required maintenance performed on the air pollution control and monitoring equipment.

(u) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(v) For operating units that burn materials other than traditional fuels as defined in § 241.2, a description of each material burned, and a record which documents how each material that is not a traditional fuel meets each of the legitimacy criteria in § 241.3(d). If you combust a material that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the material satisfy the definition of processing in § 241.2. If the material received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a copy of the non-waste determination granted by EPA.

(w) For operating units that burn tires,

(1) A certification that the shipment of tires that are non-waste per 40 CFR 241.3(b)(2)(i), are part of an established tire collection program, consistent with the definition of that term in § 241.2. The certification must document that the tires were not discarded and are handled as valuable commodities in accordance with § 241.3(d), from the point of removal from the automobile through arrival at the combustion facility. The certification must identify the entity the tires were received from (for example, the name of the state or private collection program), the quantity, volume, or weight of tires received by you, and the dates received. The certification must be signed by the owner or operator of the combustion unit, or by a responsible official of the established tire collection program, and must include the following certification of compliance, "The tires from this tire collection program meet the EPA definition of an established tire collection program in 40 CFR section 241." and state the title or position of the person signing the certification.

(2) You must also keep a record that identifies where on your plant site the tires from each tire collection program are located, and that accounts for all tires at the plant site.

■ 27. Section 60.2210 is amended by revising paragraph (e) and adding paragraphs (k) through (o) to read as follows:

**§ 60.2210 What information must I include in my annual report?**

* * * * *

(e) If no deviation from any emission limitation or operating limit that applies to you has been reported, a statement that there was no deviation from the emission limitations or operating limits during the reporting period.

* * * * *

(k) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction.

(l) For each deviation from an emission or operating limitation that occurs for a CISWI unit for which you are not using a continuous monitoring system to comply with the emission or operating limitations in this subpart, the annual report must contain the following information.

(1) The total operating time of the CISWI unit at which the deviation occurred during the reporting period.

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(m) If there were periods during which the continuous monitoring system, including the continuous emission monitoring system, was out of control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI unit for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart.

(1) The date and time that each malfunction started and stopped.

(2) The date, time, and duration that each CMS was inoperative, except for zero (low-level) and high-level checks.

(3) The date, time, and duration that each continuous monitoring system was out-of-control, including start and end dates and hours and descriptions of corrective actions taken.

(4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of malfunction or during another period.

(5) A summary of the total duration of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period.

(6) A breakdown of the total duration of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes.

(7) A summary of the total duration of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the CISWI unit at which the continuous monitoring system downtime occurred during that reporting period.

(8) An identification of each parameter and pollutant that was monitored at the CISWI unit.

(9) A brief description of the CISWI unit.

(10) A brief description of the continuous monitoring system.

(11) The date of the latest continuous monitoring system certification or audit.

(12) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period.

(n) If there were periods during which the continuous monitoring system, including the continuous emission monitoring system, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period.

(o) A continuous monitoring system is out of control in accordance with the procedure in 40 CFR part 60, appendix F of this part, as if any of the following occur.

(1) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the

applicable performance specification or in the relevant standard.

(2) The continuous monitoring system fails a performance test audit (*e.g.,* cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit.

(3) The continuous opacity monitoring system calibration drift exceeds two times the limit in the applicable performance specification in the relevant standard.

* * * * *

■ 28. Section 60.2220 is amended by revising paragraph (c) and removing paragraphs (e) and (f).

**§ 60.2220 What must I include in the deviation report?**

* * * * *

(c) Durations and causes of the following:

(1) Each deviation from emission limitations or operating limits and your corrective actions.

(2) Bypass events and your corrective actions.

* * * * *

■ 29. Section 60.2230 is revised to read as follows:

**§ 60.2230 Are there any other notifications or reports that I must submit?**

(a) Yes. You must submit notifications as provided by § 60.7.

(b) If you cease combusting solid waste but continue to operate, you must provide 30 days prior notice of the effective date of the waste-to-fuel switch, consistent with 60.2145(a). The notification must identify:

(1) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(2) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(3) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(4) The date on which you became subject to the currently applicable emission limits;

(5) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.,* the effective date of the waste-to-fuel switch), consistent with paragraphs (b)(2) and (3)of this section.

■ 30. Section 60.2235 is revised to read as follows:

**§ 60.2235 In what form can I submit my reports?**

(a) Submit initial, annual and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(b) As of January 1, 2012, and within 60 days after the date of completing each performance test, as defined in § 63.2, conducted to demonstrate compliance with this subpart, you must submit relative accuracy test audit (*i.e.,* reference method) data and performance test (*i.e.,* compliance test) data, except opacity data, electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (*see http://www.epa.gov/ttn/chief/ert/ert tool.html/*) or other compatible electronic spreadsheet. Only data collected using test methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

■ 31. Section 60.2242 is revised to read as follows:

**§ 60.2242 Am I required to apply for and obtain a Title V operating permit for my unit?**

Yes. Each CISWI unit and air curtain incinerator subject to standards under this subpart must operate pursuant to a permit issued under Section 129(e) and Title V of the Clean Air Act.

■ 32. Section 60.2250 is revised to read as follows:

**§ 60.2250 What are the emission limitations for air curtain incinerators?**

Within 60 days after your air curtain incinerator reaches the charge rate at which it will operate, but no later than 180 days after its initial startup, you must meet the two limitations specified in paragraphs (a) and (b) of this section.

(a) Maintain opacity to less than or equal to 10 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values), except as described in paragraph (b) of this section.

(b) Maintain opacity to less than or equal to 35 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) during the startup period that is within the first 30 minutes of operation.

■ 33. Section 60.2260 is amended by revising paragraph (d) to read as follows:

**§ 60.2260 What are the recordkeeping and reporting requirements for air curtain incinerators?**

* * * * *

(d) You must submit the results (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) of the initial opacity tests no later than 60 days following the initial test. Submit annual opacity test results within 12 months following the previous report.

* * * * *

■ 34. Section 60.2265 is amended by:

■ a. Adding definitions for "Affirmative defense", "Burn-off oven", "Bypass stack", "Chemical recovery unit", "Continuous monitoring system", "Cyclonic burn barrel", "Energy recovery unit", "Energy recovery unit designed to burn biomass (Biomass)", "Energy recovery unit designed to burn coal (Coal)", "Energy recovery unit designed to burn solid materials (Solids)", "Homogeneous wastes" "Incinerator", "Kiln", "Laboratory analysis unit", "Minimum voltage or amperage", "Opacity", "Operating day", "Performance evaluation", "Performance test", "Process change", "Raw mill", "Small remote incinerator", "Soil treatment unit", "Solid waste incineration unit," "Space heater" and "Waste-burning kiln", in alphabetical order.

■ b. Revising the definition for "Commercial and industrial solid waste incineration (CISWI) unit", "dioxin/furans", "Modification or modified CISWI unit", and "Wet scrubber".

■ c. Removing paragraph (3) of the definition for "Deviation."

■ d. Removing the definition for "Agricultural waste", "Commercial or industrial waste", "Contained gaseous material", and "Solid waste".

**§ 60.2265 What definitions must I know?**

* * * * *

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

*Burn-off oven* means any rack reclamation unit, part reclamation unit, or drum reclamation unit. A burn-off oven is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Bypass stack* means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

* * * * *

*Chemical recovery unit* means combustion units burning materials to

recover chemical constituents or to produce chemical compounds where there is an existing commercial market for such recovered chemical constituents or compounds. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (*i.e.,* black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process.

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid.

(3) Units burning only wood or coal feedstock for the production of charcoal.

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals which are reclaimed and reused as catalysts or used to produce commercial grade catalysts.

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds.

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen, carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes.

(7) Units burning only photographic film to recover silver.

* * * * *

*Commercial and industrial solid waste incineration (CISWI) unit* means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 that have been discarded, and you do not keep and produce records as required by § 60.2175(v), the material is a solid waste and the operating unit is a CISWI unit. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system.

* * * * *

*Continuous monitoring system* means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters.

* * * * *

*Cyclonic burn barrel* means a combustion device for waste materials that is attached to a 55 gallon, openhead drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air. A cyclonic burn barrel is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements.

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

*Dioxins/furans* means tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans.

* * * * *

*Energy recovery unit* means a combustion unit combusting solid waste (as that term is defined by the Administrator under RCRA in 40 CFR 240) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

*Energy recovery unit designed to burn biomass (Biomass)* means an energy recovery unit that burns solid waste and at least 10 percent biomass, but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

*Energy recovery unit designed to burn coal (Coal)* means an energy recovery unit that burns solid waste and at least 10 percent coal on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

*Energy recovery unit designed to burn liquid waste materials and gas (Liquid/gas)* means an energy recovery unit that burns a liquid waste with liquid or gaseous fuels not combined with any solid fuel or waste materials.

*Energy recovery unit designed to burn solid materials (Solids)* includes energy recovery units designed to burn coal and energy recovery units designed to burn biomass.

* * * * *

*Homogeneous wastes* are stable, consistent in formulation, have known fuel properties, have a defined origin, have predictable chemical and physical attributes, and result in consistent combustion characteristics and have a consistent emissions profile.

*Incinerator* means any furnace used in the process of combusting solid waste (as that term is defined by the Administrator under RCRA in 40 CFR part 240) for the purpose of reducing the volume of the waste by removing combustible matter. Incinerator designs include single chamber and two-chamber.

*Kiln* means an oven or furnace, including any associated preheater or precalciner devices, used for processing a substance by burning, firing or drying. Kilns include cement kilns that produce clinker by heating limestone and other materials for subsequent production of Portland Cement.

*Laboratory analysis unit* means units that burn samples of materials for the purpose of chemical or physical analysis. A laboratory analysis unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

*Minimum voltage or amperage* means 90 percent of the lowest test-run average voltage or amperage to the electrostatic precipitator measured during the most recent particulate matter or mercury performance test demonstrating compliance with the applicable emission limits.

*Modification or modified CISWI unit* means a CISWI unit that has been changed later than June 1, 2001, and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, see the definition of CISWI unit.

(2) Any physical change in the CISWI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which

section 129 or section 111 of the Clean Air Act has established standards.

*Opacity* means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

*Operating day* means a 24-hour period between 12:00 midnight and the following midnight during which any amount of solid waste is combusted at any time in the CISWI unit.

* * * * *

*Performance evaluation* means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

*Performance test* means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

*Process change* means a significant permit revision, but only with respect to those pollutant-specific emission units for which the proposed permit revision is applicable, including but not limited to a change in the air pollution control devices used to comply with the emission limits for the affected CISWI unit (*e.g.,* change in the sorbent used for activated carbon injection).

* * * * *

*Raw mill* means a ball and tube mill, vertical roller mill or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

* * * * *

*Small, remote incinerator* means an incinerator that combusts solid waste (as that term is defined by the Administrator under RCRA in 40 CFR part 240) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

*Soil treatment unit* means a unit that thermally treats petroleum contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Solid waste incineration unit* means a distinct operating unit of any facility which combusts any solid waste (as that term is defined by the Administrator under RCRA in 40 CFR part 240) material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term "solid waste incineration unit" does not include: (A) Materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals; (B) qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or (C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes, and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

*Space heater* means a usually portable appliance for heating a relatively small area. These units are not subject to the incinerator, waste-burning kiln, or small, remote subcategories.

* * * * *

*Waste-burning kiln* means a kiln that is heated, in whole or in part, by combusting solid waste (as that term is defined by the Administrator pursuant to Subtitle D of RCRA).

*Wet scrubber* means an add-on air pollution control device that uses an aqueous or alkaline scrubbing liquor to collect particulate matter (including nonvaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

* * * * *

■ 35. Table 1 of subpart CCCC is revised to read as follows:

TABLE 1 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR CISWI UNITS FOR WHICH CONSTRUCTION IS COMMENCED AFTER NOVEMBER 30, 1999, BUT NO LATER THAN JUNE 4, 2010, OR FOR WHICH MODIFICATION OR RECONSTRUCTION IS COMMENCED ON OR AFTER JUNE 1, 2001, BUT NO LATER THAN SEPTEMBER 21, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium | 0.004 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Carbon Monoxide | 157 parts per million by dry volume. | 30 day rolling average | Carbon Monoxide CEMS (Performance Specification 4A of this part, use a span value of 300 ppm.). |
| Dioxin/Furan (toxic equivalency basis). | 0.41 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters per run). | Performance test (Method 23 of appendix A–7 of this part). |
| Hydrogen Chloride | 62 parts per million by dry volume | 3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead | 0.04 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |

TABLE 1 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR CISWI UNITS FOR WHICH CONSTRUCTION IS COMMENCED AFTER NOVEMBER 30, 1999, BUT NO LATER THAN JUNE 4, 2010, OR FOR WHICH MODIFICATION OR RECONSTRUCTION IS COMMENCED ON OR AFTER JUNE 1, 2001, BUT NO LATER THAN SEPTEMBER 21, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Mercury | 0.47 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[b] collect a minimum volume of 1 dry standard cubic meter per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[b] |
| Nitrogen Oxides | 388 parts per million by dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 800 ppm or less. |
| Opacity | 10 percent | Three 1-hour blocks consisting of ten 6-minute averages opacity values. | Performance test (Method 9 at 40 CFR part 60, appendix A–4). |
| Particulate matter | 70 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or A–8). |
| Sulfur Dioxide | 20 parts per million by dry volume | 3-run average (For Method 6, collect a minimum volume of 200 liters per run. For Method 6C, collect sample for a minimum duration of 1 hour per run). | Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4. Use a span gas with a concentration of 50 ppm or less. |

a All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.
b Incorporated by reference, *see* § 60.17.

■ 36. Table 4 of subpart CCCC is amended by revising the entry for "Annual Report" and "Emission limitation or operating limit deviation report."

TABLE 4 TO SUBPART CCCC OF PART 60—SUMMARY OF REPORTING REQUIREMENTS [a]

| Report | Due date | Contents | Reference |
|---|---|---|---|
| * | * | * | * |
| Annual report | No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report. | • Name and address<br>• Statement and signature by responsible official.<br>• Date of report<br>• Values for the operating limits<br>• Highest recorded 3-hour average and the lowest 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported.<br>• If a performance test was conducted during the reporting period, the results of the test.<br>• If a performance test was not conducted during the reporting period, a statement that the requirements of § 60.2155(a) were met.<br>• Documentation of periods when all qualified CISWI unit operators were unavailable for more than 8 hours but less than 2 weeks. | §§ 60.2205 and 60.2210. |

TABLE 4 TO SUBPART CCCC OF PART 60—SUMMARY OF REPORTING REQUIREMENTS [a]—Continued

| Report | Due date | Contents | Reference |
|---|---|---|---|
| | | • If you are conducting performance tests once every 3 years consistent with § 60.2155(a), the date of the last 2 performance tests, a comparison of the emission level you achieved in the last 2 performance tests to the 75 percent emission limit threshold required in § 60.2155(a) and a statement as to whether there have been any operational changes since the last performance test that could increase emissions. | |
| * | * | * | * |
| Emission limitation or operating limit deviation report. | By August 1 of that year for data collected during the first half of the calendar year. By February 1 of the following year for data collected during the second half of the calendar year. | • Dates and times of deviation .....<br>• Averaged and recorded data for those dates.<br>• Duration and causes of each deviation and the corrective actions taken.<br>• Copy of operating limit monitoring data and any test reports.<br>• Dates, times and causes for monitor downtime incidents. | § 60.2215 and 60.2220. |
| * | * | * | * |

[a] This table is only a summary, *see* the referenced sections of the rule for the complete requirements.

■ 37. Table 5 to Subpart CCCC is added to read as follows:

TABLE 5 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium ..... | 0.0023 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meter per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8 of this part).<br>Use ICPMS for the analytical finish. |
| Carbon Monoxide ..... | 12 parts per million by dry volume | 30 day rolling average ..... | Carbon Monoxide CEMS (Performance Specification 4A of this part, using an RA of 0.5 ppm instead of 5 ppm as specified in section 13.2. For the cylinder gas audit, +/− 15% or 0.5 ppm, whichever is greater.) Use a span gas with a concentration of 20 ppm or less. |
| Dioxin/furan (Total Mass Basis) ..... | 0.052 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meter per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxin/furan (toxic equivalency basis). | 0.13 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meter per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Fugitive ash ..... | Visible emissions for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |
| Hydrogen Chloride ..... | 0.091 part per million by dry volume. | 3-run average (For Method 26, collect a minimum volume of 200 liters per run. For Method 26A, collect a minimum volume of 3 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead ..... | 0.0019 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meter per run). | Performance test (Method 29 of appendix A–8 at 40 CFR part 60). Use ICPMS for the analytical finish. |

TABLE 5 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Mercury | 0.00016 milligrams per dry standard cubic meter. | 3-run average (collect enough volume to meet a detection limit data quality objective of 0.03 μg/dry standard cubic meter). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008) [b]. |
| Nitrogen Oxides | 23 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 50 ppm or less. |
| Particulate matter (filterable) | 18 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters per run). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8 at 40 CFR part 60). |
| Sulfur dioxide | 11 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4. Use a span gas with a concentration of 20 ppm or less. |

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.

■ 38. Table 6 to Subpart CCCC is added to read as follows:

TABLE 6 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR ENERGY RECOVERY UNITS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011

| For the air pollutant | You must meet this emission limitation [a] | | Using this averaging time | And determining compliance using this method |
|---|---|---|---|---|
| | Liquid/gas | Solids | | |
| Cadmium | 0.023 milligrams per dry standard cubic meter. | 0.00051 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Carbon monoxide | 36 parts per million dry volume. Coal—46 parts per million dry volume. | Biomass—160 parts per million dry volume. | 30 day rolling average | Carbon Monoxide CEMS (Performance Specification 4A of this part, using a RA of 0.5 ppm instead of 5 ppm as specified in section 13.2. For the cylinder gas audit, +/−15% or 0.5 ppm, whichever is greater. Use a span gas with a concentration of 100 ppm or less for a liquid/gas or coal-fed boiler. Use a span gas with a concentration of 300 ppm or less for a biomass-fed boiler. |
| Dioxins/furans (Total Mass Basis). | No Total Mass Basis limit, must meet the toxic equivalency basis limit below. | 0.068 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 0.002 nanograms per dry standard cubic meter. | 0.011 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters per run). | Performance test (Method 23 of appendix A–7 of this part). |
| Fugitive ash | Visible emissions for no more than 5 percent of the hourly observation period. | Visible emissions for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods. | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |

TABLE 6 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR ENERGY RECOVERY UNITS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | | Using this averaging time | And determining compliance using this method |
|---|---|---|---|---|
| | Liquid/gas | Solids | | |
| Hydrogen chloride ..... | 14 parts per million dry volume. | 0.45 parts per million dry volume. | 3-run average (For Method 26, collect a minimum volume of 200 liters per run. For Method 26A, collect a minimum volume of 3 dry standard cubic meters per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead ..... | 0.096 milligrams per dry standard cubic meter. | 0.00313 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Mercury ..... | 0.00025 milligrams per dry standard cubic meter. | 0.00033 milligrams per dry standard cubic meter. | 3-run average (collect enough volume to meet an in-stack detection limit data quality objective of 0.03 ug/dscm). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[b]. |
| Oxides of nitrogen ..... | 76 parts per million dry volume. | Biomass—290 parts per million dry volume.<br>Coal—340 parts per million dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 150 ppm or less for liquid/gas fuel boilers. Use a span gas with a concentration of 700 ppm or less for solid fuel boilers. |
| Particulate matter (filterable). | 110 milligrams per dry standard cubic meter. | 250 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8) if the unit has a design capacity less than 250 MMBtu/hr; or PM CEMS (performance specification 11 of appendix B of this part) if the unit has a design capacity equal to or greater than 250 MMBtu/hr. Use Method 5 or 5I of Appendix A of this part and collect a minimum sample volume of 1 dscm per test run for the PM CEMS correlation testing. |
| Sulfur dioxide ..... | 720 parts per million dry volume. | Biomass—6.2 parts per million dry volume.<br>Coal—650 parts per million dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6C at 40 CFR part 60, appendix A–4. Use a span gas with a concentration of 20 ppm or less for a biomass-fed boiler. Use a span gas with a concentration of 1500 ppm or less for a liquid/gas boiler or coal-fed boiler. |

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the Total Mass Basis limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.

■ 39. Table 7 to Subpart CCCC is added to read as follows:

TABLE 7 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR WASTE-BURNING KILNS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium ..... | 0.00048 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |

TABLE 7 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR WASTE-BURNING KILNS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Carbon monoxide | 90 parts per million dry volume | 30-day rolling average | Carbon monoxide CEMS (Performance Specification 4A of this part, using an RA of 1 ppm instead of 5 ppm as specified in section 13.2. For the cylinder gas audit, +/− 15% or 0.5 ppm, whichever is greater). Use a span gas with a concentration of 200 ppm or less. |
| Dioxins/furans (total mass basis) | 0.090 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 0.0030 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 3.0 parts per million dry volume | 3-run average (1 hour minimum sample time per run) or 30-day rolling average if HCl CEMS are used. | Performance test (Method 321 at 40 CFR part 63, appendix A) or HCl CEMS if a wet scrubber is not used. |
| Lead | 0.0026 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 4 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Mercury | 0.0062 milligrams per dry standard cubic meter. | 30-day rolling average | Mercury CEMS or sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B of this part.) |
| Oxides of nitrogen | 200 [b] parts per million dry volume | 30-day rolling average | $NO_X$ Continuous Emissions Monitoring System (performance specification 2 of appendix B of this part). Use a span gas with a concentration of 400 ppm or less. |
| Particulate matter (filterable) | 2.5 milligrams per dry standard cubic meter. | 30-day rolling average | PM Continuous Emissions Monitoring System (performance specification 11 of appendix B of this part). |
| Sulfur dioxide | 38 parts per million dry volume | 30-day rolling average | Sulfur dioxide Continuous Emissions Monitoring System (performance specification 2 of appendix B of this part). Use a span gas with a concentration of 100 ppm or less. |

[a] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[b] $NO_X$ limits for new waste-burning kilns based on data for best-performing similar source, Portland Cement kilns. *See* "CISWI Emission Limit Calculations for Existing and New Sources" for details.

■ 40. Table 8 to Subpart CCCC is added to read as follows:

TABLE 8 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR SMALL, REMOTE INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium | 0.61 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |

TABLE 8 TO SUBPART CCCC OF PART 60—EMISSION LIMITATIONS FOR SMALL, REMOTE INCINERATORS THAT COMMENCED CONSTRUCTION AFTER JUNE 4, 2010, OR THAT COMMENCED RECONSTRUCTION OR MODIFICATION AFTER SEPTEMBER 21, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Carbon monoxide | 12 parts per million dry volume | 24 hour block average | Carbon monoxide CEMS (Performance Specification 4A of this part, using a RA of 0.5 ppm instead of 5 ppm as specified in section 13.2. For the cylinder gas audit, +/− 15% or 0.5 ppm, whichever is greater.). Use a span gas with a concentration of 25 ppm or less. |
| Dioxins/furans (total mass basis) | 1,200 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 31 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Fugitive ash | Visible emissions for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 200 parts per million by dry volume. | 3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead | 0.26 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic). | Performance test (Method 29 at 40 CFR part 60,appendix A–8). Use ICPMS for the analytical finish. |
| Mercury | 0.0035 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008) [b], collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum volume as specified in Method 30B at 40 CFR part 60, appendix A). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008)b. |
| Oxides of nitrogen | 78 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60,appendix A–4). Use a span gas with a concentration of 150 ppm or less. |
| Particulate matter (filterable) | 230 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8). |
| Sulfur dioxide | 1.2 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4. Use a span gas with a concentration of 5 ppm or less. |

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.
[b] Incorporated by reference, *see* § 60.17.

■ 41. Revise the heading for subpart DDDD to read as follows:

## Subpart DDDD—Emissions Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incineration Units

* * * * *

■ 42. Section 60.2500 is revised to read as follows:

### § 60.2500 What is the purpose of this subpart?

This subpart establishes emission guidelines and compliance schedules for the control of emissions from commercial and industrial solid waste incineration (CISWI) units. The pollutants addressed by these emission guidelines are listed in table 2 of this subpart and tables 6 through 9 of this subpart. These emission guidelines are developed in accordance with sections 111(d) and 129 of the Clean Air Act and subpart B of this part.

■ 43. Section 60.2505 is revised to read as follows:

### § 60.2505 Am I affected by this subpart?

(a) If you are the Administrator of an air quality program in a state or United States protectorate with one or more existing CISWI units that meets the criteria in paragraphs (b) through (d) of this section, you must submit a state plan to EPA that implements the

emission guidelines contained in this subpart.

(b) You must submit a state plan to EPA by December 3, 2001 for incinerator units that commenced construction on or before November 30, 1999 and that were not modified or reconstructed after June 1, 2001.

(c) You must submit a state plan that meets the requirements of this subpart and contains the more stringent emission limit for the respective pollutant in table 6 of this subpart or table 1 of subpart CCCC of this part to EPA by March 21, 2012 for incinerators that commenced construction after November 30, 1999, but no later than June 4, 2010, or commenced modification or reconstruction after June 1, 2001 but no later than September 21, 2011.

(d) You must submit a state plan to EPA that meets the requirements of this subpart and contains the emission limits in tables 7 through 9 of this subpart by March 21, 2012 for CISWI units other than incinerator units that commenced construction on or before June 4, 2010.

■ 44. Section 60.2525 is revised to read as follows:

**§ 60.2525 What if my state plan is not approvable?**

(a) If you do not submit an approvable state plan (or a negative declaration letter) by December 2, 2002, EPA will develop a federal plan according to § 60.27 to implement the emission guidelines contained in this subpart. Owners and operators of CISWI units not covered by an approved state plan must comply with the federal plan. The federal plan is an interim action and will be automatically withdrawn when your state plan is approved.

(b) If you do not submit an approvable state plan (or a negative declaration letter) to EPA that meets the requirements of this subpart and contains the emission limits in tables 6 through 9 of this subpart for CISWI units that commenced construction after November 30, 1999, but on or before by June 4, 2010, then EPA will develop a federal plan according to § 60.27 to implement the emission guidelines contained in this subpart. Owners and operators of CISWI units not covered by an approved state plan must comply with the federal plan. The federal plan is an interim action and will be automatically withdrawn when your state plan is approved.

■ 45. Section 60.2535 is amended by:

■ a. Revising paragraph (a) introductory text.

■ b. Redesignating paragraph (b) as paragraph (c).

■ c. Adding paragraph (b).

**§ 60.2535 What compliance schedule must I include in my state plan?**

(a) For CISWI units in the incinerator subcategory that commenced construction on or before November 30, 1999, your state plan must include compliance schedules that require CISWI units to achieve final compliance as expeditiously as practicable after approval of the state plan but not later than the earlier of the two dates specified in paragraphs (a)(1) and (2) of this section.

* * * * *

(b) For CISWI units in the incinerator subcategory that commenced construction after November 30, 1999, but on or before June 4, 2010, and for CISWI units in the energy recovery units, waste-burning kilns, and small remote incinerators subcategories that commenced construction before June 4, 2010, your state plan must include compliance schedules that require CISWI units to achieve final compliance as expeditiously as practicable after approval of the state plan but not later than the earlier of the two dates specified in paragraphs (b)(1) and (b)(2) of this section.

(1) March 21, 2016.

(2) 3 years after the effective date of state plan approval.

* * * * *

■ 46. Section 60.2540 is amended by revising paragraph (a) to read as follows:

**§ 60.2540 Are there any state plan requirements for this subpart that apply instead of the requirements specified in subpart B?**

* * * * *

(a) State plans developed to implement this subpart must be as protective as the emission guidelines contained in this subpart. State plans must require all CISWI units to comply by the dates specified in § 60.2535. This applies instead of the option for case-by-case less stringent emission standards and longer compliance schedules in § 60.24(f).

* * * * *

■ 47. Section 60.2541 is added to read as follows:

**§ 60.2541 In lieu of a state plan submittal, are there other acceptable option(s) for a state to meet its Clean Air Act section 111(d)/129(b)(2) obligations?**

Yes, a state may meet its Clean Air Act section 111(d)/129 obligations by submitting an acceptable written request for delegation of the federal plan that meets the requirements of this section. This is the only other option for a state to meet its Clean Air Act section 111(d)/129 obligations.

(a) An acceptable federal plan delegation request must include the following:

(1) A demonstration of adequate resources and legal authority to administer and enforce the federal plan.

(2) The items under § 60.2515(a)(1), (2) and (7).

(3) Certification that the hearing on the state delegation request, similar to the hearing for a state plan submittal, was held, a list of witnesses and their organizational affiliations, if any, appearing at the hearing, and a brief written summary of each presentation or written submission.

(4) A commitment to enter into a Memorandum of Agreement with the Regional Administrator who sets forth the terms, conditions, and effective date of the delegation and that serves as the mechanism for the transfer of authority. Additional guidance and information is given in EPA's Delegation Manual, Item 7–139, Implementation and Enforcement of 111(d)(2) and 111(d)/(2)/129(b)(3) federal plans.

(b) A state with an already approved CISWI Clean Air Act section 111(d)/129 state plan is not precluded from receiving EPA approval of a delegation request for the revised federal plan, providing the requirements of paragraph (a) of this section are met, and at the time of the delegation request, the state also requests withdrawal of EPA's previous state plan approval.

(c) A state's Clean Air Act section 111(d)/129 obligations are separate from its obligations under Title V of the Clean Air Act.

■ 48. Section 60.2542 is added to read as follows:

**§ 60.2542 What authorities will not be delegated to state, local, or tribal agencies?**

The authorities listed under § 60.2030(c) will not be delegated to state, local, or tribal agencies.

■ 49. Section 60.2545 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 60.2545 Does this subpart directly affect CISWI unit owners and operators in my state?**

* * * * *

(b) If you do not submit an approvable plan to implement and enforce the guidelines contained in this subpart for CISWI units that commenced construction before November 30, 1999 by December 2, 2002, EPA will implement and enforce a federal plan, as provided in § 60.2525, to ensure that each unit within your state reaches compliance with all the provisions of this subpart by December 1, 2005.

(c) If you do not submit an approvable plan to implement and enforce the guidelines contained in this subpart by March 21, 2012 for CISWI units that commenced construction after November 29, 1999, but on or before June 4, 2010, EPA will implement and enforce a federal plan, as provided in § 60.2525, to ensure that each unit within your state that commenced construction after November 29, 1999, but on or before June 4, 2010, reaches compliance with all the provisions of this subpart by March 21, 2016.

■ 50. Section § 60.2550 is amended by revising paragraph (a)(1) to read as follows:

**§ 60.2550 What CISWI units must I address in my state plan?**

(a) * * *

(1) Incineration units in your state that commenced construction on or before June 4, 2010.

* * * * *

■ 51. Section § 60.2555 is amended by:

■ a. Revising the introductory text.

■ b. Removing and reserving paragraph (b).

■ c. Revising paragraphs (c), (e)(3), (f)(3), and (g).

■ d. Removing and reserving paragraphs (j), (k) and (l).

■ e. Revising paragraphs (m) and (n).

■ f. Removing paragraph (o).

**§ 60.2555 What combustion units are exempt from my state plan?**

This subpart exempts the types of units described in paragraphs (a), (c) through (i), (m), and (n) of this section, but some units are required to provide notifications. Air curtain incinerators are exempt from the requirements in this subpart except for the provisions in §§ 60.2805, 60.2860, and 60.2870.

* * * * *

(b) [Reserved]

(c) *Municipal waste combustion units.* Incineration units that are regulated under subpart Ea of this part (Standards of Performance for Municipal Waste Combustors); subpart Eb of this part (Standards of Performance for Large Municipal Waste Combustors); subpart Cb of this part (Emission Guidelines and Compliance Time for Large Municipal Combustors); AAAA of this part (Standards of Performance for Small Municipal Waste Combustion Units); or subpart BBBB of this part (Emission Guidelines for Small Municipal Waste Combustion Units).

* * * * *

(e) * * *

(3) You submit a request to the Administrator for a determination that the qualifying cogeneration facility is combusting homogenous waste as that term is defined in § 60.2875. The request must include information sufficient to document that the unit meets the criteria of the definition of a small power production facility and that the waste material the unit is proposed to burn is homogeneous.

* * * * *

(f) * * *

(3) You submit a request to the Administrator for a determination that the qualifying cogeneration facility is combusting homogenous waste as that term is defined § 60.2875. The request must include information sufficient to document that the unit meets the criteria of the definition of a cogeneration facility and that the waste material the unit is proposed to burn is homogeneous.

(g) *Hazardous waste combustion units.* Units for which you are required to get a permit under section 3005 of the Solid Waste Disposal Act.

* * * * *

(j) [Reserved]

(k) [Reserved]

(l) [Reserved]

(m) *Sewage treatment plants.* Incineration units regulated under subpart O of this part (Standards of Performance for Sewage Treatment Plants).

(n) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to subpart LLLL of this part (Standards of Performance for Sewage Sludge Incineration Units) or subpart MMMM of this part (Emission Guidelines for Sewage Sludge Incineration Units). Sewage sludge incineration unit designs may include fluidized bed and multiple hearth.

**§ 60.2558 [Removed]**

■ 52. Section 60.2558 is removed.

■ 53. Section 60.2635 is amended by revising paragraph (c)(1)(vii) to read as follows:

**§ 60.2635 What are the operator training and qualification requirements?**

* * * * *

(c) * * *

(1) * * *

(vii) Actions to prevent and correct malfunctions or to prevent conditions that may lead to malfunctions.

* * * * *

■ 54. Section 60.2650 is amended by revising paragraph (d) to read as follows:

**§ 60.2650 How do I maintain my operator qualification?**

* * * * *

(d) Prevention and correction of malfunctions or conditions that may lead to malfunction.

* * * * *

■ 55. Section 60.2670 is revised to read as follows:

**§ 60.2670 What emission limitations must I meet and by when?**

(a) You must meet the emission limitations for each CISWI unit, including bypass stack or vent, specified in table 2 of this subpart or tables 6 through 9 of this subpart by the final compliance date under the approved state plan, federal plan, or delegation, as applicable. The emission limitations apply at all times the unit is operating including and not limited to startup, shutdown, or malfunction.

(b) Units that do not use wet scrubbers must maintain opacity to less than or equal to the percent opacity (three 1-hour blocks consisting of ten 6-minute average opacity values) specified in table 2 of this subpart, as applicable.

■ 56. Section 60.2675 is amended by:

■ a. Revising paragraphs (a) introductory text and paragraphs (a)(2), (a)(3), and (a)(4).

■ b. Revising paragraph (b).

■ c. Adding paragraphs (d), (e), (f), and (g) to read as follows:

**§ 60.2675 What operating limits must I meet and by when?**

(a) If you use a wet scrubber(s) to comply with the emission limitations, you must establish operating limits for up to four operating parameters (as specified in table 3 of this subpart) as described in paragraphs (a)(1) through (4) of this section during the initial performance test.

* * * * *

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the fan for the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(3) Minimum scrubber liquid flow rate, which is calculated as the lowest 1-hour average liquid flow rate at the inlet to the wet acid gas or particulate matter scrubber measured during the

most recent performance test demonstrating compliance with all applicable emission limitations.

(4) Minimum scrubber liquor pH, which is calculated as the lowest 1-hour average liquor pH at the inlet to the wet acid gas scrubber measured during the most recent performance test demonstrating compliance with the HCl emission limitation.

* * * * *

(b) You must meet the operating limits established during the initial performance test on the date the initial performance test is required or completed (whichever is earlier). You must conduct an initial performance evaluation of each continuous monitoring system and continuous parameter monitoring system within 60 days of installation of the monitoring system.

* * * * *

(d) If you use an electrostatic precipitator to comply with the emission limitations, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage × secondary current = secondary electric power) for each test run. The operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(e) If you use activated carbon sorbent injection to comply with the emission limitations, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations.

(f) If you use selective noncatalytic reduction to comply with the emission limitations, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI unit), and the reagent flow rate during the nitrogen oxides performance testing. The operating limits for the selective noncatalytic reduction are calculated as the lowest 1-hour average charge rate, secondary chamber temperature, and reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations, and if you do not determine compliance with your particulate matter emission limitation with a particulate matter continuous emissions monitoring system, you must maintain opacity to less than or equal to ten percent opacity (1-hour block average).

■ 57. Section 60.2680 is revised to read as follows:

**§ 60.2680 What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, or an electrostatic precipitator to comply with the emission limitations?**

(a) If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, or an electrostatic precipitator or limit emissions in some other manner, including mass balances, to comply with the emission limitations under § 60.2670, you must petition the EPA Administrator for specific operating limits to be established during the initial performance test and continuously monitored thereafter. You must not conduct the initial performance test until after the petition has been approved by the Administrator. Your petition must include the five items listed in paragraphs (a)(1) through (5) of this section.

(1) Identification of the specific parameters you propose to use as additional operating limits.

(2) A discussion of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters and how limits on these parameters will serve to limit emissions of regulated pollutants.

(3) A discussion of how you will establish the upper and/or lower values for these parameters which will establish the operating limits on these parameters.

(4) A discussion identifying the methods you will use to measure and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments.

(5) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

(b) [Reserved]

■ 58. Section 60.2685 is revised to read as follows:

**§ 60.2685 Affirmative Defense for Exceedance of an Emission Limit During Malfunction.**

In response to an action to enforce the standards set forth in paragraph § 60.2670 you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at § 60.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions and/or parameter monitoring and systems, as well as control systems, were kept in operation if at all possible, consistent with safety and good air pollution control practices;

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is

to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Notification.* The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 60.2670 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report within 45 days of the initial occurrence of the exceedances.

■ 59. Section 60.2690 is amended by revising paragraphs (c) and (g)(1) and (2) and adding paragraphs (h) and (i) to read as follows:

**§ 60.2690 How do I conduct the initial and annual performance test?**

* * * * *

(c) All performance tests must be conducted using the minimum run duration specified in tables 2 and 6 through 9 of this subpart.

* * * * *

(g) * * *

(1) Measure the concentration of each dioxin/furan tetra- through octa-isomer emitted using EPA Method 23 at 40 CFR part 60, appendix A.

(2) For each dioxin/furan (tetra- through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 4 of this subpart.

* * * * *

(h) Method 22 at 40 CFR part 60, appendix A–7 must be used to determine compliance with the fugitive ash emission limit in table 2 of this subpart or tables 6 through 9 of this subpart.

(i) If you have an applicable opacity operating limit, you must determine compliance with the opacity limit using Method 9 at 40 CFR part 60, appendix A–4, based on three 1-hour blocks consisting of ten 6-minute average opacity values, unless you are required to install a continuous opacity monitoring system, consistent with § 60.2710 and § 60.2730.

■ 60. Section 60.2695 is revised to read as follows:

**§ 60.2695 How are the performance test data used?**

You use results of performance tests to demonstrate compliance with the emission limitations in table 2 of this subpart or tables 6 through 9 of this subpart.

■ 61. Section 60.2700 is revised to read as follows:

**§ 60.2700 How do I demonstrate initial compliance with the amended emission limitations and establish the operating limits?**

You must conduct a performance test, as required under §§ 60.2690 and 60.2670, to determine compliance with the emission limitations in table 2 of this subpart and tables 6 through 9 of this subpart, to establish compliance with any opacity operating limits in § 60.2675, and to establish operating limits using the procedures in § 60.2675 or § 60.2680. The performance test must be conducted using the test methods listed in table 2 of this subpart and tables 6 through 9 of this subpart and the procedures in § 60.2690. The use of the bypass stack during a performance test shall invalidate the performance test. You must conduct a performance evaluation of each continuous monitoring system within 60 days of installation of the monitoring system.

■ 62. Section 60.2705 is revised to read as follows:

**§ 60.2705 By what date must I conduct the initial performance test?**

(a) The initial performance test must be conducted no later than 180 days after your final compliance date. Your final compliance date is specified in table 1 of this subpart.

(b) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you conducted a test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you do not need to retest until 6 months from the date you reintroduce that solid waste.

(c) If you commence combusting or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you have not conducted a performance test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you must conduct a performance test within 60 days commencing or recommencing solid waste combustion.

■ 63. Section 60.2706 is added to read as follows:

**§ 60.2706 By what date must I conduct the initial air pollution control device inspection?**

(a) The initial air pollution control device inspection must be conducted within 60 days after installation of the control device and the associated CISWI unit reaches the charge rate at which it will operate, but no later than 180 days after the final compliance date for meeting the amended emission limitations.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless the owner or operator obtains written approval from the state agency establishing a date whereby all necessary repairs of the designated facility must be completed.

■ 64. Section 60.2710 is revised to read as follows:

**§ 60.2710 How do I demonstrate continuous compliance with the amended emission limitations and the operating limits?**

(a) Compliance with standards.

(1) The emission standards and operating requirements set forth in this subpart apply at all times.

(2) If you cease combusting solid waste you may opt to remain subject to the provisions of this subpart. Consistent with the definition of CISWI unit, you are subject to the requirements of this subpart at least 6 months following the last date of solid waste combustion. Solid waste combustion is ceased when solid waste is not in the combustion chamber (*i.e.,* the solid waste feed to the combustor has been cut off for a period of time not less than the solid waste residence time).

(3) If you cease combusting solid waste you must be in compliance with any newly applicable standards on the effective date of the waste-to-fuel switch. The effective date of the waste-to-fuel switch is a date selected by you,

that must be at least 6 months from the date that you ceased combusting solid waste, consistent with § 60.2710(a)(2). Your source must remain in compliance with this subpart until the effective date of the waste-to-fuel switch.

(4) If you own or operate an existing commercial or industrial combustion unit that combusted a fuel or non-waste material, and you commence or recommence combustion of solid waste, you are subject to the provisions of this subpart as of the first day you introduce or reintroduce solid waste to the combustion chamber, and this date constitutes the effective date of the fuel-to-waste switch. You must complete all initial compliance demonstrations for any Section 112 standards that are applicable to your facility before you commence or recommence combustion of solid waste. You must provide 30 days prior notice of the effective date of the waste-to-fuel switch. The notification must identify:

(i) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(ii) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(iii) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(iv) The date on which you became subject to the currently applicable emission limits;

(v) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.,* the effective date of the waste-to-fuel switch), consistent with paragraphs (a)(2) and (3) of this section.

(5) All air pollution control equipment necessary for compliance with any newly applicable emissions limits which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch.

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS. Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with section 112 monitoring requirements or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in table 2 of this subpart or tables 6 through 9 of this subpart and opacity for each CISWI unit as required under § 60.2690. The annual performance test must be conducted using the test methods listed in table 2 of this subpart or tables 6 through 9 of this subpart and the procedures in § 60.2690. Annual performance tests are not required if you use continuous emission monitoring systems or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 60.2675 or established under § 60.2680 and as specified in § 60.2735. Operation above the established maximum or below the established minimum operating limits constitutes a deviation from the established operating limits. Three-hour block average values are used to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 60.2680. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste used to establish operating limits during the performance test.

(e) For energy recovery units, incinerators, and small remote units, you must perform annual visual emissions test for ash handling.

(f) For energy recovery units, you must conduct an annual performance test for the pollutants listed in table 7 of this subpart.

(g) For facilities using a continuous emission monitoring system to demonstrate compliance with the carbon monoxide emission limit, compliance with the carbon monoxide emission limit may be demonstrated by using the continuous emission monitoring system according to the following requirements:

(1) You must measure emissions according to § 60.13 to calculate 1-hour arithmetic averages, corrected to 7 percent oxygen. You must demonstrate initial compliance with the carbon monoxide emissions limit using a 30-day rolling average of the 1-hour arithmetic average emission concentrations, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

(2) Operate the carbon monoxide continuous emissions monitoring system in accordance with the applicable requirements of performance specification 4A of appendix B and the quality assurance procedures of appendix F of this part.

(h) For energy recovery units with design capacities greater than 250 MMBtu/hr and waste-burning kilns, demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter continuous emissions monitoring system according to the procedures in § 60.2730(n).

(i) For energy recovery units with design capacities greater than or equal to 10 MMBTU/hour, if you have an opacity operating limit, you must install, operate, certify and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 60.2730.

(j) For waste-burning kilns, you must conduct an annual performance test for the pollutants (except mercury and particulate matter, and hydrogen chloride if no acid gas wet scrubber is used) listed in table 8 of this subpart. If your waste-burning kiln is not equipped with a wet scrubber, you must determine compliance with the hydrogen chloride emission limit using a continuous emission monitoring system as specified in § 60.2730. You must determine compliance with the mercury emissions limit using a mercury continuous emission monitoring system according to the following requirements:

(1) Operate a continuous emission monitoring system in accordance with performance specification 12A at 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with performance specification 12B at 40 CFR part 60, appendix B. The duration of the performance test must be a calendar month. For each calendar month in which the waste-burning kiln operates, hourly mercury concentration data and stack gas volumetric flow rate data must be obtained.

(2) Owners or operators using a mercury continuous emissions monitoring systems must install, operate, calibrate and maintain an instrument for continuously measuring and recording the mercury mass emissions rate to the atmosphere according to the requirements of performance specifications 6 and 12A at

40 CFR part 60, appendix B and quality assurance procedure 5 at 40 CFR part 60, appendix F.

(3) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury continuous emission monitor while the raw mill of the in-line kiln/raw mill is operating under normal conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(k) If you use an air pollution control device to meet the emission limitations in this subpart, you must conduct an initial and annual inspection of the air pollution control device. The inspection must include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation.

(2) Develop a site-specific monitoring plan according to the requirements in paragraph (l) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i).

(l) For each continuous monitoring system required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan according to the requirements of this paragraph (l) that addresses paragraphs (l)(1)(i) through (vi) of this section.

(1) You must submit this site-specific monitoring plan at least 60 days before your initial performance evaluation of your continuous monitoring system.

(i) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.,* on or downstream of the last control device).

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems.

(iii) Performance evaluation procedures and acceptance criteria (*e.g.,* calibrations).

(iv) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d).

(v) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13.

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b),(c), (c)(1), (c)(4), (d), (e), (f) and (g).

(2) You must conduct a performance evaluation of each continuous monitoring system in accordance with your site-specific monitoring plan.

(3) You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(m) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (l) and (m)(1) through (4) of this section.

(1) Install the flow sensor and other necessary equipment in a position that provides a representative flow.

(2) Use a flow sensor with a measurement sensitivity of no greater than 2 percent of the expected process flow rate.

(3) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(4) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(n) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (l) and (n)(1) through (6) of this section.

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.,* PM scrubber pressure drop).

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(4) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.,* check for pressure tap pluggage daily).

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(o) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (l) and (n)(1) through (6) of this section.

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (*e.g.,* PM scrubber pressure drop).

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less.

(4) Perform checks at least once each process operating day to ensure pressure measurements are not obstructed (*e.g.,* check for pressure tap pluggage daily).

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(p) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the requirements in paragraphs (l) and (p)(1) through (2) of this section.

(1) Install sensors to measure (secondary) voltage and current to the precipitator collection plates.

(2) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(q) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (*e.g.,* weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (l) and (q)(1) through (3) of this section.

(1) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate.

(2) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(r) If you elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (l) and (r)(1) through (5) of this section.

(1) Install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment *e.g.*, for a positive pressure fabric filter) of the fabric filter.

(2) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(3) Conduct a performance evaluation of the bag leak detection system in accordance with your monitoring plan and consistent with the guidance provided in EPA–454/R–98–015 (incorporated by reference, *see* § 60.17).

(4) Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor.

(5) Use a bag leak detection system equipped with a system that will sound an alarm when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed readily by plant operating personnel.

(s) For facilities using a continuous emission monitoring system to demonstrate compliance with the sulfur dioxide emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the continuous emission monitoring system specified in § 60.2730 to measure sulfur dioxide and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The sulfur dioxide continuous emission monitoring system must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in this paragraph (s). For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide continuous emission monitoring systems should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the continuous emission monitoring systems, whichever is greater.

(1) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 2 in appendix B of this part, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the continuous emission monitors and the test methods specified in paragraphs (s)(1)(i) and (s)(1)(ii) of this section.

(i) For sulfur dioxide, EPA Reference Method 6 or 6C, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(2) The span value of the continuous emissions monitoring system at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule. The span value of the continuous emission monitoring system at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this rule.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of this part.

(t) For facilities using a continuous emission monitoring system to demonstrate continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the continuous emission monitoring system specified in § 60.2730 to measure nitrogen oxides and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7. The nitrogen oxides continuous emission monitoring system must be operated according to performance specification 2 in appendix B of this part and must follow the procedures and methods specified in paragraphs (t)(1) through (t)(5) of this section.

(1) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 2 of appendix B of this part, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the continuous emission monitoring systems and the test methods specified in paragraphs (t)(1)(i) and (t)(1)(ii) of this section.

(i) For nitrogen oxides, EPA Reference Method 7 or 7E at 40 CFR part 60, appendix A–4 must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(2) The span value of the continuous emission monitoring system must be 125 percent of the maximum estimated hourly potential nitrogen oxide emissions of unit.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with procedure 1 in appendix F of this part.

(4) The owner or operator of an affected facility may request that compliance with the nitrogen oxides emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (t)(4)(i) through (t)(4)(iv) of this section. This relationship may be reestablished during performance compliance tests.

(i) The fuel factor equation in Method 3B must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A, 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor.

(ii) Samples must be taken for at least 30 minutes in each hour.

(iii) Each sample must represent a 1-hour average.

(iv) A minimum of 3 runs must be performed.

(u) For facilities using a continuous emissions monitoring system to demonstrate continuous compliance with any of the emission limits of this subpart, you must complete the following:

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average, calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7.

(2) Operate all continuous emissions monitoring systems in accordance with the applicable procedures under appendices B and F of this part.

(v) Use of the bypass stack at any time is an emissions standards deviation for

particulate matter, HCl, Pb, Cd, Hg, $NO_X$, $SO_2$, and dioxin/furans.

(w) For energy recovery units with a heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide continuous emission monitoring system, you must operate and maintain the continuous oxygen monitoring system specified in § 60.2730 according to the procedures in paragraphs (w)(1) through (4) of this section by the compliance date specified in table 1 of this subpart. The oxygen level shall be monitored at the outlet of the energy recovery unit.

(1) Each monitor must be operated and maintained according to the applicable procedures under performance specification 3 of appendix B of this part and according to the site-specific monitoring plan developed according to paragraph (1) of this section.

(2) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 3 of appendix B of this part, oxygen data must be collected concurrently (or within a 30- to 60-minute period) by both the continuous emission monitor and the test methods specified in paragraphs (w)(3) of this section.

(3) For oxygen, EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), as applicable, must be used.

(4) You must calculate and record a 30-day rolling average oxygen concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of this part.

■ 65. Section 60.2715 is revised to read as follows:

**§ 60.2715 By what date must I conduct the annual performance test?**

You must conduct annual performance tests between 11 and 13 months of the previous performance test.

■ 66. Section 60.2716 is added to read as follows:

**§ 60.2716 By what date must I conduct the annual air pollution control device inspection?**

On an annual basis (no more than 12 months following the previous annual air pollution control device inspection), you must complete the air pollution control device inspection as described in § 60.2706.

■ 67. Section 60.2720 is revised to read as follows:

**§ 60.2720 May I conduct performance testing less often?**

(a) You must conduct annual performance tests according to the schedule specified in § 60.2715, with the following exceptions:

(1) You may conduct a repeat performance test at any time to establish new values for the operating limits to apply from that point forward, as specified in § 60.2725. The Administrator may request a repeat performance test at any time.

(2) You must repeat the performance test within 60 days of a process change, as defined in § 60.2875.

(3) If the initial or any subsequent performance test for any pollutant in table 2 or tables 6 through 9 of this subpart, as applicable, demonstrates that the emission level for the pollutant is no greater than the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, and you are not required to conduct a performance test for the pollutant in response to a request by the Administrator in paragraph (a)(1) of this section or a process change in paragraph (a)(2) of this section, you may elect to skip conducting a performance test for the pollutant for the next 2 years. You must conduct a performance test for the pollutant during the third year and no more than 37 months following the previous performance test for the pollutant. For cadmium and lead, both cadmium and lead must be emitted at emission levels no greater than their respective emission levels specified in paragraph (a)(3)(i) of this section for you to qualify for less frequent testing under this paragraph.

(i) For particulate matter, hydrogen chloride, mercury, carbon monoxide, nitrogen oxides, sulfur dioxide, cadmium, lead, and dioxins/furans, the emission level equal to 75 percent of the applicable emission limit in table 2 or tables 6 through 9 of this subpart, as applicable, to this subpart.

(ii) For fugitive emissions, visible emissions (of combustion ash from the ash conveying system) for 2 percent of the time during each of the three 1-hour observations periods.

(4) If you are conducting less frequent testing for a pollutant as provided in paragraph (a)(3) of this section and a subsequent performance test for the pollutant indicates that your CISWI unit does not meet the emission level specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, as applicable, you must conduct annual performance tests for the pollutant according to the schedule specified in paragraph (a) of this section until you qualify for less frequent testing for the pollutant as specified in paragraph (a)(3) of this section.

(b) [Reserved]

■ 68. Section 60.2730 is amended by revising paragraphs (b)(6) and (c) and adding paragraphs (d) through (q) to read as follows:

**§ 60.2730 What monitoring equipment must I install and what parameters must I monitor?**

* * * * *

(b) * * *

(6) The bag leak detection system must be equipped with an alarm system that will alert automatically an operator when an increase in relative particulate matter emission over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel.

* * * * *

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, or an electrostatic precipitator to comply with the emission limitations under § 60.2670, you must install, calibrate (to the manufacturers' specifications), maintain and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.2680.

(d) If you use activated carbon injection to comply with the emission limitations in this subpart, you must measure the minimum sorbent flow rate once per hour.

(e) If you use selective noncatalytic reduction to comply with the emission limitations, you must complete the following:

(1) Following the date on which the initial performance test is completed or is required to be completed under § 60.2690, whichever date comes first, ensure that the affected facility does not operate above the maximum charge rate, or below the minimum secondary chamber temperature (if applicable to your CISWI unit) or the minimum reagent flow rate measured as 3-hour block averages at all times.

(2) Operation of the affected facility above the maximum charge rate, below the minimum secondary chamber temperature and below the minimum reagent flow rate simultaneously constitute a violation of the nitrogen oxides emissions limit.

(f) If you use an electrostatic precipitator to comply with the emission limits of this subpart, you must monitor the secondary power to the electrostatic precipitator collection plates and maintain the 3-hour block averages at or above the operating limits

established during the mercury or particulate matter performance test.

(g) For waste-burning kilns not equipped with a wet scrubber, in place of hydrogen chloride testing with EPA Method 321 at 40 CFR part 63, appendix A, an owner or operator must install, calibrate, maintain, and operate a continuous emission monitoring system for monitoring hydrogen chloride emissions discharged to the atmosphere and record the output of the system. To demonstrate continuous compliance with the hydrogen chloride emissions limit for units other than waste-burning kilns not equipped with a wet scrubber, a facility may substitute use of a hydrogen chloride continuous emissions monitoring system for conducting the hydrogen chloride annual performance test, monitoring the minimum hydrogen chloride sorbent flow rate and monitoring the minimum scrubber liquor pH.

(h) To demonstrate continuous compliance with the particulate matter emissions limit, a facility may substitute use of a particulate matter continuous emissions monitoring system for conducting the particulate matter annual performance test and monitoring the minimum pressure drop across the wet scrubber, if applicable.

(i) To demonstrate continuous compliance with the dioxin/furan emissions limit, a facility may substitute use of a continuous automated sampling system for the dioxin/furan annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 at 40 CFR part 60, appendix A–7. You may propose alternative continuous monitoring consistent with the requirements in § 60.13(i). The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 at 40 CFR part 60, appendix A–7 must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q).

(j) To demonstrate continuous compliance with the mercury emissions limit, a facility may substitute use of a continuous automated sampling system for the mercury annual performance test. You must record the output of the system and analyze the sample at set intervals using any suitable determinative technique that can meet performance specification 12B criteria. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to mercury from monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Method 29 or 30B at 40 CFR part 60, appendix A–8, ASTM D6784–02 (Reapproved 2008) (incorporated by reference, see § 60.17), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q).

(k) To demonstrate continuous compliance with the nitrogen oxides emissions limit, a facility may substitute use of a continuous emissions monitoring system for the nitrogen oxides annual performance test to demonstrate compliance with the nitrogen oxides emissions limits.

(1) Install, calibrate, maintain and operate a continuous emission monitoring system for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for nitrogen oxides is completed or is required to be completed under § 60.2690, compliance with the emission limit for nitrogen oxides required under § 60.52b(d) must be determined based on the 30-day rolling average of the hourly emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million by volume (dry basis) and used to calculate the 30-day rolling average concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(l) To demonstrate continuous compliance with the sulfur dioxide emissions limit, a facility may substitute use of a continuous automated sampling system for the sulfur dioxide annual performance test to demonstrate compliance with the sulfur dioxide emissions limits.

(1) Install, calibrate, maintain and operate a continuous emission monitoring system for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 2 of appendix B of this part, the quality assurance requirements of procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for sulfur dioxide is completed or is required to be completed under § 60.2690, compliance with the sulfur dioxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(m) For energy recovery units that do not use a wet scrubber, fabric filter with bag leak detection system, or particulate matter continuous emission monitoring system, you must install, operate, certify and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 60.2670. Energy recovery units that use a particulate matter continuous emissions monitoring system to demonstrate initial and continuing compliance according to the procedures in § 60.2730(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for opacity consistent with § 60.2710(f).

(1) Install, operate and maintain each continuous opacity monitoring system according to performance specification 1 at 40 CFR part 60, appendix B.

(2) Conduct a performance evaluation of each continuous opacity monitoring system according to the requirements in § 60.13 and according to performance specification 1 at 40 CFR part 60, appendix B.

(3) As specified in § 60.13(e)(1), each continuous opacity monitoring system must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) Reduce the continuous opacity monitoring system data as specified in § 60.13(h)(1).

(5) Determine and record all the 6-minute averages (and 1-hour block averages as applicable) collected.

(n) For energy recovery units with design capacities greater than 250 MMBtu/hr and waste-burning kilns, in place of particulate matter testing with EPA Method 5 at 40 CFR part 60, appendix A–3, an owner or operator

must install, calibrate, maintain and operate a continuous emission monitoring system for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 at 40 CFR part 60, appendix A–3 must install, calibrate, maintain and operate a continuous emission monitoring system and must comply with the requirements specified in paragraphs (n)(1) through (n)(14) of this section.

(1) Notify the Administrator 1 month before starting use of the system.

(2) Notify the Administrator 1 month before stopping use of the system.

(3) The monitor must be installed, evaluated and operated in accordance with the requirements of performance specification 11 of appendix B of this part and quality assurance requirements of procedure 2 of appendix F of this part and § 60.13.

(4) The initial performance evaluation must be completed no later than 180 days after the final compliance date for meeting the amended emission limitations, as specified under § 60.2690 or within 180 days of notification to the Administrator of use of the continuous monitoring system if the owner or operator was previously determining compliance by Method 5 at 40 CFR part 60, appendix A–3 performance tests, whichever is later.

(5) The owner or operator of an affected facility may request that compliance with the particulate matter emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. The relationship between oxygen and carbon dioxide levels for the affected facility must be established according to the procedures and methods specified in § 60.2710(s)(5)(i) through (s)(5)(iv).

(6) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions as required under § 60.2690. Compliance with the particulate matter emission limit must be determined by using the continuous emission monitoring system specified in paragraph (n) of this section to measure particulate matter and calculating a 30-day rolling average emission concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, appendix A–7 of this part.

(7) Compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 at 40 CFR part 60, Appendix A–7 of the part from the 1-hour arithmetic average of the continuous emission monitoring system outlet data.

(8) At a minimum, valid continuous monitoring system hourly averages must be obtained as specified § 60.2735.

(9) The 1-hour arithmetic averages required under paragraph (n)(7) of this section must be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (or carbon dioxide) (dry basis) and must be used to calculate the 30-day rolling average emission concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(10) All valid continuous emission monitoring system data must be used in calculating average emission concentrations even if the minimum continuous emission monitoring system data requirements of paragraph (n)(8) of this section are not met.

(11) The continuous emission monitoring system must be operated according to performance specification 11 in appendix B of this part.

(12) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 11 in appendix B of this part, particulate matter and oxygen (or carbon dioxide) data must be collected concurrently (or within a 30-to 60-minute period) by both the continuous emission monitors and the following test methods.

(i) For particulate matter, EPA Reference Method 5 at 40 CFR part 60, appendix A–3 must be used.

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A or 3B at 40 CFR part 60, appendix A–2, as applicable, must be used.

(13) Quarterly accuracy determinations and daily calibration drift tests must be performed in accordance with procedure 2 in appendix F of this part.

(14) When particulate matter emissions data are missing because of continuous emission monitoring system breakdowns, repairs, calibration checks and zero and span adjustments, you must collect emissions data by using other monitoring systems as approved by the Administrator or EPA Reference Method 19 at 40 CFR part 60, appendix A–7 to provide, as necessary, valid emissions data for a minimum of 85 percent of the hours per day, 90 percent of the hours per calendar quarter, and 95 percent of the hours per calendar year that the affected facility is operated and combusting waste.

(o) To demonstrate continuous compliance with the carbon monoxide emissions limit, a facility may substitute use of a continuous automated sampling system for the carbon monoxide annual performance test to demonstrate compliance with the carbon monoxide emissions limits.

(1) Install, calibrate, maintain, and operate a continuous emission monitoring system for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under performance specification 4B of appendix B of this part, the quality assurance procedure 1 of appendix F of this part and the procedures under § 60.13 must be followed for installation, evaluation, and operation of the continuous emission monitoring system.

(2) Following the date that the initial performance test for carbon monoxide is completed or is required to be completed under § 60.2690, compliance with the carbon monoxide emission limit may be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using continuous emission monitoring system outlet data. The 1-hour arithmetic averages must be expressed in parts per million corrected to 7 percent oxygen (dry basis) and used to calculate the 30-day rolling average emission concentrations. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

(p) The owner/operator of an affected source with a bypass stack shall install, calibrate (to manufacturers' specifications), maintain and operate a device or method for measuring the use of the bypass stack including date, time and duration.

(q) For energy recovery units with a heat input capacity of 100 MMBtu per hour or greater that do not use a carbon monoxide continuous emission monitoring system, you must install, operate and maintain the continuous oxygen monitoring system according to the procedures in paragraphs (q)(1) through (4) of this section by the compliance date specified in table 1 of this subpart. The oxygen level shall be monitored at the outlet of the energy recovery unit.

(1) Each monitor must be installed, operated, and maintained according to the applicable procedures under performance specification 3 of appendix B of this part, the quality assurance procedure 1 of appendix F of this part, the procedures under § 60.13 and according to the site-specific monitoring plan developed according to paragraph (l) of this section.

(2) During each relative accuracy test run of the continuous emission monitoring system required by performance specification 3 of appendix B of this part, oxygen data must be collected concurrently (or within a 30- to 60-minute period) by both the continuous emission monitor and the test methods specified in paragraphs (w)(3) of this section.

(3) For oxygen, EPA Reference Method 3A or 3B, or as an alternative ANSI/ASME PTC 19.10–1981 (incorporated by reference, *see* § 60.17), as applicable, must be used.

(4) You must calculate and record a 30-day rolling average oxygen concentration using Equation 19–19 in section 12.4.1 of EPA Reference Method 19 of Appendix A–7 of this part. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2).

■ 69. Section 60.2735 is revised to read as follows:

**§ 60.2735 Is there a minimum amount of monitoring data I must obtain?**

For each continuous monitoring system required or optionally allowed under § 60.2730, you must monitor and collect data according to this section:

(a) You must operate the monitoring system and collect data at all required intervals at all times compliance is required except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods (as specified in § 60.2770(o) of this part), and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(b) You may not use data recorded during the monitoring system malfunctions, repairs associated with monitoring system malfunctions or out-of control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(c) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments, failure to collect required data is a deviation of the monitoring requirements.

■ 70. Section 60.2740 is amended by:
■ a. Revising the introductory text.
■ b. Revising paragraphs (b)(5) and (e).
■ c. Removing and reserving paragraphs (c) and (d).
■ d. Adding paragraphs (n) through (v).

**§ 60.2740 What records must I keep?**

You must maintain the items (as applicable) as specified in paragraphs (a), (b), and (e) through (v) of this section for a period of at least 5 years:

* * * * *

(b) * * *

(5) For affected CISWI units that establish operating limits for controls other than wet scrubbers under § 60.2675(d) through (f) or § 60.2680, you must maintain data collected for all operating parameters used to determine compliance with the operating limits.

* * * * *

(c) [Reserved]

(d) [Reserved]

(e) Identification of calendar dates and times for which data show a deviation from the operating limits in table 3 of this subpart or a deviation from other operating limits established under § 60.2675(d) through (f) or § 60.2680 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

* * * * *

(n) Maintain records of the annual air pollution control device inspections that are required for each CISWI unit subject to the emissions limits in table 2 of this subpart or tables 6 through 9 of this subpart, any required maintenance and any repairs not completed within 10 days of an inspection or the timeframe established by the state regulatory agency.

(o) For continuously monitored pollutants or parameters, you must document and keep a record of the following parameters measured using continuous monitoring systems.

(1) All 6-minute average levels of opacity.

(2) All 1-hour average concentrations of sulfur dioxide emissions.

(3) All 1-hour average concentrations of nitrogen oxides emissions.

(4) All 1-hour average concentrations of carbon monoxide emissions.

(5) All 1-hour average concentrations of particulate matter emissions.

(6) All 1-hour average concentrations of mercury emissions.

(7) All 1-hour average concentrations of hydrogen chloride emissions.

(p) Records indicating use of the bypass stack, including dates, times and durations.

(q) If you choose to stack test less frequently than annually, consistent with § 60.2720(a) through (c), you must keep annual records that document that your emissions in the previous stack test(s) were less than 75 percent of the applicable emission limit and document that there was no change in source operations including fuel composition and operation of air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past year.

(r) Records of the occurrence and duration of each malfunction of operation (*i.e.*, process equipment) or the air pollution control and monitoring equipment.

(s) Records of all required maintenance performed on the air pollution control and monitoring equipment.

(t) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(u) For operating units that burn materials other than traditional fuels as defined in § 241.2, a description of each material burned, and a record which documents how each material that is not a traditional fuel meets each of the legitimacy criteria in § 241.3(d). If you combust a material that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4), you must keep records as to how the operations that produced the material satisfy the definition of processing in § 241.2. If the material received a non-waste determination pursuant to the petition process submitted under § 241.3(c), you must keep a copy of the non-waste determination granted by EPA.

(v) For operating units that burn tires, a certification that the shipments of tires that are non-waste per 40 CFR 241.3(b)(2)(i), are part of an established tire collection program, consistent with the definition of that term in § 241.2. The certification must document that

the tires were not discarded and are handled as valuable commodities in accordance with § 241.3(b)(2)(i), from the point of removal from the automobile through arrival at the combustion facility. The certification must identify the entity the tires were received from (for example, the name of the state or private collection program), the quantity, volume, or weight of tires received by you, and the dates received. The certification must be signed by the owner or operator of the combustion unit, or by a responsible official of the established tire collection program, and must include the following certification of compliance, "The tires from this tire collection program meet the EPA definition of an established tire collection program in § 241" and state the title or position of the person signing the certification. You must also keep a record that identifies where on your plant site the tires from each tire collection program are located, and that accounts for all tires at the plant site.

■ 71. Section 60.2770 is amended by revising paragraph (e) and adding paragraphs (k) through (o) to read as follows:

**§ 60.2770 What information must I include in my annual report?**

* * * * *

(e) If no deviation from any emission limitation or operating limit that applies to you has been reported, a statement that there was no deviation from the emission limitations or operating limits during the reporting period.

* * * * *

(k) If you had a malfunction during the reporting period, the compliance report must include the number, duration, and a brief description for each type of malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction.

(l) For each deviation from an emission or operating limitation that occurs for a CISWI unit for which you are not using a CMS to comply with the emission or operating limitations in this subpart, the annual report must contain the following information.

(1) The total operating time of the CISWI unit at which the deviation occurred during the reporting period.

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(m) If there were periods during which the continuous monitoring system, including the continuous emission monitoring system, was out of control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI unit for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart.

(1) The date and time that each malfunction started and stopped.

(2) The date, time, and duration that each CMS was inoperative, except for zero (low-level) and high-level checks.

(3) The date, time, and duration that each continuous monitoring system was out-of-control, including start and end dates and hours and descriptions of corrective actions taken.

(4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of malfunction or during another period.

(5) A summary of the total duration of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period.

(6) A breakdown of the total duration of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes.

(7) A summary of the total duration of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the CISWI unit at which the continuous monitoring system downtime occurred during that reporting period.

(8) An identification of each parameter and pollutant that was monitored at the CISWI unit.

(9) A brief description of the CISWI unit.

(10) A brief description of the continuous monitoring system.

(11) The date of the latest continuous monitoring system certification or audit.

(12) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period.

(n) If there were periods during which the continuous monitoring system, including the continuous emission monitoring system, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period.

(o) A continuous monitoring system is out of control if any of the following occur.

(1) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the applicable performance specification or in the relevant standard.

(2) The continuous monitoring system fails a performance test audit (*e.g.*, cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit.

(3) The continuous opacity monitoring system calibration drift exceeds two times the limit in the applicable performance specification in the relevant standard.

■ 72. Section 60.2780 is amended by revising paragraph (c) and removing paragraphs (e) and (f).

**§ 60.2780 What must I include in the deviation report?**

* * * * *

(c) Durations and causes of the following:

(1) Each deviation from emission limitations or operating limits and your corrective actions.

(2) Bypass events and your corrective actions.

* * * * *

■ 73. Section 60.2790 is revised to read as follows:

**§ 60.2790 Are there any other notifications or reports that I must submit?**

(a) Yes. You must submit notifications as provided by § 60.7.

(b) If you cease combusting solid waste but continue to operate, you must provide 30 days prior notice of the effective date of the waste-to-fuel switch, consistent with § 60.2710(a). The notification must identify:

(1) The name of the owner or operator of the CISWI unit, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(2) The currently applicable subcategory under this subpart, and any 40 CFR part 63 subpart and subcategory that will be applicable after you cease combusting solid waste;

(3) The fuel(s), non-waste material(s) and solid waste(s) the CISWI unit is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(4) The date on which you became subject to the currently applicable emission limits;

(5) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (i.e., the effective date of the waste-to-fuel switch), consistent with paragraphs (b)(2) and (3)of this section.

■ 74. Section 60.2795 is revised to read as follows:

**§ 60.2795 In what form can I submit my reports?**

(a) Submit initial, annual and deviation reports electronically or in paper format, postmarked on or before the submittal due dates.

(b) After December 31, 2011, within 60 days after the date of completing each performance evaluation or performance test, as they are defined in § 63.2, conducted to demonstrate compliance with this subpart, the owner or operator of the affected facility must submit the relative accuracy test audit data and performance test data, except opacity data, to EPA by successfully submitting the data electronically to EPA's Central Data Exchange (CDX) by using the Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/ert_tool.html*).

■ 75. Section 60.2805 is revised to read as follows:

**§ 60.2805 Am I required to apply for and obtain a Title V operating permit for my unit?**

Yes. Each CISWI unit and air curtain incinerator subject to standards under this subpart must operate pursuant to a permit issued under Clean Air Act sections 129(e) and Title V.

■ 76. Section 60.2860 is revised to read as follows:

**§ 60.2860 What are the emission limitations for air curtain incinerators?**

After the date the initial stack test is required or completed (whichever is earlier), you must meet the limitations in paragraphs (a) and (b) of this section.

(a) Maintain opacity to less than or equal to 10 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values), except as described in paragraph (b) of this section.

(b) Maintain opacity to less than or equal to 35 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) during the startup period that is within the first 30 minutes of operation.

■ 77. Section 60.2870 is amended by revising paragraph (c)(2) to read as follows:

**§ 60.2870 What are the recordkeeping and reporting requirements for air curtain incinerators?**

* * * * *

(c) * * *

(2) The results (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) of the initial opacity tests.

* * * * *

■ 78. Section 60.2875 is amended by:

■ a. Adding definitions for "Affirmative defense," "Burn-off oven," "Bypass stack," "Chemical recovery unit," "Continuous monitoring system," "Cyclonic burn barrel," "Energy recovery unit," "Energy recovery unit designed to burn biomass (Biomass)," "Energy recovery unit designed to burn coal (Coal)," "Energy recovery unit designed to burn liquid wastes material and gas (Liquid/gas)," "Energy recovery unit designed to burn solid materials (Solid)," "Fabric filter," "Homogeneous wastes," "Incinerator," "Kiln," "Laboratory analysis unit," "Minimum voltage or amperage," "Opacity," "Operating day," "Performance evaluation," "Performance test," "Process change," "Raw mill," "Small remote incinerator," "Soil treatment unit," "Solid waste incineration unit," "Space heater" and "Waste-burning kiln," in alphabetical order.

■ b. Revising the definition for "Commercial and industrial solid waste incineration (CISWI) unit," "Modification," and "Wet scrubber."

■ c. Removing paragraph (3) of the definition for "Deviation."

■ d. Removing the definition for "Commercial or industrial waste," "Contained gaseous material," and "Solid Waste."

**§ 60.2875 What definitions must I know?**

* * * * *

*Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

*Burn-off oven* means any rack reclamation unit, part reclamation unit, or drum reclamation unit. A burn-off oven is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Bypass stack* means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

* * * * *

*Chemical recovery* unit means combustion units burning materials to recover chemical constituents or to produce chemical compounds where there is an existing commercial market for such recovered chemical constituents or compounds. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (*i.e.,* black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process.

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid.

(3) Units burning only wood or coal feedstock for the production of charcoal.

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals that are reclaimed and reused as catalysts or used to produce commercial grade catalysts.

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds.

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen, carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes.

(7) Units burning only photographic film to recover silver.

* * * * *

*Commercial and industrial solid waste incineration (CISWI) unit* means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 that have been discarded, and you do not keep and produce records as required by § 60.2740(u), the material is a solid waste and the operating unit is a CISWI unit. While not all CISWI units will include all of the following components, a CISWI unit includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI unit does not include air pollution control equipment or the stack. The CISWI unit boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion

chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI unit includes all ash handling systems connected to the bottom ash handling system.

* * * * *

*Continuous monitoring system (CMS)* means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters.

* * * * *

Cyclonic burn barrel *means a combustion device for waste materials that is attached to a 55 gallon, openhead drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air.* A cyclonic burn barrel is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Deviation* means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements.

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

* * * * *

*Energy recovery unit* means a combustion unit combusting solid waste (as that term is defined by the Administrator under Resource Conservation and Recovery Act in 40 CFR 240) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

*Energy recovery unit designed to burn biomass (Biomass)* means an energy recovery unit that burns solid waste and at least 10 percent biomass, but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

*Energy recovery unit designed to burn coal (Coal)* means an energy recovery unit that burns solid waste and at least 10 percent coal on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

*Energy recovery unit designed to burn liquid waste material and gas (Liquid/gas)* means an energy recovery unit that burns a liquid waste with liquid or gaseous fuels not combined with any solid fuel or waste materials.

*Energy recovery unit designed to burn solid materials (Solids)* includes energy recovery units designed to burn coal and energy recovery units designed to burn biomass

*Fabric filter* means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

*Homogeneous wastes* are stable, consistent in formulation, have known fuel properties, have a defined origin, have predictable chemical and physical attributes, and result in consistent combustion characteristics and have a consistent emissions profile.

*Incinerator* means any furnace used in the process of combusting solid waste (as the term is defined by the Administrator under Resource Conservation and Recovery Act in 40 CFR 240) for the purpose of reducing the volume of the waste by removing combustible matter. Incinerator designs include single chamber and two-chamber.

*Kiln* means an oven or furnace, including any associated preheater or precalciner devices, used for processing a substance by burning, firing or drying. Kilns include cement kilns that produce clinker by heating limestone and other materials for subsequent production of Portland Cement.

*Laboratory analysis unit* means units that burn samples of materials for the purpose of chemical or physical analysis. A laboratory analysis unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

* * * * *

*Minimum voltage or amperage* means 90 percent of the lowest test-run average voltage or amperage to the electrostatic precipitator measured during the most recent particulate matter or mercury performance test demonstrating compliance with the applicable emission limits.

*Modification* or *modified CISWI unit* means a CISWI unit that has been changed later than June 1, 2001, and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI unit (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI unit used to calculate these costs, see the definition of CISWI unit.

(2) Any physical change in the CISWI unit or change in the method of operating it that increases the amount of any air pollutant emitted for which Clean Air Act section 129 or section 111 has established standards.

*Opacity* means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

*Operating day* means a 24-hour period between 12:00 midnight and the following midnight during which any amount of solid waste is combusted at any time in the CISWI unit.

* * * * *

*Performance evaluation* means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

*Performance test* means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

*Process change* means a significant permit revision, but only with respect to those pollutant-specific emission units for which the proposed permit revision is applicable, including but not limited to a change in the air pollution control devices used to comply with the emission limits for the affected CISWI unit (*e.g.,* change in the sorbent used for activated carbon injection).

* * * * *

*Raw mill* means a ball and tube mill, vertical roller mill or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

* * * * *

*Small, remote incinerator* means an incinerator that combusts solid waste (as that term is defined by the Administrator under RCRA in 40 CFR 240) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

*Soil treatment unit* means a unit that thermally treats petroleum–contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

*Solid waste incineration unit* means a distinct operating unit of any facility which combusts any solid (as that term is defined by the Administrator under the Resource Conservation and Recovery Act in 40 CFR part 240) waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term "solid waste incineration unit" does not include (A) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals, (B) qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or (C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

*Space heater* means a usually portable appliance for heating a relatively small area.

* * * * *

*Waste-burning kiln* means a kiln that is heated, in whole or in part, by combusting solid waste (as that term is defined by the Administrator under the Resource Conservation and Recovery Act pursuant in 40 CFR part 240).

* * * * *

■ 79. Table 1 to Subpart DDDD of Part 60 is revised to read as follows:

TABLE 1 TO SUBPART DDDD OF PART 60—MODEL RULE—INCREMENTS OF PROGRESS AND COMPLIANCE SCHEDULES

| Comply with these increments of progress | By these dates[a] |
|---|---|
| Increment 1—Submit final control plan. | (Dates to be specified in state plan). |
| Increment 2—Final compliance. | (Dates to be specified in state plan).[b] |

[a] Site-specific schedules can be used at the discretion of the state.

[b] The date can be no later than 3 years after the effective date of state plan approval or December 1, 2005 for CISWI units that commenced construction on or before November 30, 1999. The date can be no later than 3 years after the effective date of approval of a revised state plan or March 21, 2012 for CISWI units that commenced construction on or before June 4, 2010.

■ 80. Table 2 to subpart DDDD is amended by:

■ a. Revising the title to read "Table 2 to Subpart DDDD of Part 60—Model Rule—Emission Limitations That Apply Before [Date to be specified in state plan]."

■ b. Revising the entries for "Hydrogen chloride," "Mercury," "Opacity" and "Oxides of nitrogen."

■ c. Adding footnotes b and c.

TABLE 2 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY BEFORE [Date to be specified in state plan][b]

| For the air pollutant | You must meet this emission limitation[a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| * * | * * | * * | * * |
| Hydrogen chloride | 62 parts per million by dry volume | 3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| * * | * * | * * | * * |
| Mercury | 0.47 milligrams per dry standard cubic meter. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[c] |
| Opacity | 10 percent | Three 1-hour blocks consisting of ten 6-minute average opacity values. | Performance test (Method 9 at 40 CFR part 60, appendix A–4). |
| * * | * * | * * | * * |
| Oxides of nitrogen | 388 parts per million by dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Methods 7 or 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 800 ppm or less. |
| * * | * * | * * | * * |

[b] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or March 21, 2016.

[c] Incorporated by reference, *see* § 60.17.

■ 81. Table 4 of subpart DDDD is amended by revising the row headings to read as follows:

TABLE 4 TO SUBPART DDDD OF PART 60—MODEL RULE—TOXIC EQUIVALENCY FACTORS

| Dioxin/furan isomer | Toxic equivalency factor |
|---|---|
| * * * * | * * * |

■ 82. Table 5 of subpart DDDD is amended by:

■ a. Revising the entry for "Annual Report".

■ b. Revising the entry for "Emission limitation or operating limit deviation report".

TABLE 5 TO SUBPART DDDD OF PART 60—SUMMARY OF REPORTING REQUIREMENTS [a]

| Report | Due date | Contents | Reference |
|---|---|---|---|
| * | * * * | * * | * |
| Annual report | No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report. | • Name and address<br>• Statement and signature by responsible official.<br>• Date of report<br>• Values for the operating limits<br>• Highest recorded 3-hour average and the lowest 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported.<br>• If a performance test was conducted during the reporting period, the results of the test.<br>• If a performance test was not conducted during the reporting period, a statement that the requirements of § 60.2720(a) were met.<br>• Documentation of periods when all qualified CISWI unit operators were unavailable for more than 8 hours but less than 2 weeks.<br>• If you are conducting performance tests once every 3 years consistent with § 60.2720(a), the date of the last 2 performance tests, a comparison of the emission level you achieved in the last 2 performance tests to the 75 percent emission limit threshold required in § 60.2720(a) and a statement as to whether there have been any operational changes since the last performance test that could increase emissions. | §§ 60.2765 and 60.2770. |
| * | * * * | * * | * |
| Emission limitation or operating limit deviation report. | By August 1 of that year for data collected during the first half of the calendar year. By February 1 of the following year for data collected during the second half of the calendar year. | • Dates and times of deviation<br>• Averaged and recorded data for those dates.<br>• Duration and causes of each deviation and the corrective actions taken.<br>• Copy of operating limit monitoring data and any test reports.<br>• Dates, times and causes for monitor downtime incidents. | § 60.2775 and 60.2780. |
| * | * * * | * * | * |

[a] This table is only a summary, see the referenced sections of the rule for the complete requirements.

■ 83. Table 6 to Subpart DDDD is added as follows:

TABLE 6 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS ON AND AFTER [DATE TO BE SPECIFIED IN STATE PLAN] [a]

| For the air pollutant | You must meet this emission limitation [b] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium | 0.0026 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Carbon monoxide | 36 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 10 at 40 CFR part 60, appendix A–4). Use a maximum allowable drift of 0.2 ppm and a span gas with a CO concentration of 75 ppm or less. The span gas must contain approximately the same concentration of $CO_2$ expected from the source. |
| Dioxins/furans (total mass basis) | 4.6 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 0.13 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 29 parts per million dry volume | 3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead | 0.0036 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Mercury | 0.0054 milligrams per dry standard cubic meter. | 3-run average (For Method 29 an ASTM D6784–02 (Reapproved 2008)b, collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008) [c]. |
| Oxides of nitrogen | 53 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 100 ppm or less. |
| Particulate matter filterable | 34 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8). |
| Sulfur dioxide | 11 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4. Use a maximum allowable drift of 0.2 ppm and a span gas with concentration of 20 ppm or less. |
| Fugitive ash | Visible emissions for no more than 5% of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |

[a] The date specified in the state plan can be no later than 3 years after the effective date of approval of a revised state plan or March 21, 2016.

[b] All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

[c] Incorporated by reference, see § 60.17.

■ 84. Table 7 of Subpart DDDD is added as follows:

TABLE 7 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER MAY 20, 2011

| For the air pollutant | You must meet this emission limitation [a] | | Using this averaging time | And determining compliance using this method |
|---|---|---|---|---|
| | Liquid/gas | Solids | | |
| Cadmium | 0.023 milligrams per dry standard cubic meter. | 0.00051 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Carbon monoxide | 36 parts per million dry volume. | Biomass—490 parts per million dry volume.<br>Coal—59 parts per million dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 10 at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 100 ppm or less for liquid/gas boilers and coal-fed boilers. Use a span gas with a concentration of 1000 ppm or less for biomass-fed boilers. |
| Dioxins/furans (total mass basis). | 2.9 nanograms per dry standard cubic meter. | 0.35 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 0.32 nanograms per dry standard cubic meter. | 0.059 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 14 parts per million dry volume. | 0.45 parts per million dry volume. | 3-run average (collect a minimum volume of 1 dry standard cubic meters). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead | 0.096 milligrams per dry standard cubic meter. | 0.0036 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). Use ICPMS for the analytical finish. |
| Mercury | 0.0013 milligrams per dry standard cubic meter. | 0.00033 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008),[b] collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[b] |
| Oxides of nitrogen | 76 parts per million dry volume. | Biomass—290 parts per million dry volume.<br>Coal—340 parts per million dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 150 ppm or less for liquid/gas fuel boilers. Use a span gas with a concentration of 700 ppm or less for solid fuel boilers. |

TABLE 7 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER MAY 20, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | | Using this averaging time | And determining compliance using this method |
|---|---|---|---|---|
| | Liquid/gas | Solids | | |
| Particulate matter filterable | 110 milligrams per dry standard cubic meter. | 250 milligrams per dry standard cubic meter or 30-day rolling average if PM CEMS is required or being used. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8) if the unit has a design capacity less than or equal to 250 MMBtu/hr; or PM CEMS (performance specification 11 of appendix B of this part) if the unit has a design capacity greater than 250 MMBtu/hr. Use Method 5 or 5I of Appendix A of this part and collect a minimum sample volume of 1 dscm for the PM CEMS correlation testing. |
| Sulfur dioxide | 720 parts per million dry volume. | Biomass—6.2 parts per million dry volume.<br>Coal—650 parts per million dry volume. | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4. Use a span gas with a concentration of 20 ppm or less for biomass-fed boilers. Use a span gas with a concentration of 1500 ppm or less for liquid/gas and coal-fed boilers. |
| Fugitive ash | Visible emissions for no more than 5 percent of the hourly observation period. | Visible emissions for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods. | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.
[b] Incorporated by reference, see § 60.17.

■ 85. Table 8 of Subpart DDDD is added as follows:

TABLE 8 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO WASTE-BURNING KILNS AFTER MAY 20, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium | 0.00048 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Carbon monoxide | 110 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 10 at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 200 ppm or less. |
| Dioxins/furans (total mass basis) | 0.02 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 0.0070 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 25 parts per million dry volume | 3-run average (collect a minimum volume of 1 dry standard cubic meter) or 30-day rolling average if HCl CEMS is being used. | Performance test (Method 321 at 40 CFR part 63, appendix A) or HCl CEMS if a wet scrubber is not used. |

TABLE 8 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO WASTE-BURNING KILNS AFTER MAY 20, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Lead | 0.0026 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 2 dry standard cubic meters). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Mercury | 0.0079 milligrams per dry standard cubic meter. | 30-day rolling average | Mercury CEMS or sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B of this part.) |
| Oxides of nitrogen | 540 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 1,000 ppm or less. |
| Particulate matter filterable | 6.2 milligrams per dry standard cubic meter. | 30-day rolling average | PM CEMS (performance specification 11 of appendix B of this part; Use Method 5 or 5I of Appendix A of this part and collect a minimum sample volume of 2 dscm for the PM CEMS correlation testing.) |
| Sulfur dioxide | 38 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 80 ppm or less. |

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

■ 86. Table 9 of Subpart DDDD is added as follows:

TABLE 9 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER MAY 20, 2011

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Cadmium | 0.61 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Carbon monoxide | 20 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 10 at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 50 ppm or less. |
| Dioxins/furans (total mass basis) | 1,200 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Dioxins/furans (toxic equivalency basis). | 57 nanograms per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 23 at 40 CFR part 60, appendix A–7). |
| Hydrogen chloride | 220 parts per million dry volume | 3-run average (For Method 26, collect a minimum volume of 60 liters per run. For Method 26A, collect a minimum volume of 1 dry standard cubic meter per run). | Performance test (Method 26 or 26A at 40 CFR part 60, appendix A–8). |
| Lead | 2.7 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 29 at 40 CFR part 60, appendix A–8). |
| Mercury | 0.0057 milligrams per dry standard cubic meter. | 3-run average (For Method 29 and ASTM D6784–02 (Reapproved 2008)b, collect a minimum volume of 2 dry standard cubic meters per run. For Method 30B, collect a minimum sample as specified in Method 30B at 40 CFR part 60, appendix A). | Performance test (Method 29 or 30B at 40 CFR part 60, appendix A–8) or ASTM D6784–02 (Reapproved 2008).[b] |

TABLE 9 TO SUBPART DDDD OF PART 60—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER MAY 20, 2011—Continued

| For the air pollutant | You must meet this emission limitation [a] | Using this averaging time | And determining compliance using this method |
|---|---|---|---|
| Oxides of nitrogen | 240 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 7E at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 500 ppm or less. |
| Particulate matter filterable | 230 milligrams per dry standard cubic meter. | 3-run average (collect a minimum volume of 1 dry standard cubic meter). | Performance test (Method 5 or 29 at 40 CFR part 60, appendix A–3 or appendix A–8). |
| Sulfur dioxide | 420 parts per million dry volume | 3-run average (1 hour minimum sample time per run). | Performance test (Method 6 or 6c at 40 CFR part 60, appendix A–4). Use a span gas with a concentration of 1000 ppm or less. |
| Fugitive ash | Visible emissions for no more than 5 percent of the hourly observation period. | Three 1-hour observation periods | Visible emission test (Method 22 at 40 CFR part 60, appendix A–7). |

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.
[b] Incorporated by reference, *see* § 60.17.

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