**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 261**

**[EPA-HQ-RCRA-2005-0017; FRL - ]**

**RIN 2050-AG57**

**Withdrawal of the Emission-Comparable Fuel Exclusion under RCRA**

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

**ACTION:** Proposed rule.

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**SUMMARY:** EPA is proposing to withdraw the conditional exclusion from regulations promulgated on December 19, 2008 under subtitle C of the Resource Conservation and Recovery Act (RCRA) for so-called Emission Comparable Fuel (ECF). These are fuels produced from hazardous secondary materials which, when burned in industrial boilers under specified conditions, generate emissions that are comparable to emissions from burning fuel oil in those boilers. EPA is proposing to withdraw this conditional exclusion because ECF appears to be better regarded as being a discarded material and regulated as a hazardous waste. The exclusions for comparable fuel and synthesis gas fuel are not addressed or otherwise affected by this proposed rule.

**DATES:** Comments must be received on or before **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having their full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before **[insert date** *thirty days after date of publication in the* **Federal Register.]**

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-RCRA-2005-0017, by one of the following methods:

- www.regulations.gov : Follow the on-line instructions for submitting comments.
- Email: rcra-docket@epa.gov.
- Fax: 202-566-9744.
- Mail: RCRA Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. We request that you also send a separate copy of your comments to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**). In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.
- Hand Delivery: RCRA Docket, EPA Docket Center (2822T), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

*Instructions:* Direct your comments to Docket ID No EPA-HQ-RCRA-2005-0017. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comments include information claimed to be Confidential Business

Information (CBI) or other information the disclosure of which is restricted by statute. Clearly mark the part or all of the information that you claim to be CBI. The www.regulations.gov website 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 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. For additional information about EPA's public docket, visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm. We also request that interested parties who would like information they previously submitted to EPA to be considered as part of this action, to identify the relevant information by docket entry numbers and page numbers.

*Docket:* All documents in the docket are listed in the 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 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:** Mary Jackson, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, Mailcode: 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460; telephone number: (703) 308-8453; fax number: (703) 308-8433; email address: jackson.mary@epa.gov .

**SUPPLEMENTARY INFORMATION:**

**General Information**

A. Does This Action Apply to Me?

Categories and entities potentially affected by this action include:

| **Example of Potentially Affected Entities** | |
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| **NAICS Code** | **Industry Description** |
| 3251 | Basic Chemical Manufacturing |
| 3241 | Petroleum and Coal Products Manufacturing |
| 4884 | Support Activities for Road Transportation |

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| 5622 | Waste Treatment and Disposal |
| 3252 | Resin, Synthetic Rubber, and Artificial Synthetic Fibers and Filaments Manufacturing |
| 3259 | Other Chemical Product and Preparation Manufacturing |
| 3254 | Pharmaceutical and Medicine Manufacturing |
| 9281 | National Security and International Affairs |
| 3255 | Paint, Coating, and Adhesive Manufacturing |
| 5614 | Business Support Services |
| 3273 | Cement Manufacturing |

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

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

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Send or deliver information identified as CBI to the following address: Ms. LaShan Haynes, RCRA Document Control Officer, EPA (Mail Code 5305W), Attention Docket ID No.

EPA-HQ-RCRA-2005-0017, 1200 Pennsylvania Avenue, NW, Washington DC, 20460. 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 so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (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,
- Make sure to submit your comments by the comment period deadline identified.

*3. Docket Copying Costs:*

You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies are 15 cents/page.

*4. How Do I Obtain a Copy of This Document and Other Related Information?*

In addition to being available in the docket, an electronic copy of today's proposed rule will also be available on the Worldwide Web (WWW). Following the Administrator's signature, a copy of this document will be posted on the WWW at http://www.epa.gov/hwcmact. This website also provides other information related to the NESHAP for hazardous waste combustors.

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The information presented in this preamble is organized as follows:

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 Usage

I. National Technology Transfer Advancement Act

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

## I. Statutory Authority

The emission-comparable fuel (ECF) regulations were promulgated under the authority of sections 1004 and 2002 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6903 and 6912. Withdrawal of the rule would be issued under the same authority, and hazardous waste fuels are regulated pursuant to section 3004(q) of RCRA.

## II. Background

### *A. What Is the Intent of the Proposed Rule?*

This rule proposes to withdraw the conditional exclusion from regulation under subtitle C of RCRA for ECF, as codified at §261.38.[1] The conditional exclusion states that hazardous secondary materials that meet all of the hazardous constituent specifications applicable to comparable fuel, except concentration limits for oxygenates and hydrocarbons, and that are stored and burned under prescribed conditions, are not discarded and thus, are not solid wastes.

EPA notes, however, that classification of ECF as a non-waste is not legally compelled, and an alternative classification is permissible. As discussed in more detail in the following section, ECF is a hazardous secondary material which can reasonably be regarded as discarded when stored and burned because: (1) the material can have substantially higher concentrations of hazardous oxygenates and hydrocarbons than fuel oil, and thus, lacking physical identity to fossil fuel, combustion of the material may be considered to be similar to incinerating or destroying it, a form of discarding; (2) the exclusion is conditioned on extensive, substantive requirements on

[1] See 73 FR 77954 (December 19, 2008).

burning, similar to the requirements for permitted hazardous waste combustors, which conditions are needed to prevent discard; and (3) the exclusion is conditioned on extensive, substantive requirements on storage, similar to the requirements for permitted hazardous waste storage units. EPA has the authority to adopt conditional exclusions from the definition of solid waste; however, when conditions grow ever more elaborate and extensive and are more and more comparable (or identical) to those required for the management of hazardous waste, the question is raised as to whether the material is discarded because of the necessity for waste management-like conditions on its handling. Put another way, the conditions can become a surrogate for RCRA's cradle-to-grave hazardous waste management system, and the hazardous secondary materials to which such conditions pertain can be classified as discarded. Given the elements of discard involved in combusting ECF, and the extensive waste management-related types of conditions EPA developed for this conditional exclusion, it is now EPA's view, subject to consideration of public comment, that these materials should be classified as solid waste and, when listed or when exhibiting a characteristic, hazardous wastes rather than as products.

This proposal would not affect the exclusions for comparable fuel and synthesis gas fuel that were promulgated in 1998[2] (also codified in §261.38), nor is EPA soliciting comment on those exclusions or otherwise reconsidering or reopening them. In addition, this proposal does not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion.[3]

*B. Who Will Be Affected by the Proposed Rule?*

Entities that generate, burn, and store ECF would be potentially affected by this proposed rule. The basic structure of the exclusion is that ECF is not a solid (and hazardous) waste as

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2 See 63 FR 33782 (June 19, 1998).

3 See 73 FR at 77963-64.

generated, and hence is not subject to the subtitle C regulations. Under today's proposal to withdraw the exclusion of ECF, ECF would again be classified as a hazardous waste, and all entities managing such hazardous secondary materials would again be subject to all applicable subtitle C hazardous waste standards. Since the rule was promulgated in December 2008 and became effective in January 2009, and since we are not aware that any states have adopted or applied for authorization for this rule, we would expect that very few facilities, if any, are managing their hazardous secondary materials pursuant to this rule. However, the Agency requests comments on whether any generators or burners are managing ECF pursuant to the terms of the conditional exclusion.

We are also not aware of any commercial hazardous waste combustors that are no longer receiving newly excluded hazardous secondary materials subject to the ECF rule, because the materials are now being managed under the ECF conditional exclusion. To the extent this is occurring, however, the commercial hazardous waste combustors in question would have lost the waste management revenues for those diverted fuels and may have needed to meet their heat input requirements by using other waste fuels or fossil fuels. Under today's proposal to withdraw the ECF exclusion, those hazardous secondary materials that were managed as excluded ECF would again be classified as hazardous waste fuels. Thus, those affected commercial hazardous waste combustors may have the opportunity to provide hazardous waste management services for hazardous secondary materials managed as ECF. However, as noted above, we suspect that very few facilities, if any, are already managing ECF under the conditional exclusion. If that is the case, commercial hazardous waste combustors have likely experienced very little change.

## III. Summary of the Proposed Rule

This proposed rule would withdraw the conditional exclusion for ECF under §261.38, including the exclusion itself in §261.4(a)(16), specifications and associated conditions applicable to ECF under §261.38(a), the implementation conditions applicable to ECF under §261.38(b), the storage and burning conditions for ECF under §261.38(c), the provisions for failure to comply with the conditions for the ECF exclusion under §261.38(d)(2), the alternative storage conditions for ECF under §261.38(e), and the notification of closure of an ECF storage unit under §261.38(f).

As noted above, this proposed rule would not affect, however, the exclusion for comparable fuel or synthesis gas fuel, including the specifications and associated conditions for these materials under §261.38(a), the implementation conditions applicable to these materials under §261.38(b), and the provision for failure to comply with the conditions for exclusion of these materials under §261.38(d)(1).

Finally, the proposed rule would not affect the clarifications and revisions to the conditions for comparable fuel that EPA promulgated concurrently with the ECF exclusion; specifically: (1) clarification that comparable fuel that is spilled or leaked and that no longer meets the conditions of the exclusion must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste or if it is otherwise a listed hazardous waste (§261.38(b)(15)); (2) clarification that the comparable fuel tank system and container storage units become subject to the RCRA hazardous waste facility standards if not cleaned of liquids and accumulated solids within 90 days of ceasing operations as a comparable fuel storage unit (§261.38(b)(13)); (3) waiver of the RCRA closure requirements for tank systems and container storage units that were used only to store hazardous wastes that are subsequently excluded as comparable fuel

(§261.38(b)(14)); (4) clarification that boiler residues, including bottom ash and emission control residue, from burning comparable fuel would be subject to regulation as hazardous waste if they exhibit a hazardous waste characteristic (§261.38(b)(12)); and (5) a condition[4] requiring that the one-time notice by the generator to regulatory officials must include an estimate of the average and maximum monthly and annual quantity of comparable fuel for which an exclusion is claimed (§261.38(b)(2)(i)(A)).

## IV. Rationale for Proposing to Revoke the Exclusion for ECF

### *A. ECF May Be Classified as a Waste Rather than as a Product*

Since 1998, hazardous secondary materials (i.e., spent materials, sludges, byproducts, and off-specification commercial chemical products) which have fuel value and whose hazardous constituent levels are comparable to those found in fuel oil that could be burned in their place have been excluded from the definition of solid waste (and, hence, cannot be hazardous waste). See §261.38.[5] These materials are called comparable fuels.

On December 19, 2008,[6] EPA added an additional group of hazardous secondary materials to the exclusions in §261.38. These are hazardous secondary materials that, as generated, are handled as fuel products through all phases of management. The rule sought to assure that this will occur through a series of conditions on the circumstances of their storage and burning, and based on their substantial physical identity --except for their level of hydrocarbons and oxygenates -- with fuel oil. These hazardous secondary materials must meet all of the hazardous constituent specifications for comparable fuel, except those for oxygenates and

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[4] Please note that this condition applies prospectively to generators that newly claim the comparable fuel exclusion after December 19, 2008 and to generators that must submit a revised notification after December 19, 2008 because of a substantive change in the information required by the notice.

[5] See 63 FR 33782 (June 19, 1998).

[6] See 73 FR 77954.

hydrocarbons. These excluded fuels are termed "emission-comparable fuel" (or "ECF") because the emissions from an industrial boiler burning these hazardous secondary materials under the conditions of the exclusion are comparable to the emissions from an industrial boiler burning fuel oil, the fossil fuel for which ECF could substitute. See 73 FR at 77956.

However, ECF is a hazardous secondary material because the material can have substantially higher concentrations of hazardous oxygenates and hydrocarbons than fuel oil, and thus, lacking physical identity to fossil fuel, can also be reasonably considered to be discarded when burned (and when accumulated/stored prior to burning). Hazardous oxygenates and hydrocarbons contribute fuel value (and are often found at some level in petroleum-based fuel products albeit less than allowed in ECF); however, several of these compounds (e.g., polycyclic aromatic hydrocarbons, naphthalene, benzene, and acrolein) are also highly toxic[7] to human health and to the environment. EPA based the ECF exclusion on its view that these hazardous compounds would be destroyed in the combustion process, to the extent that their concentration in the emissions would be comparable to that in the emissions from the combustion of fuel oil in industrial boilers. However, to ensure comparable emissions, EPA conditioned the exclusion on extensive, substantive requirements on burning that are in fact similar to the requirements for permitted hazardous waste combustors—including conditions on the type of unit in which ECF can be combusted, constituent-by-constituent feedrate limits controlling the amount of ECF which may be burned (some of which are miniscule),[8] and boiler operating conditions (e.g., CO

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[7] USEPA, "Final Technical Support Document for the Exclusion of Emission Comparable Fuels," November 2008, Section 2.4.

[8] We note that the maximum firing rate for ECF containing a polynuclear aromatic hydrocarbon (among the hydrocarbons which can be present in unlimited concentrations in ECF) when the ECF is co-fired with natural gas is 0.55% on a heat input basis (i.e., the ECF can contribute only 0.55% of the heat input to the boiler), and the maximum firing rate for such an ECF would be virtually zero if it were to be co-fired with fuel oil. See USEPA, "Final Technical Support Document for the Exclusion of Emission Comparable Fuels," November 2008, Table 6-5. These feedrate restrictions are needed to ensure that emissions from burning ECF are comparable to emissions from

control, dioxin/furan control, automatic ECF cutoff systems, and operator training). See §261.38(c)(2). In the case of ECF, because it was necessary to preclude discard by meeting conditions tantamount to satisfying the substantive subtitle C regulatory regime, EPA concludes that the hazardous secondary material is more waste-like than product-like.

Similarly, the exclusion contains extensive conditions on storage that are virtually identical to the requirements for permitted hazardous waste storage units. See §261.38(c)(1). That is, while EPA has the authority to establish storage conditions in order to identify hazardous secondary materials that are not discarded, the collection of storage conditions on products and by-products that EPA adopted for ECF to prevent discard are so similar to the requirements for hazardous waste storage units under Subparts I and J of Part 264 that they become a surrogate to those required for the management of hazardous waste, and thus, the material may be more waste-like than product-like, and can reasonably be classified as discarded. Put another way, if it is necessary to preclude discard by meeting conditions tantamount to satisfying the substantive subtitle C regulatory regime, then the secondary material may be classified as a waste in the first instance.

*B. Why EPA Now Proposes to Reclassify ECF as a Waste*

We have explained how ECF could be classified as a waste rather than as a product. We explain here the rationale underlying EPA's proposal choosing to reclassify ECF as a waste.

The fundamental premise of the ECF rule is that ECF is no more hazardous than burning fuel oil, because combustion of this material will have comparable emissions. However, to ensure that the material does not pose greater risks, EPA felt compelled to promulgate a very detailed set of conditions—the equivalent of a detailed regulatory scheme—for both the storage

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burning fuel oil, but are so restrictive that they indicate the hazardous secondary material is more waste-like than product-like since virtually none of it could be burned in order to preserve emission comparability.

and combustion of ECF. As noted, the conditions of the exclusion are virtually the same in many critical instances as the substantive rules which apply while storing and combusting hazardous waste. For example, EPA concluded that burning ECF can lead to greater concentrations of hazardous constituents in air emissions under "normal" combustion conditions. Therefore, EPA imposed special design and operational conditions to ensure effective combustion of ECF, which are similar to the requirements for industrial boilers burning hazardous wastes under the exemption from stack emissions testing for destruction and removal efficiency (DRE) provided by 40 CFR 266.110. Therefore, upon further consideration, the Agency believes that burning of ECF under the conditional exclusion is really not much different from burning hazardous waste in a hazardous waste combustion unit. We note that a number of commenters on the proposed rule raised these same concerns.

As a matter of policy, the nature of these requirements related to burning ECF is such that, in EPA's view, they are most appropriately applied through a careful review process, overseen by the regulator with an opportunity for public comment. For example, a formal review of an ECF burner's operations would ensure that the boiler meets the design conditions, and that the required operating limits (e.g., CO limit, ECF feedrate limit, boiler load, gas temperature for dioxin/furan control) are properly monitored and linked to an automatic ECF feed cutoff system. However, facilities that burn ECF, under the ECF rule, would satisfy these conditions absent the formal process to apply for and obtain an operating permit. That is, facilities would be allowed to comply with this complicated set of operating conditions without any type of review process. Although the Agency contemplated that the authorized permitting authority would ensure compliance through enforcement oversight rather than through the permitting process, the Agency now believes it is important that each ECF burner undergoes a

thorough review on the operation of the combustion unit as part of the existing subtitle C permitting structure. Indeed, EPA, on reconsideration (but subject to consideration of public comment), has concluded that the ECF rule will actually require more resources and more attention from the regulatory agency than a subtitle C approach to reach a comparable level of assurance that appropriate combustion conditions are met. Under the ECF rule, the burden would be on state enforcement personnel to ensure that the conditions are met after the fact, while under a permit system, the burden is on the regulated entity to demonstrate to the regulatory authority that the terms of the regulations are met. In many cases, regulations that are directly enforced make sense, but where regulations govern specialized combustion conditions, and where technical judgments are important in determining compliance, the permit process provides important protections.

With respect to storage, ECF contains higher (potentially unlimited) concentrations of hazardous hydrocarbons and oxygenates than fuel oil, and so poses a greater storage hazard than fuel oil. In addition, ECF may often behave as a dense non-aqueous phase liquid and be more difficult to contain than fuel oil should it leak or spill. Several of these hazardous hydrocarbons and oxygenates are also highly volatile, raising concern about the hazard of fugitive air emissions and resulting in the need for fugitive emission controls. In addition, since storage units are not subject to closure and financial assurance conditions under the present rule, ECF storage units may be improperly closed, which could result in spills or leaks. All of these factors are reasons why a thorough review on the operation of the storage units should be undertaken as part of the existing subtitle C permitting structure, as opposed to a self-implementing structure. Thus, given all of these potentials for harm in storage – all of which are classic damage pathways for waste storage – EPA is proposing to remove the exclusion for ECF when ECF is stored.

For all these reasons, EPA now concludes, subject to consideration of public comment, that it is more straightforward and more appropriate simply to apply the hazardous waste rules directly, i.e., to reclassify ECF as solid waste subject to a hazardous waste determination and, if hazardous, the RCRA cradle-to-grave management system.

## V. State Authority

### *A. Applicability of the Rule in Authorized States*

Under section 3006 of RCRA, EPA may authorize qualified States to administer their own hazardous waste programs in lieu of the federal program within the state. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for State authorization are found at 40 CFR part 271.

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

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. EPA is directed by the statute to implement these requirements and prohibitions in authorized States, including

the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA related provisions as State law to retain final authorization, EPA implements the HSWA provisions in authorized States until the States do so.

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

*B. Effect on State Authorization*

The provisions in today's notice are not being proposed under the authority of HSWA and are considered to be more stringent than current requirements. States that have adopted the exclusion would be required to modify their programs to remove the exclusion for ECF because they must conform to the Federal regulations that are more stringent than the authorized State regulations. States that adopted the comparable fuel exclusion promulgated on June 19, 1998 and codified at §261.38, but that have not adopted the ECF exclusion, will still need to revise their programs to adopt the more stringent conditions applicable to comparable fuel (see 73 FR at 77963-64) that were promulgated concurrently with the ECF exclusion on December 19, 2008.

Section 271.21(e)(2) of EPA's State authorization regulations (40 CFR part 271) requires that States with final authorization modify their programs to reflect Federal program changes and submit the modifications to EPA for approval. The deadline by which the States will need to modify their programs is determined by the date of promulgation of a final rule in accordance

with §271.21(e)(2). Once EPA approves the modification, the State requirements would become RCRA subtitle C requirements.

## VI. Statutory and Executive Order Reviews

### *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." Pursuant to the terms of Executive Order 12866, the Agency, in conjunction with the Office of Management and Budget (OMB), has determined that this proposed rule is a significant regulatory action because it proposes to withdraw a rule that OMB previously determined contains novel policy issues, as defined under part 3(f)(4) of the Order. Accordingly, EPA submitted this action to OMB for review under EO 12866. Any changes made in response to OMB recommendations have been documented in the docket for this action.

This proposed withdrawal of the RCRA Conditional Exclusion for ECF would result in lost benefits to society; however, the net annual social benefits lost by withdrawing the final rule would not be as large as originally estimated. The economic assessment (*Assessment*)[9] prepared in support of the December 2008 final rule estimated total annual net social benefits (i.e., net resource savings) of $13.4 million per year, assuming all authorized states were to adopt the rule (which as noted earlier, we do not believe has occurred). The benefits estimate was based on the best available data and information at the time of the analysis. However, upon further research and assessment, we have determined that one of our key analytical assumptions,[10] derived from

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[9] USEPA, "Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," May 14, 2008.

[10] Our primary data source, USEPA, "2005 National Biennial Report," does not identify a management method code for wastes that are combusted in an incinerator and where the heating value of the wastes is used beneficially in lieu of fossil or other fuels to combust other waste with little or no heating value. Thus, the vast majority of the waste that we identify as likely to be excluded as ECF, and which is currently combusted in incinerators, may already be burned for energy recovery.

data reporting limitations, may not reflect actual waste management patterns, as reported. Adjusting for this discrepancy results in a revised annual net social benefits estimate of approximately $6.6 million, again assuming that the current rule were to be adopted by all authorized states.[11] Actual net social benefits are likely lower since we believe most states have not adopted the rule. This adjustment indicates that the net annual social benefits lost by withdrawing the final rule would not be as large as originally estimated.[12]

*B. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1361.14. Withdrawing the ECF exclusion would result in an increase in the reporting and recordkeeping burden for ECF generators and burners, back to the level prior to promulgation of the exclusion. That is, under the ECF conditional exclusion, because ECF was no longer classified as a hazardous waste, the generator and burner would not be required to comply with the paperwork, reporting, and recordkeeping requirements under the subtitle C hazardous waste regulations. However, ECF generators and burners would be subject to an annual public reporting and recordkeeping burden for the collection of information required under the conditional exclusion. Thus, overall, the reporting and recordkeeping burden for ECF generators and burners resulted in a net annual reduction of 32,899 hours (assuming that all authorized states adopted the rule, which has not occurred) and a savings of $1.3 million in capital and operation and maintenance costs (based on the same assumption). Therefore,

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[11] USEPA, "Revised Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," July 15, 2009.

[12] USEPA, "Assessment of the Potential Costs, Benefits, and Other Impacts of the Proposed Withdrawal of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," July 15, 2009.

withdrawing the ECF conditional exclusion would result in a reporting and recordkeeping burden of 32,899 hours and a cost of $1.3 million in capital, and operation and maintenance costs, assuming full adoption by authorized states. Since we believe this has not occurred, the new burden would be far less. If authorized states have not fully adopted the rule, withdrawing the ECF conditional exclusion would not change the reporting and recordkeeping burden from what existed prior to promulgation of the conditional exclusion. OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR 261.38 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2050 –0073. 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 in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA-HQ-RCRA-2005-0017. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Officer for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after [Insert date of publication in the Federal Register], a comment to OMB is best assured of having its full effect if OMB receives it by [Insert date 30 days after publication in the Federal

Register]. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

*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 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 this proposed rule on small entities, I certify that this action would 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 USC 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 have determined that the affected ECF generators are not owned by small governmental jurisdictions or nonprofit organizations. Therefore, only small businesses were analyzed for small entity impacts. For the purposes of the impact analyses, small entity is defined either by the number of employees or by the dollar amount of sales. The level at which a business is considered small is determined for each North American Industrial Classification System (NAICS) code by the Small Business Administration.

This rule, as proposed, is projected to result in increased costs to companies that may have started to use the conditional exclusion, as identified in the ECF Final Rule, although we suspect that very few facilities, if any, have begun to comply with this rule. However, the [reversed] cost impacts to potentially affected entities are not expected to be significant, as discussed under the Regulatory Flexibility section of the May 14, 2008 Assessment document.[13] As a result, the rule would not result in significant adverse economic impacts to affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act*

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. Total annual cost impacts of this action, as proposed, are not expected to exceed

[13] USEPA, "Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule," May 14, 2008.

$6.6 million. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

This proposed 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. No small governments are known to own or manage any of the affected entities.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It would 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 action primarily and directly affects generators and burners of ECF. There are no state and local government bodies that would incur direct compliance costs by this rulemaking. Thus, Executive Order 13132 does not apply to this proposed 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 solicits comment on this 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). This proposed rule would neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

EPA did not consult directly with representatives of Tribal governments in the process of developing this proposal. Thus, EPA solicits comments on this proposed rule from Tribal officials.

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

This action is not subject to EO 13045 (62 F.R. 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed action will present a disproportionate risk to children.

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

This proposed rule 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.

*I. National Technology Transfer Advancement Act*

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

Because EPA is proposing to withdraw the conditional exclusion for ECF under §261.38, 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 (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.

EPA has determined that this proposed rule would not have disproportionately high and/or adverse human health or environmental effects on minority or low-income populations because it would require ECF to be managed under the RCRA Subtitle C hazardous waste regulations, thereby potentially reducing exposures to the public, including to minority and low-income populations.

**List of Subject in 40 CFR part 261**

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

Dated: Nov. 30, 2009

Lisa P. Jackson,

Administrator.

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

**PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE**

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

**Authority**: 42 U.S.C. 6903, 6912(b), 6925.

2. Section 261.4 is amended by revising paragraph (a)(16) to read as follows:

**§ 261.4 Exclusions.**

(a)* * *

(16) Comparable fuels or comparable syngas fuels that meet the requirements of §261.38.

* * * * *

3. Section 261.38 is revised to read as follows:

**§ 261.38 Exclusion of comparable fuel and syngas fuel.**

(a) *Specifications for excluded fuels*. Wastes that meet the specifications for comparable fuel or syngas fuel under paragraphs (a)(1) or (a)(2) of this section, respectively, and the other requirements of this section, are not solid wastes.

(1) *Comparable fuel specifications*. .—(i) *Physical specifications*.—(A) *Heating value*. The heating value must exceed 5,000 BTU/lbs. (11,500 J/g).

(B) *Viscosity*. The viscosity must not exceed: 50 cS, as-fired.

(ii) *Constituent specifications*. For compounds listed in Table 1 to this section, the specification levels and, where non-detect is the specification, minimum required detection limits are: (see Table 1 of this section).

(2) *Synthesis gas fuel specifications*. —Synthesis gas fuel (i.e., syngas fuel) that is generated from hazardous waste must:

(i) Have a minimum Btu value of 100 Btu/Scf;

(ii) Contain less than 1 ppmv of total halogen;

(iii) Contain less than 300 ppmv of total nitrogen other than diatomic nitrogen ($N_2$);

(iv) Contain less than 200 ppmv of hydrogen sulfide; and

(v) Contain less than 1 ppmv of each hazardous constituent in the target list of appendix VIII constituents of this part.

(3) *Blending to meet the specifications. (i)* Hazardous waste shall not be blended to meet the comparable fuel specification under paragraph (a)(1) of this section, except as provided by paragraph (a)(3)(ii) of this section:

(ii) *Blending to meet the viscosity specification*. A hazardous waste blended to meet the viscosity specification for comparable fuel shall:

(A) As generated and prior to any blending, manipulation, or processing, meet the constituent and heating value specifications of paragraphs (a)(1)(i)(A) and (a)(1)(ii) of this section;

(B) Be blended at a facility that is subject to the applicable requirements of parts 264, 265, or 267 or §262.34 of this chapter; and

(C) Not violate the dilution prohibition of paragraph (a)(6) of this section.

(4) *Treatment to meet the comparable fuel specifications.* (i) A hazardous waste may be treated to meet the specifications for comparable fuel set forth in paragraph (a)(1) of this section provided the treatment:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying hazardous constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or §262.34 of this chapter; and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a comparable fuel remain a hazardous waste.

(5) *Generation of a syngas fuel.* (i) A syngas fuel can be generated from the processing of hazardous wastes to meet the exclusion specifications of paragraph (a)(2) of this section provided the processing:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264, 265, or 267, or §262.34 of this chapter or is an exempt recycling unit pursuant to §261.6(c); and

(C) Does not violate the dilution prohibition of paragraph (a)(6) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a syngas fuel remain a hazardous waste.

(6) *Dilution prohibition.* No generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a hazardous waste to meet the specifications of paragraphs (a)(1)(i)(A) or (a)(1)(ii) of this section for comparable fuel, or paragraph (a)(2) of this section for syngas.

(b) *Implementation.*--(1) *General.*--(i) Wastes that meet the specifications provided by paragraph (a) of this section for comparable fuel or syngas fuel are excluded from the definition of solid waste provided that the conditions under this section are met. For purposes of this section, such materials are called excluded fuel; the person claiming and qualifying for the exclusion is called the excluded fuel generator and the person burning the excluded fuel is called the excluded fuel burner.

(ii) The person who generates the excluded fuel must claim the exclusion by complying with the conditions of this section and keeping records necessary to document compliance with those conditions.

(2) *Notices.* (i) *Notices to state RCRA and CAA Directors in authorized states or regional RCRA and CAA Directors in unauthorized states.* (A) The generator must submit a one-time notice, except as provided by paragraph (b)(2)(i)(C) of this section, to the Regional or State RCRA and CAA Directors, in whose jurisdiction the exclusion is being claimed and where the excluded fuel will be burned, certifying compliance with the conditions of the exclusion and providing the following documentation:

(*1*) The name, address, and RCRA ID number of the person/facility claiming the exclusion;

(*2*) The applicable EPA Hazardous Waste Code(s) that would otherwise apply to the excluded fuel;

(*3*) The name and address of the units meeting the requirements of paragraphs (b)(3) and (c) of this section, that will burn the excluded fuel;

(*4*) An estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed, except as provided by paragraph (b)(2)(i)(C) of this section; and

(*5*) The following statement, which shall be signed and submitted by the person claiming the exclusion or his authorized representative:

Under penalty of criminal and civil prosecution for making or submitting false statements, representations, or omissions, I certify that the requirements of 40 CFR 261.38 have been met for all comparable fuels identified in this notification. Copies of the records and information required at 40 CFR 261.38(b)(8) are available at the generator's facility. Based on my inquiry of the individuals immediately responsible for obtaining the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(B) If there is a substantive change in the information provided in the notice required under this paragraph, the generator must submit a revised notification.

(C) Excluded fuel generators must include an estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed only in notices

submitted after December 19, 2008 for newly excluded fuel or for revised notices as required by paragraph (b)(2)(i)(B) of this section.

(ii) *Public notice*. Prior to burning an excluded fuel, the burner must publish in a major newspaper of general circulation local to the site where the fuel will be burned, a notice entitled "Notification of Burning a Fuel Excluded Under the Resource Conservation and Recovery Act" and containing the following information:

(A) Name, address, and RCRA ID number of the generating facility(ies);

(B) Name and address of the burner and identification of the unit(s) that will burn the excluded fuel;

(C) A brief, general description of the manufacturing, treatment, or other process generating the excluded fuel;

(D) An estimate of the average and maximum monthly and annual quantity of the excluded fuel to be burned; and

(E) Name and mailing address of the Regional or State Directors to whom the generator submitted a claim for the exclusion.

(3) *Burning*. The exclusion applies only if the fuel is burned in the following units that also shall be subject to Federal/State/local air emission requirements, including all applicable requirements implementing section 112 of the Clean Air Act:

(i) Industrial furnaces as defined in §260.10 of this chapter;

(ii) Boilers, as defined in §260.10 of this chapter, that are further defined as follows:

(A) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes; or

(B) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale;

(iii) Hazardous waste incinerators subject to regulation under subpart O of parts 264 or 265 of this chapter and applicable CAA MACT standards.

(iv) Gas turbines used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale.

(4) *Fuel analysis plan for generators*. The generator of an excluded fuel shall develop and follow a written fuel analysis plan which describes the procedures for sampling and analysis of the material to be excluded. The plan shall be followed and retained at the site of the generator claiming the exclusion.

(i) At a minimum, the plan must specify:

(A) The parameters for which each excluded fuel will be analyzed and the rationale for the selection of those parameters;

(B) The test methods which will be used to test for these parameters;

(C) The sampling method which will be used to obtain a representative sample of the excluded fuel to be analyzed;

(D) The frequency with which the initial analysis of the excluded fuel will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(E) If process knowledge is used in the determination, any information prepared by the generator in making such determination.

(ii) For each analysis, the generator shall document the following:

(A) The dates and times that samples were obtained, and the dates the samples were analyzed;

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

(C) A description of the temporal and spatial locations of the samples;

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

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

(F) All quantitation limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and the description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred;

(G) All laboratory results demonstrating whether the exclusion specifications have been met; and

(H) All laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in paragraph (b)(9) of this section and also provides for the availability of the documentation to the claimant upon request.

(iii) Syngas fuel generators shall submit for approval, prior to performing sampling, analysis, or any management of an excluded syngas fuel, a fuel analysis plan containing the elements of paragraph (b)(4)(i) of this section to the appropriate regulatory authority. The approval of fuel analysis plans must be stated in writing and received by the facility prior to sampling and analysis to demonstrate the exclusion of a syngas. The approval of the fuel analysis plan may contain such provisions and conditions as the regulatory authority deems appropriate.

(5) *Excluded fuel sampling and analysis.* (i) *General.* For wastes for which an exclusion is claimed under the specifications provided by paragraphs (a)(1)or (a)(2) of this section, the generator of the waste must test for all the constituents in appendix VIII to this part, except those that the generator determines, based on testing or knowledge, should not be present in the fuel. The generator is required to document the basis of each determination that a constituent with an applicable specification should not be present. The generator may not determine that any of the following categories of constituents with a specification in Table 1 to this section should not be present:

(A) A constituent that triggered the toxicity characteristic for the constituents that were the basis for listing the hazardous secondary material as a hazardous waste, or constituents for which there is a treatment standard for the waste code in 40 CFR 268.40;

(B) A constituent detected in previous analysis of the waste;

(C) Constituents introduced into the process that generates the waste; or

(D) Constituents that are byproducts or side reactions to the process that generates the waste.

Note to paragraph (b)(5): Any claim under this section must be valid and accurate for all hazardous constituents; a determination not to test for a hazardous constituent will not shield a generator from liability should that constituent later be found in the excluded fuel above the exclusion specifications.

(ii) *Use of process knowledge.* For each waste for which the comparable fuel or syngas exclusion is claimed where the generator of the excluded fuel is not the original generator of the hazardous waste, the generator of the excluded fuel may not use process knowledge pursuant to

paragraph (b)(5)(i) of this section and must test to determine that all of the constituent specifications of paragraphs (a)(1) and (a)(2) of this section, as applicable, have been met.

(iii) The excluded fuel generator may use any reliable analytical method to demonstrate that no constituent of concern is present at concentrations above the specification levels. It is the responsibility of the generator to ensure that the sampling and analysis are unbiased, precise, and representative of the excluded fuel. For the fuel to be eligible for exclusion, a generator must demonstrate that:

(A) The 95% upper confidence limit of the mean concentration for each constituent of concern is not above the specification level; and

(B) The analyses could have detected the presence of the constituent at or below the specification level.

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

(v) In an enforcement action, the burden of proof to establish conformance with the exclusion specification shall be on the generator claiming the exclusion.

(vi) The generator must conduct sampling and analysis in accordance with the fuel analysis plan developed under paragraph (b)(4) of this section.

(vii) *Viscosity condition for comparable fuel.* (A) Excluded comparable fuel that has not been blended to meet the kinematic viscosity specification shall be analyzed as-generated.

(B) If hazardous waste is blended to meet the kinematic viscosity specification for comparable fuel, the generator shall:

(*1*) Analyze the hazardous waste as-generated to ensure that it meets the constituent and heating value specifications of paragraph (a)(1) of this section; and

(*2*) After blending, analyze the fuel again to ensure that the blended fuel meets all comparable fuel specifications.

(viii) Excluded fuel must be re-tested, at a minimum, annually and must be retested after a process change that could change its chemical or physical properties in a manner than may affect conformance with the specifications.

(7) *Speculative accumulation.* Excluded fuel must not be accumulated speculatively, as defined in §261.1(c)(8).

(8) *Operating record.* The generator must maintain an operating record on site containing the following information:

(i) All information required to be submitted to the implementing authority as part of the notification of the claim:

(A) The owner/operator name, address, and RCRA ID number of the person claiming the exclusion;

(B) For each excluded fuel, the EPA Hazardous Waste Codes that would be applicable if the material were discarded; and

(C) The certification signed by the person claiming the exclusion or his authorized representative.

(ii) A brief description of the process that generated the excluded fuel. If the comparable fuel generator is not the generator of the original hazardous waste, provide a brief description of the process that generated the hazardous waste;

(iii) The monthly and annual quantities of each fuel claimed to be excluded;

(iv) Documentation for any claim that a constituent is not present in the excluded fuel as required under paragraph (b)(5)(i) of this section;

(v) The results of all analyses and all detection limits achieved as required under paragraph (b)(4) of this section;

(vi) If the comparable fuel was generated through treatment or blending, documentation of compliance with the applicable provisions of paragraphs (a)(3) and (a)(4) of this section;

(vii) If the excluded fuel is to be shipped off-site, a certification from the burner as required under paragraph (b)(10) of this section;

(viii) The fuel analysis plan and documentation of all sampling and analysis results as required by paragraph (b)(4) of this section; and

(ix) If the generator ships excluded fuel off-site for burning, the generator must retain for each shipment the following information on-site:

(A) The name and address of the facility receiving the excluded fuel for burning;

(B) The quantity of excluded fuel shipped and delivered;

(C) The date of shipment or delivery;

(D) A cross-reference to the record of excluded fuel analysis or other information used to make the determination that the excluded fuel meets the specifications as required under paragraph (b)(4) of this section; and

(E) A one-time certification by the burner as required under paragraph (b)(10) of this section.

(9) *Records retention.* Records must be maintained for a period of three years.

(10) *Burner certification to the generator.* Prior to submitting a notification to the State and Regional Directors, a generator of excluded fuel who intends to ship the excluded fuel off-site for burning must obtain a one-time written, signed statement from the burner:

(A) Certifying that the excluded fuel will only be burned in an industrial furnace, industrial boiler, utility boiler, or hazardous waste incinerator, as required under paragraph (b)(3) of this section;

(B) Identifying the name and address of the facility that will burn the excluded fuel; and

(C) Certifying that the state in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(11) *Ineligible waste codes.* Wastes that are listed as hazardous waste because of the presence of dioxins or furans, as set out in appendix VII of this part, are not eligible for these exclusions, and any fuel produced from or otherwise containing these wastes remains a hazardous waste subject to the full RCRA hazardous waste management requirements.

(12) *Regulatory status of boiler residues.* Burning excluded fuel that was otherwise a hazardous waste listed under §§261.31 through 261.33 does not subject boiler residues, including bottom ash and emission control residues, to regulation as derived-from hazardous wastes.

(13) *Residues in containers and tank systems upon cessation of operations.* (i) Liquid and accumulated solid residues that remain in a container or tank system for more than 90 days after the container or tank system ceases to be operated for storage or transport of excluded fuel product are subject to regulation under parts 262 through 265, 267, 268, 270, 271, and 124 of this chapter.

(ii) Liquid and accumulated solid residues that are removed from a container or tank system after the container or tank system ceases to be operated for storage or transport of

excluded fuel product are solid wastes subject to regulation as hazardous waste if the waste exhibits a characteristic of hazardous waste under §§261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed under §§261.31 through 261.33 when the exclusion was claimed.

(iii) Liquid and accumulated solid residues that are removed from a container or tank system and which do not meet the specifications for exclusion under paragraphs (a)(1) or (a)(2) of this section are solid wastes subject to regulation as hazardous waste if:

(A) The waste exhibits a characteristic of hazardous waste under §§261.21 through 261.24; or

(B) The fuel were otherwise a hazardous waste listed under §§261.31 through 261.33. The hazardous waste code for the listed waste applies to these liquid and accumulated solid resides.

(14) *Waiver of RCRA Closure Requirements*. Interim status and permitted storage and combustion units, and generator storage units exempt from the permit requirements under §262.34 of this chapter, are not subject to the closure requirements of 40 CFR parts 264, 265, and 267 provided that the storage and combustion unit has been used to manage only hazardous waste that is subsequently excluded under the conditions of this section, and that afterward will be used only to manage fuel excluded under this section.

(15) *Spills and leaks*. (i) Excluded fuel that is spilled or leaked and that therefore no longer meets the conditions of the exclusion is discarded and must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste under §§261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed in §§261.31 through 261.33.

(ii) For excluded fuel that would have otherwise been a hazardous waste listed in §§261.31 through 261.33 and which is spilled or leaked, the hazardous waste code for the listed waste applies to the spilled or leaked material.

(16) Nothing in this section preempts, overrides, or otherwise negates the provisions in CERCLA Section 103, which establish reporting obligations for releases of hazardous substances, or the Department of Transportation requirements for hazardous materials in 49 CFR parts 171 through 180.

(c) *Failure to comply with the conditions of the exclusion*. An excluded fuel loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion under this section, and the material must be managed as a hazardous waste from the point of generation. In such situations, EPA or an authorized state agency may take enforcement action under RCRA section 3008(a).

Table 1 to § 261.38--Detection and Detection Limit Values for Comparable Fuel Specification

| Chemical name | CAS No. | Concentration Limit (mg/kg at 10,000 Btu/lb) | Minimum Required Detection Limit (mg/kg) |
|---|---|---|---|
| Total Nitrogen as N | NA | 4900 | ..... |
| Total Halogens as Cl | NA | 540 | ..... |
| Total Organic Halogens as Cl | NA | [a] | ..... |
| Polychlorinated biphenyls, total [Aroclors, total] | 1336-36-3 | ND | 1.4 |
| Cyanide, total | 57-12-5 | ND | 1 |
| Metals: | | | |
| Antimony, total | 7440-36-0 | 12 | ..... |
| Arsenic, total | 7440-38-2 | 0.23 | ..... |
| Barium, total | 7440-39-3 | 23 | ..... |
| Beryllium, total | 7440-41-7 | 1.2 | ..... |
| Cadmium, total | 7440-43-9 | 1.2 | ..... |
| Chromium, total | 7440-47-3 | 2.3 | ..... |
| Cobalt | 7440-48-4 | 4.6 | ..... |
| Lead, total | 7439-92-1 | 31 | ..... |
| Manganese | 7439-96-5 | 1.2 | ..... |
| Mercury, total | 7439-97-6 | 0.25 | ..... |
| Nickel, total | 7440-02-0 | 58 | ..... |
| Selenium, total | 7782-49-2 | 0.23 | ..... |
| Silver, total | 7440-22-4 | 2.3 | ..... |
| Thallium, total | 7440-28-0 | 23 | ..... |
| Hydrocarbons: | | | |
| Benzo[a]anthracene | 56-55-3 | 2400 | ..... |
| Benzene | 71-43-2 | 4100 | ..... |
| Benzo[b]fluoranthene | 205-99-2 | 2400 | ..... |
| Benzo[k]fluoranthene | 207-08-9 | 2400 | ..... |
| Benzo[a]pyrene | 50-32-8 | 2400 | ..... |
| Chrysene | 218-01-9 | 2400 | ..... |
| Dibenzo[a,h]anthracene | 52-70-3 | 2400 | ..... |
| 7,12-Dimethylbenz[a]anthracene | 57-97-6 | 2400 | ..... |
| Fluoranthene | 206-44-0 | 2400 | ..... |
| Indeno(1,2,3-cd)pyrene | 193-39-5 | 2400 | ..... |
| 3-Methylcholanthrene | 56-49-5 | 2400 | ..... |
| Naphthalene | 91-20-3 | 3200 | ..... |
| Toluene | 108-88-3 | 36000 | ..... |
| Oxygenates: | | | |
| Acetophenone | 98-86-1 | 2400 | ..... |
| Acrolein | 107-02-8 | 39 | ..... |
| Allyl alcohol | 107-18-6 | 30 | ..... |
| Bis(2-ethylhexyl)phthalate [Di-2-ethylhexyl phthalate] | 117-81-7 | 2400 | ..... |
| Butyl benzyl phthalate | 85-68-7 | 2400 | ..... |
| o-Cresol [2-Methyl phenol] | 95-48-7 | 2400 | ..... |
| m-Cresol [3-Methyl phenol] | 108-39-4 | 2400 | ..... |
| p-Cresol [4-Methyl phenol] | 106-44-5 | 2400 | ..... |
| Di-n-butyl phthalate | 84-74-2 | 2400 | ..... |

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| Diethyl phthalate | 84-66-2 | 2400 | ..... |
| 2,4-Dimethylphenol | 105-67-9 | 2400 | ..... |
| Dimethyl phthalate | 131-11-3 | 2400 | ..... |
| Di-n-octyl phthalate | 117-84-0 | 2400 | ..... |
| Endothall | 145-73-3 | 100 | ..... |
| Ethyl methacrylate | 97-63-2 | 39 | ..... |
| 2-Ethoxyethanol [Ethylene glycol monoethyl ether] | 110-80-5 | 100 | ..... |
| Isobutyl alcohol | 78-83-1 | 39 | ..... |
| Isosafrole | 120-58-1 | 2400 | ..... |
| Methyl ethyl ketone [2-Butanone] | 78-93-3 | 39 | ..... |
| Methyl methacrylate | 80-62-6 | 39 | ..... |
| 1,4-Naphthoquinone | 130-15-4 | 2400 | ..... |
| Phenol | 108-95-2 | 2400 | ..... |
| Propargyl alcohol [2-Propyn-1-ol] | 107-19-7 | 30 | ..... |
| Safrole | 94-59-7 | 2400 | ..... |
| Sulfonated Organics: | | | |
| Carbon disulfide | 75-15-0 | ND | 39 |
| Disulfoton | 298-04-4 | ND | 2400 |
| Ethyl methanesulfonate | 62-50-0 | ND | 2400 |
| Methyl methanesulfonate | 66-27-3 | ND | 2400 |
| Phorate | 298-02-2 | ND | 2400 |
| 1,3-Propane sultone | 1120-71-4 | ND | 100 |
| Tetraethyldithiopyrophosphate [Sulfotepp] | 3689-24-5 | ND | 2400 |
| Thiophenol [Benzenethiol] | 108-98-5 | ND | 30 |
| O,O,O-Triethyl phosphorothioate | 126-68-1 | ND | 2400 |
| Nitrogenated Organics: | | | |
| Acetonitrile [Methyl cyanide] | 75-05-8 | ND | 39 |
| 2-Acetylaminofluorene [2-AAF] | 53-96-3 | ND | 2400 |
| Acrylonitrile | 107-13-1 | ND | 39 |
| 4-Aminobiphenyl | 92-67-1 | ND | 2400 |
| 4-Aminopyridine | 504-24-5 | ND | 100 |
| Aniline | 62-53-3 | ND | 2400 |
| Benzidine | 92-87-5 | ND | 2400 |
| Dibenz[a,j]acridine | 224-42-0 | ND | 2400 |
| O,O-Diethyl O-pyrazinyl phosphorothioate [Thionazin] | 297-97-2 | ND | 2400 |
| Dimethoate | 60-51-5 | ND | 2400 |
| p-(Dimethylamino) azobenzene [4-Dime thylaminoazobenzene] | 60-11-7 | ND | 2400 |
| 3,3[prime]-Dimethylbenzidine | 119-93-7 | ND | 2400 |
| α,α-Dimethylphenethylamine | 122-09-8 | ND | 2400 |
| 3,3[prime]-Dimethoxybenzidine | 119-90-4 | ND | 100 |
| 1,3-Dinitrobenzene [m-Dinitrobenzene] | 99-65-0 | ND | 2400 |
| 4,6-Dinitro-o-cresol | 534-52-1 | ND | 2400 |
| 2,4-Dinitrophenol | 51-28-5 | ND | 2400 |
| 2,4-Dinitrotoluene | 121-14-2 | ND | 2400 |
| 2,6-Dinitrotoluene | 606-20-2 | ND | 2400 |
| Dinoseb [2-sec-Butyl-4,6-dinitrophenol] | 88-85-7 | ND | 2400 |
| Diphenylamine | 122-39-4 | ND | 2400 |
| Ethyl carbamate [Urethane] | 51-79-6 | ND | 100 |
| Ethylenethiourea (2-Imidazolidinethione) | 96-45-7 | ND | 110 |

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|---|---|---|---|
| Famphur | 52-85-7 | ND | 2400 |
| Methacrylonitrile | 126-98-7 | ND | 39 |
| Methapyrilene | 91-80-5 | ND | 2400 |
| Methomyl | 16752-77-5 | ND | 57 |
| 2-Methyllactonitrile, [Acetone cyanohydrin] | 75-86-5 | ND | 100 |
| Methyl parathion | 298-00-0 | ND | 2400 |
| MNNG (N-Metyl-N-nitroso-N[prime]-nitroguanidine) | 70-25-7 | ND | 110 |
| 1-Naphthylamine, [α-Naphthylamine] | 134-32-7 | ND | 2400 |
| 2-Naphthylamine, [β-Naphthylamine] | 91-59-8 | ND | 2400 |
| Nicotine | 54-11-5 | ND | 100 |
| 4-Nitroaniline, [p-Nitroaniline] | 100-01-6 | ND | 2400 |
| Nitrobenzene | 98-96-3 | ND | 2400 |
| p-Nitrophenol, [p-Nitrophenol] | 100-02-7 | ND | 2400 |
| 5-Nitro-o-toluidine | 99-55-8 | ND | 2400 |
| N-Nitrosodi-n-butylamine | 924-16-3 | ND | 2400 |
| N-Nitrosodiethylamine | 55-18-5 | ND | 2400 |
| N-Nitrosodiphenylamine, [Diphenylnitrosamine] | 86-30-6 | ND | 2400 |
| N-Nitroso-N-methylethylamine | 10595-95-6 | ND | 2400 |
| N-Nitrosomorpholine | 59-89-2 | ND | 2400 |
| N-Nitrosopiperidine | 100-75-4 | ND | 2400 |
| N-Nitrosopyrrolidine | 930-55-2 | ND | 2400 |
| 2-Nitropropane | 79-46-9 | ND | 2400 |
| Parathion | 56-38-2 | ND | 2400 |
| Phenacetin | 62-44-2 | ND | 2400 |
| 1,4-Phenylene diamine, [p-Phenylenediamine] | 106-50-3 | ND | 2400 |
| N-Phenylthiourea | 103-85-5 | ND | 57 |
| 2-Picoline [alpha-Picoline] | 109-06-8 | ND | 2400 |
| Propylthioracil, [6-Propyl-2-thiouracil] | 51-52-5 | ND | 100 |
| Pyridine | 110-86-1 | ND | 2400 |
| Strychnine | 57-24-9 | ND | 100 |
| Thioacetamide | 62-55-5 | ND | 57 |
| Thiofanox | 39196-18-4 | ND | 100 |
| Thiourea | 62-56-6 | ND | 57 |
| Toluene-2,4-diamine [2,4-Diaminotoluene] | 95-80-7 | ND | 57 |
| Toluene-2,6-diamine [2,6-Diaminotoluene] | 823-40-5 | ND | 57 |
| o-Toluidine | 95-53-4 | ND | 2400 |
| p-Toluidine | 106-49-0 | ND | 100 |
| 1,3,5-Trinitrobenzene, [sym-Trinitobenzene] | 99-35-4 | ND | 2400 |
| Halogenated Organics: | | | |
| Allyl chloride | 107-05-1 | ND | 39 |
| Aramite | 140-57-8 | ND | 2400 |
| Benzal chloride [Dichloromethyl benzene] | 98-87-3 | ND | 100 |
| Benzyl chloride | 100-44-77 | ND | 100 |
| bis(2-Chloroethyl)ether [Dichoroethyl ether] | 111-44-4 | ND | 2400 |
| Bromoform [Tribromomethane] | 75-25-2 | ND | 39 |
| Bromomethane [Methyl bromide] | 74-83-9 | ND | 39 |
| 4-Bromophenyl phenyl ether [p-Bromo diphenyl ether] | 101-55-3 | ND | 2400 |
| Carbon tetrachloride | 56-23-5 | ND | 39 |
| Chlordane | 57-74-9 | ND | 14 |

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|---|---|---|---|
| p-Chloroaniline | 106-47-8 | ND | 2400 |
| Chlorobenzene | 108-90-7 | ND | 39 |
| Chlorobenzilate | 510-15-6 | ND | 2400 |
| p-Chloro-m-cresol | 59-50-7 | ND | 2400 |
| 2-Chloroethyl vinyl ether | 110-75-8 | ND | 39 |
| Chloroform | 67-66-3 | ND | 39 |
| Chloromethane [Methyl chloride] | 74-87-3 | ND | 39 |
| 2-Chloronaphthalene [beta-Chloronaphthalene] | 91-58-7 | ND | 2400 |
| 2-Chlorophenol [o-Chlorophenol] | 95-57-8 | ND | 2400 |
| Chloroprene [2-Chloro-1,3-butadiene] | 1126-99-8 | ND | 39 |
| 2,4-D [2,4-Dichlorophenoxyacetic acid] | 94-75-7 | ND | 7 |
| Diallate | 2303-16-4 | ND | 3400 |
| 1,2-Dibromo-3-chloropropane | 96-12-8 | ND | 39 |
| 1,2-Dichlorobenzene [o-Dichlorobenzene] | 95-50-1 | ND | 2400 |
| 1,3-Dichlorobenzene [m-Dichlorobenzene] | 541-73-1 | ND | 2400 |
| 1,4-Dichlorobenzene [p-Dichlorobenzene] | 106-46-7 | ND | 2400 |
| 3,3[prime]-Dichlorobenzidine | 91-94-1 | ND | 2400 |
| Dichlorodifluoromethane [CFC-12] | 75-71-8 | ND | 39 |
| 1,2-Dichloroethane [Ethylene dichloride] | 107-06-2 | ND | 39 |
| 1,1-Dichloroethylene [Vinylidene chloride] | 75-35-4 | ND | 39 |
| Dichloromethoxy ethane [Bis(2-chloroethoxy)methane] | 111-91-1 | ND | 2400 |
| 2,4-Dichlorophenol | 120-83-2 | ND | 2400 |
| 2,6-Dichlorophenol | 87-65-0 | ND | 2400 |
| 1,2-Dichloropropane [Propylene dichloride] | 78-87-5 | ND | 39 |
| cis-1,3-Dichloropropylene | 10061-01-5 | ND | 39 |
| trans-1,3-Dichloropropylene | 10061-02-6 | ND | 39 |
| 1,3-Dichloro-2-propanol | 96-23-1 | ND | 30 |
| Endosulfan I | 959-98-8 | ND | 1.4 |
| Endosulfan II | 33213-65-9 | ND | 1.4 |
| Endrin | 72-20-8 | ND | 1.4 |
| Endrin aldehyde | 7421-93-4 | ND | 1.4 |
| Endrin Ketone | 53494-70-5 | ND | 1.4 |
| Epichlorohydrin [1-Chloro-2,3-epoxy propane] | 106-89-8 | ND | 30 |
| Ethylidene dichloride [1,1-Dichloroethane] | 75-34-3 | ND | 39 |
| 2-Fluoroacetamide | 640-19-7 | ND | 100 |
| Heptachlor | 76-44-8 | ND | 1.4 |
| Heptachlor epoxide | 1024-57-3 | ND | 2.8 |
| Hexachlorobenzene | 118-74-1 | ND | 2400 |
| Hexachloro-1,3-butadiene [Hexachlorobutadiene]. | 87-68-3 | ND | 2400 |
| Hexachlorocyclopentadiene | 77-47-4 | ND | 2400 |
| Hexachloroethane | 67-72-1 | ND | 2400 |
| Hexachlorophene | 70-30-4 | ND | 59000 |
| Hexachloropropene [Hexachloropropylene] | 1888-71-7 | ND | 2400 |
| Isodrin | 465-73-6 | ND | 2400 |
| Kepone [Chlordecone] | 143-50-0 | ND | 4700 |
| Lindane [gamma-BHC] [gamma-Hexachlorocyclohexane] | 58-89-9 | ND | 1.4 |
| Methylene chloride [Dichloromethane] | 75-09-2 | ND | 39 |
| 4,4[prime]-Methylene-bis(2-chloroaniline) | 101-14-4 | ND | 100 |
| Methyl iodide [Iodomethane] | 74-88-4 | ND | 39 |

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| Pentachlorobenzene | 608-93-5 | ND | 2400 |
| Pentachloroethane | 76-01-7 | ND | 39 |
| Pentachloronitrobenzene [PCNB] [Quintobenzene] [Quintozene]. | 82-68-8 | ND | 2400 |
| Pentachlorophenol | 87-88-5 | ND | 2400 |
| Pronamide | 23950-58-5 | ND | 2400 |
| Silvex [2,4,5-Trichlorophenoxypropionic acid].. | 93-72-1 | ND | 7 |
| 2,3,7,8-Tetrachlorodibenzo-p-dioxin [2,3,7,8-TCDD] | 1746-01-6 | ND | 30 |
| 1,2,4,5-Tetrachlorobenzene | 95-94-3 | ND | 2400 |
| 1,1,2,2-Tetrachloroethane | 79-35-4 | ND | 39 |
| Tetrachloroethylene [Perchloroethylene] | 127-18-4 | ND | 39 |
| 2,3,4,6-Tetrachlorophenol | 58-90-2 | ND | 2400 |
| 1,2,4-Trichlorobenzene | 120-82-1 | ND | 2400 |
| 1,1,1-Trichloroethane [Methyl chloroform] | 71-56-6 | ND | 39 |
| 1,1,2-Trichloroethane [Vinyl trichloride] | 79-00-5 | ND | 39 |
| Trichloroethylene | 79-01-6 | ND | 39 |
| Trichlorofluoromethane [Trichlormonofluoromethane] | 75-69-4 | ND | 39 |
| 2,4,5-Trichlorophenol | 95-95-4 | ND | 2400 |
| 2,4,6-Trichlorophenol | 88-06-2 | ND | 2400 |
| 1,2,3-Trichloropropane | 96-18-4 | ND | 39 |
| Vinyl Chloride | 75-01-4 | ND | 39 |

Notes:

NA--Not Applicable.

ND--Nondetect.

([a]) 25 or individual halogenated organics listed below.