ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 266

[EPA–530–Z–94–009; SWH–FRL–5022–4]

Identification and Listing of Hazardous Waste; Amendments to Definition of Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is today excluding from the RCRA regulatory definition of solid waste certain in-process recycled secondary materials utilized by the petroleum refining industry. Specifically today's rule states that oil recovered from petroleum refinery wastewaters and from other sources, both on-site and off-site, is excluded from the regulatory definition of solid waste if it is subsequently inserted (along with normal process streams) into the petroleum refining process prior to crude distillation or catalytic cracking.

EFFECTIVE DATE: This final rule is effective on July 28, 1994.

ADDRESSES: The official record for this rulemaking is identified as Docket Number F–94–SWF–FFFFF and is located in the EPA RCRA docket, Room 2616, 401 M Street SW., Washington, DC 20460. The docket is open from 9:00 to 4:00, Monday through Friday except for Federal holidays. The public must make an appointment to review docket materials by calling (202) 260–9327 The public may copy a maximum of 100 pages from any one regulatory docket at no cost. Additional copies cost $.15 per page.

FOR FURTHER INFORMATION CONTACT: General questions about the regulatory requirements under RCRA should be directed to the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency 401 M Street SW., Washington, DC 20460; Telephone: toll-free at (800) 424–9346, or locally at (703) 412–9810. For the hearing impaired, the number is (800) 553–7672 (toll-free) or (703) 412–3323 (local). For information on specific aspects of today's notice, contact Ross Elliott, Office of Solid Waste (5304), U.S. Environmental Protection Agency 401 M Street SW., Washington, DC 20460, (202) 260–8551.

SUPPLEMENTARY INFORMATION:

Outline of Today's Rule

I. Authority

These regulations are issued under the authority of Sections 2002 and 3001 *et seq.* of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6912 and 6921 *et seq.*

II. Background

A. Statutory Definition of Solid Waste

The statutory definition of solid waste, RCRA Section 1004 (27), is the starting point for determining RCRA Subtitle C jurisdiction. This is because the term "hazardous waste" is a subset of "solid waste." RCRA Sections 1004 (5) and 1004 (27). The statutory definition of solid waste indicates that "garbage, refuse, sludge and other discarded material" are solid wastes. The critical issue is when secondary materials (see definition at 50 FR at 616 n. 4, Jan. 4, 1985) that are going to be recycled can be solid wastes. Today's rulemaking addresses this question for certain operations commonly occurring in the petroleum refining and related industries.

The reader should note that EPA is conducting an assessment of the RCRA Definition of Solid Waste, as described in the EPA report, *RCRA Implementation Study Update.*[1] This ongoing effort may result in proposed regulatory changes to the definition set forth in 40 CFR 261.2 and related requirements. Today's action, however, is fairly narrow, applying to situations where certain oil-bearing secondary materials are used or reused within the petroleum refining process. EPA will continue its broad policy review of the Definition of Solid Waste, but deemed unnecessary any delay in issuing today's rule.

B. Prior Litigation

In its decision in *American Mining Congress* v. *EPA*, 824 F 2d1177 (D.C. Cir. 1987) (*AMC I*), a divided panel of the District of Columbia Circuit held that the Agency s rules defining the statutory term "solid waste," RCRA Section 1004 (27), exceeded the Agency's statutory authority to the extent that the rules asserted RCRA authority over "materials that are recycled and reused in an *ongoing* manufacturing or industrial process. *Id.* at 1186 (emphasis original). Because "these materials have not yet become part of the waste disposal problem" *id.*, they are not yet "discarded" within the meaning of Section 1004 (27) and so cannot be considered to be "solid wastes. Subsequent judicial decisions confirm that the holding in *AMC I* is limited to situations involving "materials that are 'destined for *immediate reuse* in another phase of the industry's ongoing production process' and that 'have not yet become part of the waste disposal problem. *American Mining Congress* v. *EPA*, 907 F 2d 1179, 1186 (D.C. Cir. 1990 (*AMC II*) (emphasis original); *American Petroleum Inst.* v *EPA*, 906 F 2d 729, 740–41 (D.C. Cir. 1990) (*API*); *Shell Oil* v. *EPA*, 950 F 2d 741, 755–56 (D.C. Cir. 1991); *Chemical Waste Management* v *EPA*, 976 F 2d 2,

[1] RCRA *Implementation Study Update: The Definition of Solid Waste*, U.S. EPA, July 1992, #EPA530–R–92–021.

14 (D.C. Cir. 1992), *cert. denied* 113 S.Ct. 1961 (1993).

C. January 8, 1988 Proposal

On January 8, 1988, EPA proposed rules to implement the *AMC I* opinion. Of particular significance to today's action, EPA proposed certain amendments relating to the scope of the regulatory definition of solid waste as applied to operations occurring within the petroleum refining industry. In particular, the Agency proposed to exclude from the regulatory definition of solid waste secondary materials associated with "on-going fuel production activities in the petroleum refining industry. These activities involve situations where crude oil is refined, and oil-bearing residues from that refining process are returned for further refining as part of one continuous and on-going process." 53 FR at 525 (Jan. 8, 1988). The Agency specifically proposed to exclude oil-bearing residues from the refining process when those residues are generated on-site and inserted into that on-site petroleum refining process or coker, provided that these residues are not managed in such a way as to be "characterized by elements of discard" such as placement in a disposal unit like a surface impoundment. *Id.* EPA is not taking any action today with respect to the portions of the January 8, 1988 proposal dealing with non-petroleum materials. These issues are being addressed by other on-going Agency activities (see above, Section II.A.). The Agency is, as described below taking final action with respect to the petroleum materials.

D. Description of Petroleum Exploration, Development & Production, and the Petroleum Refining Process

The presence of petroleum in geologic formations is confirmed by the drilling of exploratory wells. Once located, the development of a petroleum reservoir includes the drilling of additional wells to extract the oil or gas, and well completion and stimulation techniques designed to increase the recovery of oil or gas from that reservoir. Petroleum production generally includes all the activities associated with the recovery of petroleum from the geologic formation. These production activities involve the operation and maintenance of the producing well, and the handling and separation of the recovered crude oil, natural gas, natural gas liquids, and water. The separation of water/crude oil emulsions is performed in tanks by gravity settling, or heat may be added to separate emulsions. Crude oil is then transported via pipeline, vehicle or vessel to stock tanks and ultimately to the refinery.

Petroleum refining involves several manufacturing operations and processes, including crude desalting, atmospheric and vacuum distillation, hydrotreating, catalytic cracking, thermal processing and residual upgrading, light hydrocarbon processing, hydrocracking, catalytic reforming, extraction, isomerization, lubricating oil processing, sulfur removal and recovery and product blending and inventory. Products manufactured from petroleum refining include hydrogen, fuel gas, sulfur, liquified petroleum gas, butane, aromatic feedstocks, leaded and unleaded motor gasolines, jet fuel, kerosene, diesel, heating oil, fuel oil, and asphalt. See generally, 55 FR at 46359 (Nov 2, 1990); and EPA's Development Document for the effluent guidelines for the petroleum refining industry [2]

E. Petroleum Refining Wastewater Treatment

Petroleum refining operations generate large amounts of wastewater that require treatment in order to reduce or remove wastewater pollutants so as to produce effluent that meets discharge requirements of the Clean Water Act. Principal sources of wastewater are refinery process units (where wastewater comes in direct contact with oil), as well as oily cooling waters from cooling towers and heat exchangers. Storm water, which may be subject to minor oil contamination from leaks or spills, is also a type of wastewater at a petroleum refinery.[3]

Wastewater treatment systems at petroleum refineries generally consist of: (1) a drainage and collection system to collect and carry wastewaters to treatment units; (2) a primary treatment system to separate oil/water/solids, and (3) a secondary treatment system, normally involving biological treatment, to remove soluble biodegradable wastewater pollutants. Some refineries have tertiary treatment systems as well, consisting of water polishing steps before discharge. Secondary and tertiary treatment is frequently conducted using surface impoundments. Primary treatment, i.e. the initial separation of water, oil, and solids, normally occurs in tanks.

F. Recovered Oil and Recovered Oil Systems

Today's rule deals primarily with the status under RCRA Subtitle C of recovered oil which is returned to the petroleum refining process. "Recovered oil" is a generic term that applies to secondary materials consisting primarily of oil such as oil separator skimmings from plant wastewaters, slop oil and emulsions, oil skimmed from ballast water tanks, and oil from refinery process units (*e.g.*, off-specification process streams). As explained in detail below today's rule excludes from the definition of solid waste recovered oil from petroleum exploration and production, petroleum refining, and transportation incident to either of these activities, when the recovered oil is reinserted into a petroleum refining process. The exclusion does not apply to recovered oil generated from petroleum operations downstream of refining such as marketing or retail sales—because this oil is already excluded for the most part, as discussed below — or from non-petroleum industry operations.

This rule also does not exclude hazardous sludges (such as wastes K048, K051, or F037) or other similar wastes from regulation. Distinguishing between these wastes and recovered oil is sometimes difficult. Factors EPA will consider in making this distinction include water content, solids content, and potentially metals content. See generally 50 FR at 49170 n. 16 (Nov. 29, 1985). EPA repeats, however, that the salient characteristic of recovered oil is the obvious one: that it consist primarily of oil.

Used oil also is not a type of recovered oil, and hence remains subject to the applicable regulations for used oil. See generally 59 FR 10550 (March 4, 1994). The only exception is when *de minimis* quantities of used oil are incidentally captured by refinery wastewater treatment systems. This could occur, for example, when small leaks, spills, or drippings of used oil from machinery, pumps, or other refinery equipment during normal operations are lost to the wastewater treatment system. In these instances, the used oil present in de minimis quantities in wastewater is not subject to the used oil standards. See generally 57 FR at 41566 (Sept. 10, 1992).

The objective of a recovered oil system is to gather and recycle oil generated throughout the refinery, or (to a lesser extent) generated from off-site

[2] Section III of *Development Document for Effluent Limitations Guidelines, New Source Performance Standards and Pretreatment Standards for the Petroleum Refining Point Source Category*, U.S. EPA, October 1982, National Technical Information Service #PB838-172569.

Id., and see *Manual on Disposal of Refinery Wastes: Volume on Liquid Wastes*, American Petroleum Institute, 1969, pp. 3-4 to 3-5.

sources.[4] Recovered oil operations almost always occur in tanks, usually a series of tanks that successively purify the oil to the point where it is sufficiently clean and dewatered to be inserted into the petroleum refining process. 53 FR at 525. Some oil is collected directly from process units and sent by means of pipes or vacuum trucks to the refinery's dedicated oil tanks. Occasionally this recovered oil is of sufficient purity that it can be inserted directly into the refining process with little or no treatment in the recovered oil system.

Recovered oil from plant wastewater operations is most often a water-in-oil emulsion, which is sent first to tanks where gravity separates much of it into oil, emulsion, and water layers. The intermediate layer of emulsions then may be sent to other tanks where it will undergo further emulsion-breaking treatment (e.g., mechanical centrifuging, heating, or chemical additives). At the end of each stage, the separated water is returned to the refinery oil/water separators, while the oil is either further treated or, if sufficiently dewatered, is returned to one or more refinery process units. These may include crude oil distillation or catalytic cracking units.[5]

C. Status of Wastewater Streams, Wastewater Treatment Units, Recovered Oil, and Recovered Oil Systems Under Current RCRA Rules

Under present RCRA regulations, petroleum refinery wastewaters upstream of a wastewater discharge that is subject to regulation under Sections 307(b) or 402 of the Clean Water Act, are solid wastes. See 40 CFR 261.4(a)(1) and (2). Such petroleum refinery wastewaters are hazardous if they exhibit a characteristic of hazardous waste, or are listed hazardous wastes (although there are presently no specific hazardous waste listings for petroleum refining industry wastewaters). Petroleum refining wastewater storage and treatment operations generate a number of listed hazardous wastes. In particular, sludges from primary treatment operations are listed under the generic F037 and F038 listings. Sludges from Dissolved Air Flotation (DAF) wastewater treatment units and API separators (particular types of primary wastewater treatment devices) are listed as wastes K048 and K051, respectively. Slop oil systems generate listed wastes as well: slop oil emulsion solids are listed as K049. Also, EPA is studying additional petroleum refining wastes as part of a listing determination required by RCRA 3001 (e)(2).

In addition, petroleum refineries typically generate large volumes of wastes that exhibit hazardous waste characteristics. Individual wastewater streams upstream of wastewater treatment may exhibit the Toxicity Characteristic, particularly for chromium, lead and benzene (see 40 CFR 261.24), or the characteristics of corrosivity or ignitability (40 CFR 261.21 and 261.22, respectively). These wastewaters may also contain other hazardous constituents that are not part of the Toxicity Characteristic. See Tables in Section V *Development Document for Effluent Limitations Guidelines, New Source Performance Standards and Pretreatment Standards for the Petroleum Refining Point Source Category*. Sludges generated from secondary or tertiary wastewater treatment also may exhibit one or more hazardous waste characteristics.

Tanks storing listed wastes which engage in primary wastewater treatment operations are presently exempt from federal Subtitle C regulation because they are wastewater treatment units (*i.e.* tanks). 40 CFR 264.1 (g)(6) and 265.1 (c)(10). Hazardous wastes removed from those units are subject to regulation upon exiting the tanks. However, recovered oil is exempt from Subtitle C regulation, as is any fuel produced from such oil, under the current exemptions at § 261.6 (a)(3)(iv)–(vii). The units engaged in recovered oil operations would also be exempt under current regulations, to the extent that these units are managing materials exempt under § 261.6 (a)(3)(iv)–(vi).

III. Summary of Today's Final Rule

EPA is finalizing a revised version of the January 8, 1988 proposal in today's notice. The final rule states in essence that recovered oil from petroleum refinery operations, petroleum exploration and production, and transportation incident thereto, is excluded from the regulatory definition of solid waste if it is subsequently inserted into the petroleum refining process prior to crude distillation or catalytic cracking. The recovered oil thus need not be generated at the site of the refining process—a potentially significant expansion of the proposal. This exclusion applies, however, only if the oil is not managed in land disposal units or accumulated speculatively before it is inserted.

EPA expects that most of the recovered oil affected by this rule will be generated from wastewater treatment operations. As explained below EPA is narrowing the proposal (which would have excluded petroleum refining wastewaters containing oil that eventually gets recycled) by finding that refinery operations upstream of recovered oil systems involve wastewater treatment, not an on-going refining process. Thus, petroleum refinery wastewaters undergoing treatment should not be excluded from the definition of solid waste. In addition, even if these wastewater treatment operations are characterized as also involving recycling, the operations involve discarded residuals that can be part of the waste disposal problem, and hence the wastewater treatment operations need not be characterized as part of an "ongoing production process" for purposes of excluding materials from the definition of solid waste. Once oil is recovered, however, the Agency believes it reasonable to exclude it from the definition of solid waste if the oil is to be reused in the refining process (even though the oil may still require a significant amount of further processing before it can actually be so reused). This is because the recovered oil and its management within refining operations can be viewed as part of the petroleum refining process and not part of the waste disposal problem.

EPA is also slightly amending the regulatory exemption for petroleum coke produced using oil-bearing refinery hazardous waste (see § 261.6 (a)(3)(vii), redesignated (a)(3)(vi) in today's rule). The Agency is slightly broadening the current exemption so that it also applies to coke produced by a single petroleum refining entity, but the coker is located at a different facility from where the hazardous wastes are generated.

As a matter of drafting, the principal change brought about by today's rule takes the form of an exclusion from the regulatory definition of solid waste. Specifically, paragraph (12) is being added to the list of exclusions in § 261.4 (a). In addition, EPA is removing the regulatory exemption in § 261.6(a)(3)(v) which is superseded by today's exclusion, and redesignating the remaining exemptions in § 261.6(a)(3) (vi) and (vii) as § 261.6(a)(3) (v) and (vi), respectively, in order to maintain consecutive numbering. EPA is also revising two other regulatory exemptions in § 261.6(a)(3). Finally, EPA is making conforming changes to §§ 261.3(c)(2)(ii)(B) and 266.100(b)(3), both as a result of today's rulemaking, and to reflect conforming changes that EPA inadvertently omitted during promulgation of the used oil final rule (57 FR 41566 (September 10, 1992)).

[4] See RCRA Docket No. F–87–SWRP–FFFFF submission by the American Petroleum Institute on "Recovered Refinery Oil System" April 16, 1993.

[5] *Id*

IV Scope of Today's Final Rule

A. Limiting Scope to Recovered Oil From Petroleum Refining, Exploration and Production

As noted above, today's rule excludes recovered oil generated from petroleum exploration, production and refining activities, and from the transportation incident thereto, from being a solid waste when the recovered oil is inserted into a designated point in a petroleum refining process. This section of the preamble discusses why EPA is crafting the exclusion in this manner. More specifically we discuss why the exclusion does not cover oil recovered in operations downstream from petroleum refining, and why the exclusion does not apply to recovered oil from industries other than petroleum refining, exploration, or production.

EPA is not excluding recovered oil from operations downstream of refining, such as marketing or retail sales, because such oil is already excluded from regulation (so long as it is not disposed of). Under existing section 261.33, unused commercial chemical products that are recycled in most manners are not solid wastes when they are recycled. This principle applies to unused fuels that are recycled by being returned to fuel-production processes. (See also RCRA section 3004 (q)(l), establishing a similar principle.) Thus, for example, if a bulk oil storage terminal has a spill of product and is able to capture the spill and return it to a refinery or other legitimate fuel production operation, the spilled product is not a solid waste. (As noted at 55 FR 22671 (June 1, 1990) however, mere assertion of an intent to recycle a commercial product spill does not convert the spill into a non-waste. There must be objective indicia that recycling is reasonable, and that it will occur in a timely manner.)

For different reasons, EPA is not extending the exclusion to recovered oil from non-petroleum industries. First, such an exclusion is beyond the scope of the proposed rule. It is also beyond the scope of the judicial decisions construing the definition of solid waste. These decisions indicate that when one industry sends its residual materials to another industry for recycling, the initial industry can be considered to have discarded them. *API* v. *EPA*, 906 F 2d at 741–42; *Ilco* v. *EPA*, 996 F 2d 1126 (11th Cir. 1993). EPA is also concerned that when recovered oil originates with non-petroleum industries, the likelihood increases that the oil can be contaminated with toxic constituents that would not normally be found in petroleum industry recovered oil. See generally 56 FR at 48009 (Sept. 23, 1991); and see, e.g., EPA s Development Document for effluent guidelines for the iron and steel industry (skimmed oil from iron and steel industry contains contaminants not found in petroleum recovered oil).[6] Such oily material consequently is more likely to differ from the feedstocks customarily processed by refineries and thus need not be viewed as part of that process, and may also pose risks that can be viewed as part of the waste disposal problem. Finally the Agency is studying this issue under the aegis of the Solid Waste Definition Task Force and is not at a point where it is in a position to make a final determination.[7]

B. Rationale for Excluding Recovered Oil and Not Wastewater from Being a Solid Waste

EPA is also determining today that the oil that is skimmed from plant wastewaters during wastewater treatment (normally during the initial oil/water/solids separation step occurring during primary wastewater treatment), as well as oil recovered from other sources, is not a solid waste if it is going to be inserted into the refining process prior to the point in the process where crude distillation or catalytic cracking occurs. Thus, the recovered oil systems themselves would not be waste management units. (These units may however, contain hazardous wastes, such as K049, which become subject to regulation when removed from such units. See 40 CFR 261.4 (c), which says that hazardous waste regulation does not begin for (among other things) hazardous waste which is generated in an associated non-waste-treatment-manufacturing unit until the waste is removed from the unit.)

The petroleum industry argued in its public comments to the January 8, 1988 proposal that plant wastewaters containing oil are not solid wastes either. Rather, they characterize the primary wastewater treatment operations in which oil is skimmed from plant waters as still being part of the refining process. Thus, the argument goes, any step at a refinery that involves some recovery of oil for further use is still part of the ongoing refining process and cannot involve solid waste under the holding of *AMC I*.

EPA disagrees with respect to primary wastewater treatment operations. These operations do not involve secondary materials that are "recycled and reused in an *ongoing* manufacturing or industrial process" *AMC I*, 824 F 2d at 1186 (emphasis original); *see also AMC II*, 907 F 2d at 1186 (*AMC I* concerns only "materials that are 'destined for *immediate reuse* in another phase of *the industry's* ongoing production process' ") (emphasis original). Primary wastewater treatment operations exist to treat plant wastewater. The percentage of oil in plant wastewaters that form the influent to primary wastewater treatment is minuscule, on the order of .0001 % to .000001 % (*i.e.* from 1 to 100 parts per million oil). See Tables in Section V *Development Document for Effluent Limitations Guidelines, New Source Performance Standards and Pretreatment Standards for the Petroleum Refining Point Source Category.* While some oil may be recovered from this wastewater (an activity the Agency certainly encourages, and indeed requires to prevent the oil's discharge to surface waters and POTWs), the amounts are not significant in the context of a refinery's overall production activities. Clearly wastewater treatment is the main purpose of the systems in question, and any oil recovery is of secondary import.

Refinery wastewater is not a "secondary material immediately reused within an industrial process" *Chemical Waste Management* v. *EPA*, 976 F 2d at 14. Primary wastewater treatment is the first step in the wastewater treatment process that purifies the discarded wastewaters from the refining process so that those discarded waters can ultimately be discharged to navigable waters pursuant to Clean Water Act requirements. That a small amount of oil is removed from these wastewaters in the course of treatment does not make wastewater treatment a petroleum refining operation. Put another way, the fact that a small amount of oil may be recovered from large volumes of the discarded plant wastewaters does not require EPA to consider those operations to involve non-discarded materials, and hence to exclude all of the materials going to primary wastewater treatment operations from the definition of solid waste. *AMC II*, 907 F.2d at 1186–7 ("discarded" is an

[6] Volumes I–V of *Development Document for Effluent Limitations Guidelines and Standards for the Iron and Steel Manufacturing Point Source Category*, U.S. EPA, May 1982, National Technical Information Service #PB82–240–425, –433, –458, –466, and –474. See specifically Volume III, pp. 395–398; Volume IV pp. 107–129; Volume V p. 227.

[7] EPA also notes that when Congress created certain exemptions (not exclusions) from hazardous waste fuel labelling requirements to accommodate certain petroleum industry practices involving recovered oil, it limited the scope of those exemptions to fuels produced from oily materials "resulting from normal petroleum refining, production and transportation practices" RCRA section 3004 (r)(3). This is similar to the scope of today rule.

ambiguous term that EPA may interpret in a reasonable manner, and EPA's interpretation that recoverable materials managed in wastewater treatment operations containing surface impoundments were discarded solid wastes was reasonable).

On the other hand, recovered oil systems can be legitimately viewed as part of the petroleum refining process. The input to the recovered oil systems is primarily oil skimmed from wastewater treatment operations as well as oil recovered from other sources, not discarded refining process wastewaters. Recovered oil systems do not exist to ove contaminants from wastewater. her, their purpose is to restore overed oil to sufficient purity so that an be reused as a feedstock material he refining process. This is a natural nt to characterize activities as being t of the refining process. t is thus EPA's view that until oil is overed from refinery process stewaters, the wastewaters are carded materials and hence solid stes potentially subject to regulation der RCRA.[8] (Wastewaters remaining r oil has been recovered are still id wastes, and are typically returned n upstream point in the refinery's stewater treatment system.) The oil overed from such wastewaters is not olid waste, however (assuming it is nserted into the refining process). s reading is not only in accord with mmon sense, as explained above, but o is in accord with RCRA's goals and rposes. *AMC II*, 907 F 2d at 1186–87· *I*, 906 F 2d at 740–41. As these cases ke clear, EPA may ordinarily sider secondary materials that have ecome part of the waste disposal oblem to be discarded. *API*, 906 F. at 741, *AMC II*, 907 F 2d at 1186. at is the case here. Discarded plant stewaters up to and including the mary wastewater treatment step, can ntain high loadings of hazardous nstituents that may pose vironmental harm if released. It is imated that an average of 34% of the benzene (a human carcinogen) entering a petroleum refinery's wastewater treatment system is emitted to air from the wastewater collection portion of the system; when primary wastewater treatment (i.e., a non-enclosed oil-water separator) is included in this calculation, the amount of benzene emitted relative to the influent concentration rises to 47%.[9] Primary wastewater treatment also is sometimes conducted in land-based or in-ground units, which can (and have) resulted in environmental contamination.[10] This further indicates that these operations can be part of the waste management problem.

In addition, petroleum refineries frequently generate individual wastewater streams that exhibit characteristics of hazardous waste, which streams are mixed together so that the characteristic is removed. (The characteristic can be removed either before or during primary treatment.) These aggregated wastewater streams may still contain high volumes of hazardous constituents, however, because aggregation (i.e. dilution) and primary treatment do not significantly remove or destroy all hazardous constituents. See Tables in Section V *Development Document for Effluent Limitations Guidelines, New Source Performance Standards and Pretreatment Standards for the Petroleum Refining Point Source Category*. The aggregated wastewaters are then managed in surface impoundments, where biological treatment occurs. The D.C. Circuit has made clear, in *Chemical Waste Management* v. *EPA*, that in such circumstances the decharacterized wastewaters cannot be managed in surface impoundments unless they have first been treated to meet the treatment requirements of RCRA Section 3004(m) (requiring treatment that substantially removes or destroys hazardous constituents so that threats to human health and the environment are minimized), or unless treatment equivalent to Section 3004(m) treatment occurs before the wastewaters are discharged. *Id.* at 7 20–24.[11] The court indeed repeatedly referred to these treatment standards as the core of RCRA's hazardous waste management scheme. *Id.* at 23, 24.

EPA's interpretation that the influent into primary wastewater treatment consists of discarded wastes, not in-process petroleum, is fully in accord with these core principles of RCRA. Decharacterized wastewaters that are going to be managed in surface impoundments would nevertheless receive Section 3004 (m) treatment before their ultimate discharge, as required by the *Chemical Waste Management* opinion. Under industry's preferred reading, however, the decharacterized wastewaters would not be solid wastes at all until all oil recovery has been completed, even if held in impoundments. At that point, the wastewaters would no longer exhibit a characteristic (because they have been diluted through aggregation), and thus would not be prohibited wastes subject to Section 3004 (m) treatment. The "core principles of RCRA" would thus be avoided. EPA considers its interpretation of "discarded, that assures proper treatment of characteristically hazardous petroleum refinery wastewaters that are going to be managed in surface impoundments, to be more reasonable.[12]

EPA acknowledges that it initially proposed to exclude all such wastewaters from the definition of solid waste. 53 FR 525–526. However, the Agency's reasoning was based in part on the same mistaken view of the scope of *AMC I* that was later rejected by the *API* court. 906 F. 2d at 740–41. (EPA even relied in part on the overbroad "indigenous" concept, 53 FR 525, 526, that was remanded in *API*. 906 F 2d at 739, 742.) The Agency is obviously not bound by its proposal, and subsequent case law makes clear that the Agency has more interpretive discretion than it imagined in 1988. The interpretation adopted in today's rule is reasonable and in accord with statutory goals and purposes.

Nor is today's action inconsistent with *AMC I's* statements regarding the scope of petroleum refining activities that are outside the scope of Subtitle C. That opinion indicated that in

On similar note, the Agency is aware of vities at petroleum management facilities where -phase hydrocarbon (from spills, etc.) is oved from the water table as part of ndwater remediation (see 56 FR at 13406 (Apr. 991)). These hydrocarbon recovery operations recover materials ranging from mostly water to tly oil; only recovered materials that are narily oil, and that can be inserted into a nery's recovered oil system without reatment (or can be inserted directly into the ning process itself), would be considered covered oil" eligible for today's exclusion. The nagement of petroleum-contaminated ndwater in separation and treatment units is rly solid waste (and potentially hazardous ste) management, essentially wastewater tment.

[9] The Agency addressed benzene emissions from waste operations in a final rule published January 7 1993 (58 FR 3072) using risk-based standards for benzene. See also EPA, *Final NESHAP Standards for Waste Operations: Basis for Impact Calculations*, February 16, 1990. This document is available in the Benzene Waste Operations NESHAP docket.

[10] "Background Document to Support Listing of Primary Oil/Water Separation Sludges from the Petroleum Refining Industry," U.S. EPA, December 22, 1989, pp. 6, 10–12.

EPA is still working to interpret the scope of the "equivalence" requirement in the *Chemical Waste Management* opinion, and the language in the text should not be taken as representing the Agency's resolution of the issue. It is clear, however, that the opinion imposes obligations on facilities that use impoundments to manage wastewaters that are decharacterized by means other than full-scale section 3004 (m) treatment.

[12] EPA views the facts here as similar to those in the *AMC II* case. In particular, both situations involve wastewater treatment operations, where plant wastewaters could ultimately be managed in surface impoundments.

petroleum refining operations "(a)ny hydrocarbons that are not usable in a particular form or state are returned to an appropriate stage in the refining process so they can eventually be used. Likewise, the hydrocarbons and materials which escape from a refinery s production vessels are gathered and, by a complex retrieval system, returned to appropriate parts of the refining process." 824 F 2d at 1181. Today's rule does not assert RCRA jurisdiction over any refining operations that process hydrocarbons into products, nor over hydrocarbons that are lost from process vessels and are gathered for return to refining. Rather, the Agency is stating that up to and including primary wastewater treatment, plant wastewaters are just that, and their management is potentially subject to Subtitle C controls. Oil that is recovered from wastewater, however, is no longer a solid waste, and recovered oil systems that do engage in retrieval of hydrocarbons for eventual refining are not subject to RCRA controls.[13]

C. Rationale for Excluding Recovered Oil From Off-Site Sources

Today's final rule, in defining the scope of recovered oil subject to the exclusion, excludes recovered oil from both off-site and on-site sources. EPA believes that recovered oil from petroleum refining, exploration and production, and transportation incident thereto, whether generated from these off-site or on-site sources, is essentially the same raw material (i.e., "oil") as that which is normally and routinely transported to, and inserted into, petroleum refining processes. Therefore, recovered oil from off-site sources should also be excluded when it is going to be recycled in this manner.[14] Examples of off-site sources of recovered oil include oil recovered from other petroleum refineries, and from oil and gas drilling operations.[15]

This exclusion is somewhat broader than that proposed in the January 8, 1988 notice, which would have limited the exclusion to materials generated on-site. 53 FR 525. However, the 1988 proposal would not have been limited to recovered oil, but rather would have included all oil-bearing secondary materials, so that the Agency was particularly concerned with limiting the exclusion's scope because such materials as listed sludges, tank bottoms and contaminated media could be excluded. *Id.* In addition, if the exclusion was to cover oil-bearing hazardous secondary materials, EPA was concerned that RCRA Section 3004(r)(2) would be rendered meaningless. *Id.* These concerns are no longer present when the exclusion is limited to recovered oil.

The main reason for extending the exclusion to recovered oil generated at locations other than a refinery (when such oil is ultimately returned to a refinery) is that the oil is essentially the same (in terms of physical composition and potential risk) as recovered oil generated on-site. (The only significant difference is that recovered oil generated off-site is transported—in the same manner as crude oil. EPA does not regard this distinction as significant enough to warrant different regulatory status for off-site recovered oil.) The Agency thus is responding to comments received from industry urging the Agency to extend the scope of the exclusion to certain off-site activities. However, these commenters argued further that refineries comprise but one segment of a large, integrated industry, extending from the production field, through the pipeline, to the refinery, to the marketing terminal, to tank trucks, and, ultimately to the customer. EPA does not necessarily accept this argument, which is unnecessary to justify today's rule. Again, EPA will continue its broader policy review of the Definition of Solid Waste. EPA notes as well that the action in today's rule is not precedential for other industries. Determining what activities are a part of on-going production activities and not part of the waste disposal problem necessarily entails fact-specific evaluation. The Agency's conclusions regarding secondary materials generated by particular industries thus need not be germane to the regulatory status of secondary materials generated by other industries.

V. Rationale for Conditioning the Exclusion on Recovered Oil Not Being Placed on the Land and Not Being Accumulated Speculatively

This rule does not exclude land-based hazardous waste management units from which oil may be recovered. Thus, if recovered oil, or material containing oil, is placed in land-based units such as surface impoundments or land treatment units, those units remain subject to Subtitle C requirements (provided the material being placed is hazardous under RCRA). The Agency considers material placed in such units to be discarded, and hence solid wastes. See also *AMC I*, 824 F 2d at n.20. These are classic disposal practices (see RCRA Section 1002(b)(7)), and placement of oily materials in such units (whether for storage, treatment, or disposal) is inconsistent with the use of the material as a valued product. In addition, the D.C. Circuit held in *AMC II* that materials destined for recycling were still solid wastes if held in surface impoundments before being recycled (907 F 2d at 1186).

The final condition for the exclusion to apply is that recovered oil not be accumulated speculatively (as defined in § 261.1(c)(8)) before it is recycled back into a petroleum refining process. This is a standard condition that the Agency applies to otherwise excluded secondary materials (see, e.g., § 261.2(e)(2)(iii)) to prevent the materials being held for prolonged periods without being recycled, with attendant increased environmental risk. See 50 FR at 634–635, 658–661 (Jan. 4, 1985). No commenter seriously questioned applying this condition. Thus, recovered oil that would otherwise be excluded that is accumulated speculatively is considered to be discarded and hence a solid waste.

VI. Rationale for Not Excluding Recovered Oil That Is Inserted Into the Petroleum Refining Process After Crude Distillation or Catalytic Cracking (i.e., Into a Petroleum Coker)

Today's final rule is narrower in scope than the January 8, 1988 notice in that the Agency is not finalizing the

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[13] The Agency also views its action as consistent with its rulemaking involving residues from coke by-product operations that are returned to the coking process, or related processes. 57 FR 27880 (June 22, 1992). The Agency stated that such materials were not solid wastes provided they were not land disposed before reinsertion. See 40 CFR 261.4(a)(10). However, unlike the petroleum wastewaters containing small amounts of oil at issue here, the coke byproduct residues were found to be very similar to the raw material being replaced, and required no further purification to be usable. They could be inserted more or less directly into the coking or related tar-refining processes. Such residues are conceptually analogous to the purified oil coming from a petroleum slop oil facility.

[14] Certain wastes from petroleum exploration, development and production are currently exempt from Subtitle C regulation under § 261.4(b)(5). There may be a degree of overlap between the materials excluded by today's action, and materials currently exempt under § 261.4(b)(5). See 53 FR at 25446 (July 6, 1988), 58 FR 15284 (Mar. 22, 1993), and *Report to Congress, Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy, Volumes 1–3 and Executive Summaries*, December 1987 EPA/530–SW–88–003, for descriptions and clarifications of exempt and non-exempt wastes from oil and gas exploration, development, and production.

[15] As noted above, recovered oil does not include "used oil" (as defined in 40 CFR 279.1) brought to a refinery from off-site sources. (*De minimis* quantities of used oil that are incidentally captured by refinery wastewater treatment systems and subsequently recovered with other oil are not considered used oil.) See 57 FR 41566 (September 10, 1992) and 59 FR 1994 (March 4, 1994) for discussion on the scope of the definition of used oil. See also Section X.C.2 "Used Oil" later in this preamble.

proposed exclusion of recovered oil that is converted to petroleum coke. EPA is deferring the exclusion at this time because EPA lacks data assuring that hazardous constituents from petroleum refining do not end up in the product in quantities that, when such product is utilized as a fuel, could be harmful to human health and the environment. EPA is also concerned that toxic constituents, such as heavy metals, can be discarded by simple incorporation into the coke product. In effect, the product would be used as a disposal medium for toxic constituents, and so could be part of the "waste disposal problem. The Agency also lacks sufficient data to show whether oil recovered from refinery wastewater treatment systems contains toxic metals that are not present in the normal feed to a petroleum coker. Such metals could end up in the coke product.

In contrast, the Agency is excluding recovered oil inserted at or before a point in the refining process designed to remove toxic metal and organic contaminants, *i.e.*, prior to crude distillation or catalytic cracking. See 50 FR 28725 (July 15, 1985) and 50 FR 49169 (November 29, 1985). As explained there, the distillation process splits the feedstock into fractions based on the differing boiling points of feedstock components. Data submitted by API at that time indicated that most metals concentrate in the heavier petroleum fractions, thereby increasing the probability of contaminant removal from many fuel fractions produced using distillation (and other contaminant-removing processes). See 50 FR 49170.

Although the proposed exclusion of recovered oil that is converted to petroleum coke is not being finalized in today's rule, for different reasons EPA is slightly amending the regulatory exemption at § 261.6(a)(3)(vii) (redesignated § 261.6(a)(3)(vi) in today's rule) for petroleum coke produced using oil-bearing refinery hazardous waste. The exemption states that such coke is subject to regulation only if it exhibits a characteristic of hazardous waste. (The exemption recites the provisions of RCRA section 3004(q)(2)(A).) The purpose of the statute, and the exemption, is to allow petroleum companies to recycle their oily refinery waste to their petroleum coker, without automatically subjecting the coke output to the rules applicable to hazardous waste fuels. (Such automatic effect could occur without the exemption, if listed wastes are being reinserted into the coker, because of the derived-from rule.) S. Rept. No. 298, 98th Cong. 1st Sess. 39 (1983).

Both the statutory and current regulatory exemption, however, are worded so as to apply only to situations where petroleum coke is produced from hazardous wastes "at the same facility at which such wastes were generated *". EPA believes that this limitation is unnecessarily narrow and does not foreclose a regulatory expansion. In particular, so long as a petroleum refinery is coking its own wastes, it should not matter whether the coker is located at the site where wastes are generated or at a different facility Since the generator and coker operator remain the same entity (or "person" as defined in § 260.10) there is sufficient guarantee that hazardous wastes of unknown or uncertain composition will not be used in the coking process, which is the evident concern behind the limitation in the statute. Cf. 50 FR at 28725 (July 15, 1985); 50 FR 49170 (Nov 29, 1985). Since the hazardous wastes would remain regulated under RCRA when they are generated, transported, and stored prior to recycling, *id.*, potential concerns regarding tracking are also addressed. EPA also sees no difference in the composition of coke produced partially from on-site and off-site hazardous wastes when the coke is produced by the same entity. Consequently, the Agency is slightly broadening the current regulatory exemption so that it applies to coke produced by a single petroleum refining entity even if the coker is located at a different facility from where the hazardous wastes are generated.

Finally the coking process itself continues to be exempt from RCRA regulation as a recycling unit, provided this recycling is legitimate. Section 261.6(c)(1) ("The recycling process itself is exempt from regulation except as provided in § 261.6(d)."). Today's rule does not affect this provision.

VII. Rationale for Not Excluding Other Oil-Bearing Hazardous Materials

Just as EPA is not excluding oil-bearing wastewaters from the definition of solid waste, it is not excluding other similar types of oil-bearing materials, such as hazardous wastewater treatment sludges. These materials are not composed primarily of oil; they are unlike raw materials normally used in the petroleum refining process; and the units in which they are managed—API separators, DAF units, land treatment units and surface impoundments—are not parts of the refining process, but rather function as waste holding and treatment units. In addition, there have been many damage incidents associated with management of such materials as toxic sludges from wastewater treatment, confirming that these materials are part of the waste disposal problem, rather than part of an on-going manufacturing operation. (See, for example, the Listing Background Documents for Hazardous Wastes K048–052 and F037–038.) For these reasons, the Agency continues to classify these materials as discarded, within the meaning of RCRA Section 1004 (27). Recovered oil that is obtained from such wastes, however, is excluded from the definition of solid waste under today's final rule (assuming the rule's conditions are satisfied).

The Agency is also aware of various types of units designed to treat wastes K048–K052 and F037–F038, in order to reduce the volume and toxicity of these wastes, as well as to recover oil. See, e.g., 57 FR 37198 (August 18, 1992). EPA does not view these units as part of the manufacturing (i.e., refining) process, because such units are not part of a continuing series of unit operations that crack/distill/fractionate crude oil. The input to these units are materials such as wastewater treatment sludges, that contain relatively small amounts of oil. A different determination frustrates the Congressional objective that hazardous waste be treated properly. These types of units are the basis for treatment standards under the land disposal restrictions for K048–K052 and F037–F038. If the sludges treated in these units are no longer hazardous waste, they would not need to be treated by application of BDAT so as to minimize the threats they pose. Cf. *API*, 906 F 2d at 741–742. Thus, excluding such sludges from jurisdiction until properly treated could contribute to the waste disposal problem that Congress sought to remedy. Finally, although EPA is not excluding these types of oil-bearing materials (such as hazardous wastewater treatment sludges), the units in which the recovery of oil is occurring may still be a type of recycling unit, and therefore may be exempt from RCRA permitting requirements under 40 CFR 261.6(c)(1).

VIII. Demonstration That Recovered Oil Meets Conditions of Exclusion

Under § 261.2(f), persons claiming that recovered oil is excluded from the definition of solid waste bear the burden of proof in enforcement actions to demonstrate that they qualify for the exclusion. This would normally require some type of demonstration that the recovered oil is going to be and actually is used in a petroleum refining operation prior to crude distillation or catalytic cracking. For on-site sources, this documentation could be entries in

the operating records of the facility showing where the oil is recovered and where it re-enters the refining process. For off-site sources, this demonstration is especially important. Adequate documentation could entail *bona fide* contractual agreements with other facilities to take the recovered oil, shipping or delivery records to the receiving facility, or other similar records. These records are important to show enforcement personnel that the conditions of the exclusion have been met. Without this documentation, the burden of proof will ordinarily not be satisfied because enforcement personnel will have no way of verifying that the recovered oil actually was used in the refining process and the assumption can be made that the oil was not reused, and was instead sent off-site or managed on-site as a hazardous waste.

IX. Examples of How Today's Rule Operates

Example 1

Petroleum refinery A generates wastewater. As part of primary wastewater treatment, it skims oil from the wastewater. This operation occurs in wastewater treatment tanks. The skimmed oil is then gathered and inserted directly into crude oil storage units for insertion into the refining process.

The refinery process wastewater is still considered to be a solid waste, notwithstanding that some oil is skimmed from it. The wastewater treatment tanks used for treating the wastewater are exempt from subtitle C regulation. Section 264.1(g)(6), 265.1(c)(10). The skimmed oil is recovered oil that is excluded from being a solid waste under today's regulation because it originates from petroleum refining, it is not land disposed before being recycled, and it is returned to the designated part of the petroleum refining process. (This answer assumes that the recovered oil is not being accumulated speculatively.)

Example 2

Same facts as Example 1, except that the skimmed oil requires processing in the plant's slop oil system. This process involves demulsifying and separation via chemical addition, thermal treatment, and gravity separation.

Same answer as in Example 1. It should also be noted that water and solids from the slop oil system can be wastes, and if hazardous, can be subject to Subtitle C regulation once they are removed from the slop oil tank.

Example 3

Same facts as Example 1, except that the source of the recovered oil is a petrochemical plant wastewater treatment system.

The oil is not excluded from being a solid waste under today's rule because it does not come from petroleum refining, exploration or production operations.

Example 4

Facility B recovers oil from spills at exploration and production operations. The oil is trucked to a tank, where separation occurs. The separated oil is put into a pipeline for ultimate insertion into crude oil storage units at a petroleum refinery.

The oil recovered from the spills is excluded from being a solid waste. It is a type of recovered oil, and is excluded because it originates from exploration and production activities, is not land disposed or accumulated speculatively, and is inserted into a refining process.

Example 5

Facility C is a bulk petroleum storage facility. Oil spilled from its product storage tanks is too contaminated to be directly used as product. The oil is sent back to a refinery where it is placed in a slop oil system and returned to the refining process.

The spilled oil is excluded from being a solid waste, not under today's rule, but under § 261.33 (and § 261.2 Table 1) because it is a commercial chemical product that is being recycled rather than abandoned. (EPA interprets this principle to apply to commercial chemical products that exhibit characteristics as well as those listed in § 261.33. 50 FR 14219 (April 11, 1985).) (This answer assumes that the oil is recovered promptly and that the spills do not create permanent land disposal units. See 55 FR 22671 (June 1, 1990).)

All of these answers assume that legitimate recycling is occurring. See discussion of sham recycling criteria in many prior Agency notices, such as 53 FR 522 (Jan. 8, 1988) and 56 FR 7143, 7185 (Feb. 21, 1991).

X. Relationship to Other Programs

A. Clean Air Act (Benzene NESHAP)

On January 7 1993 (58 FR 3072) EPA promulgated under Section 112 of the Clean Air Act (42 U.S.C. 7412) final amendments to the benzene waste operations national emission standards for hazardous air pollutants (NESHAP) (V FF at 40 CFR part 61). Sources affected by V FF include chemical manufacturing plants, by-product recovery plants, petroleum refineries, and facilities at which waste management units are used to treat, store, or dispose of waste generated by chemical manufacturing plants, by-product recovery plants, or petroleum refineries.

B. Clean Water Act

Today s rule does not affect petroleum facilities' obligations under the Clean Water Act, and is consistent with the Agency's prior descriptions of primary wastewater treatment activities at petroleum refineries as involving wastewater treatment, not recycling of in-process material.

C. RCRA

1. RCRA Air Emission Standards

EPA has issued regulations that implement portions of RCRA Section 3004(n), which provision requires EPA to issue rules regulating air emissions resulting from facilities that treat, store, or dispose of hazardous wastes. 40 CFR parts 264 and 265 Subparts AA and BB. These rules control organic emissions from vents and equipment leaks from units managing hazardous wastes, which units either are already subject to RCRA Subtitle C permitting requirements, or are recycling units located at facilities which has other units already subject to Subtitle C permitting requirements.

Today's rule does not affect any units that are subject to regulation under subparts AA or BB. This is because the units that are affected by today's rule are not presently subject to Subtitle C regulation, either because they are wastewater treatment tanks exempt from regulation under §§ 264.1(g)(6) and 265.1(c)(10), because they are recycling units not covered by the Subpart AA or BB regulations (i.e., are not "distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operation" see §§ 264.1030(b), 264.1050(b), 265.1030(b), and 265.1050(b)) and otherwise exempt from regulation under § 261.6(c)(1), or because they manage materials exempt from regulation under § 261.6(a)(3) (iv), (v) and (vi).

2. Used Oil

Today's rule does not affect petroleum facilities' obligations under the Used Oil Rule. See generally, 57 FR 41566 (September 10, 1992) and 59 FR 1994 (March 4, 1994). Today's rule excludes from RCRA Subtitle C requirements only recovered oil as described. Whether or not recovered oil excluded under today's rule is subject to the used oil management standards depends on whether or not the recovered oil does or does not also meet the definition of used oil. *Id.* The Agency recently issued a final used oil rule on March 4, 1994 (see 59 FR 10550) which affects the definition of used oil and deals with issues similar to those in today's rule. According to this final used oil rule, *de minimis* quantities of used oil that are incidentally captured by a refinery's wastewater treatment system and subsequently recovered along with other oil in a refinery's recovered oil system are not regulated as used oil. 59 FR 10550 (March 4, 1994).

D. Enforcement; Effect of Today s Final Rule on RCRA 3007 3013, 7002 and 7003 Authorities

EPA s action today affects only the final regulatory definition of solid waste. It does not interpret the scope of the term "solid waste" for purposes of the non-regulatory authorities in RCRA Sections 3007 3013, 7002 and 7003. See 40 CFR § 261.1(b). Thus, for purposes of those authorities, the Agency (or citizens in the case of citizen suits under Section 7002(a)(1)(B)) would have the benefit of the full jurisdictional reach of the statutory definition of solid aste. See *Comite Pro Rescate de la alud v. Puerto Rico Aqueduct and ewer Authority*, 888 F 2d 180, 185 (1st r. 1989), *cert. denied*, 494 U.S. 1029 990) (upholding reasonableness of plying narrower definition for gulatory purposes than for purposes of minent and substantial endangerment thority); *Connecticut Coastal shermen's Association* v *Remington rms Company* 989 F 2d 1305 (2d Cir. 93) (noting potential appropriateness applying narrower regulatory finition of solid waste for determining ope of Subtitle C regulation, but plying broader statutory definition in n-regulatory contexts such as RCRA ctions 7002 and 7003).

I. State Authority

. Applicability of Rules in Authorized ates

Under Section 3006 of RCRA, EPA ay authorize qualified States to dminister and enforce the RCRA rogram within the State. (See 40 CFR art 271 for the standards and quirements for authorization.) llowing authorization, authorized ates have primary enforcement sponsibility although EPA retains forcement authority under Sections 008, 7003 and 3013 of RCRA.

Prior to the Hazardous and Solid aste Amendments of 1984 ("HSWA"), State with final authorization dministered its hazardous waste rogram entirely in lieu of EPA dministering the Federal program in at State. The Federal requirements no nger applied in the authorized State, d EPA could not issue permits for any cilities in the State which the State as authorized to permit. When new ore stringent Federal requirements ere promulgated or enacted, the State as obliged to enact equivalent thority within specified time frames. ew Federal requirements did not take ffect in an authorized State until the tate adopted the requirements as State w

In contrast, under Section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those 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, the HSWA applies in authorized States in the interim.

Today's amendments are not imposed pursuant to HSWA. The rule changes, therefore, will become effective immediately only in those States without interim or final authorization, not in authorized States. The effect of the rule changes on authorized State programs is discussed next.

B. Effect on Authorized State Programs

Today s rule will not be effective in authorized States since the requirements are not being imposed pursuant to HSWA. Thus, the requirements will be applicable only in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State laws.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. However, it should be noted that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. See 40 CFR 271.1(k). Today's amendments to § 261.4 reduce the scope of the existing Federal requirements. Therefore, authorized States will not be required to modify their programs to adopt requirements equivalent or substantially equivalent to the provisions proposed today.

However, as noted above, States are required by § 271.21 to revise their programs to reflect Federal program changes. 51 FR 33722 (September 22, 1986). A number of States qualified for final authorization prior to being required to adopt the redefinition of solid waste rulemaking of January 4, 1985 (50 FR 614). Since the January 4, 1985 rule is more stringent than the rule under which such States were authorized, such States were required to revise their programs in accordance with Part 271.21. Today's changes will not preclude EPA s ability to authorize States which have subsequently adopted the January 4, 1985 rule since it would reduce the scope of the Federal requirements. However, certain aspects of the State s regulation will be broader in scope than the Federal program and therefore not part of the authorized State program. This means that while they are enforceable under State law, they are not subject to Federal enforcement.

40 CFR 271.21(e) provides for extensions of time at the discretion of the Regional Administrator for States to adopt changes to their regulations and/or statutes to conform to change in the Federal program. The question arises, however, of whether States which have not yet adopted the January 4 rule must adhere to EPA s published compliance schedules for such adoption. Where States have delayed rulemaking pending today's rulemaking clarifying the impact of the court's decision, the EPA Regional Administrators may be flexible in further extending the modification deadlines. EPA Regional Administrators should take into account the States' regulatory and/or legislative procedures in deciding what further extensions may be warranted. However, any States which have delayed rulemaking should now proceed to expeditiously adopt the January 4, 1985 rules as amended by today's notice.

XII. Regulatory Requirements

A. Regulatory Impact Analysis Pursuant to Executive Order No. 12866

Under Executive Order No. 12866 [58 FR 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action as one that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy productivity competition, jobs, the environment, public health or safety or State, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal

mandates, the President's priorities, or the principles set forth in the Executive Order.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354), requires Federal regulatory agencies to consider the impact of rulemaking on "small entities." If a rulemaking will have a significant impact on a substantial number of small entities, agencies must consider regulatory alternatives that minimize economic impact.

Today's rulemaking does not have a significant impact on any small entity. Rather, it excludes from the definition of solid waste certain petroleum materials being recycled within the petroleum industry. Accordingly this deregulatory action will not add any economic burdens to any affected entities, small or large, and a regulatory flexibility analysis is not required. Therefore, the Administrator certifies pursuant to 5 U.S.C. 601 *et seq.*, that this rule will not have a significant impact on a substantial number of small entities because today's amendments reduce the scope of the Subtitle C regulatory program.

C. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, EPA must consider the paperwork burden imposed by any information collection request in a proposed or final rule. This rule will not impose any new information collection requirements.

List of Subjects

40 CFR Part 261

Environmental protection, Hazardous waste, Solid waste, Petroleum, Recycling.

40 CFR Part 266

Environmental protection, Energy Hazardous waste, Petroleum, Recycling.

Dated: July 15, 1994.

Carol M. Browner,

Administrator.

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

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

2. In § 261.3, paragraph (c)(2)(ii)(B) is revised to read as follows:

§ 261.3 Definition of hazardous waste.

(c)

(2) *

(ii)

(B) Waste from burning any of the materials exempted from regulation by § 261.6(a)(3) (iv) through (vi).

3. A new paragraph (a)(12) is added to § 261.4 to read as follows:

§ 261.4 Exclusions.

(a)

(12) Recovered oil from petroleum refining, exploration and production, and from transportation incident thereto, which is to be inserted into the petroleum refining process (SIC Code 2911) along with normal process streams prior to crude distillation or catalytic cracking. This exclusion applies to recovered oil stored or transported prior to insertion, except that the oil must not be stored in a manner involving placement on the land, and must not be accumulated speculatively before being so recycled. Recovered oil is oil that has been reclaimed from secondary materials (such as wastewater) generated from normal petroleum refining, exploration and production, and transportation practices. Recovered oil includes oil that is recovered from refinery wastewater collection and treatment systems, oil recovered from oil and gas drilling operations, and oil recovered from wastes removed from crude oil storage tanks. Recovered oil does not include (among other things) oil-bearing hazardous wastes listed in 40 CFR part 261 D (e.g., K048–K052, F037 F038). However, oil recovered from such wastes may be considered recovered oil. Recovered oil also does not include used oil as defined in 40 CFR 279.1.

4. In § 261.6, paragraph (a)(3)(v) is removed, paragraph (a)(3)(vi) is redesignated as (a)(3)(v), and paragraph (a)(3)(vii) is redesignated as (a)(3)(vi). Section 261.6 is further amended by revising paragraphs (a)(3)(iv) and newly redesignated (a)(3)(vi) to read as follows:

§ 261.6 Requirements for recyclable materials.

(a)

(3)

(iv) Fuels produced from the refining of oil-bearing hazardous waste along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices (this exemption does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is already excluded under § 261.4(a)(12);

(vi) Petroleum coke produced from petroleum refinery hazardous wastes containing oil by the same person who generated the waste, unless the resulting coke product exceeds one or more of the characteristics of hazardous waste in part 261, subpart C.

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

5. The authority cite for part 266 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6934.

6. Section 266.100(b)(3) is revised to read as follows:

§ 266.100 Applicability.

(b)

(3) Hazardous wastes that are exempt from regulation under §§ 261.4 and 261.6(a)(3) (iv) through (vi) of this chapter, and hazardous wastes that are subject to the special requirements for conditionally exempt small quantity generators under § 261.5 of this chapter; and

[FR Doc. 94–18452 Filed 7–27–94; 8:45 am]
BILLING CODE 6560–50–P