US EPA ARCHIVE DOCUMENT

PART 52—[AMENDED]

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

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

Subpart MM—Oregon

2. Section 52.1970 is amended by adding paragraph (c)(137) to read as follows:

§ 52.1970 Identification of plan.

* * * * *

(c) * * *

(137) On May 31, 2001, the Oregon Department of Environmental Quality requested the redesignation of Medford to attainment for carbon monoxide. The State's maintenance plan, base/attainment year emissions inventory, and the redesignation request meet the requirements of the Clean Air Act.

(i) Incorporation by reference.

(A) Oregon Administrative Rules 340–204–0090, as effective March 27, 2001.

PART 81—[AMENDED]

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

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

2. In § 81.338, the table entitled ''Oregon—Carbon Monoxide,'' the entry for Medford Area, Jackson County is revised to read as follows:

* * * * *

§ 81.338 Oregon.

* * * * *

OREGON—CARBON MONOXIDE

Designated Area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* *	* *	*	*	*
Medford Area: Jackson County (part).	September 23, 2002	Attainment		
* *	* *	*	*	*

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

* * * * *

[FR Doc. 02–18584 Filed 7–23–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261, 266, 268 and 271

[FRL–7248–3]

RIN 2050–AE69

Zinc Fertilizers Made From Recycled Hazardous Secondary Materials

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today finalizing regulations under the Resource Conservation and Recovery Act (RCRA) that apply to recycling of hazardous secondary materials to make zinc fertilizer products. This final rule establishes a more consistent regulatory framework for this practice, and establishes conditions for excluding hazardous secondary materials that are used to make zinc fertilizers from the regulatory definition of solid waste. The rule also establishes new product specifications for contaminants in zinc fertilizers made from those secondary materials.

DATES: This final rule is effective July 24, 2002, except for the amendment to 40 CFR 266.20(b), which eliminates the exemption from treatment standards for fertilizers made from recycled electric arc furnace dust. The effective date for that provision in today's final rule is January 24, 2003.

ADDRESSES: Public comments and supporting materials are available for viewing in the RCRA Docket Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling 703–603–9230. The index and some supporting materials are available electronically. *See* the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at 800–424–9346 or TDD 800–553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703–412–9810 or TDD 703–412–3323. For more detailed information on specific aspects of this rulemaking, contact Dave Fagan, U.S. EPA (5301W), 1200 Pennsylvania Ave. NW., Washington, DC 20460, (703) 308–0603, or e-mail: *fagan.david@epamail.epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Regulated Entities

Entities potentially regulated by this action are expected to include manufacturers of zinc fertilizers, and the generators of hazardous secondary materials who will supply zinc-bearing feedstocks to those manufacturers. Some intermediate handlers, such as brokers, who manage hazardous secondary materials may also be affected by this rule.

B. How Can I Get Copies of This Document and Other Related Information?

1. Docket

EPA has established an official public docket for this action under Docket ID No. RCRA–2000–0054. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OSWER Docket, 1235 Jefferson Davis Hwy, 1st Floor, Arlington, VA 22201. You may copy up to 100 pages from any docket at no charge. Additional copies cost $0.15 each.

2. Electronic Access

You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.* An electronic version of the

public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above. Once in the system, select ''search,'' then key in the appropriate docket identification number.

The index of comments received and supporting materials for this rulemaking are available from the RCRA Information Center. The official record for this action is in paper form. EPA has transferred all comments received electronically into paper form and has placed them in the official record, which also includes all comments submitted directly in writing. The official record is the paper record maintained at the address in **ADDRESSES** at the beginning of this document.

EPA's responses to the major comments received on this rulemaking are presented in the preamble to this final rule; other comments are addressed in a separate ''Response to Comments'' document which is also part of the official record for this rulemaking.

The contents of today's action are listed in the following outline:

I. Statutory Authority
II. Background
A. What Is the purpose of today's final rule?
B. Who will be affected by today's final rule?
C. How were public comments on the proposal considered by EPA?
D. How does this final rule compare to the proposal?
E. Why does EPA believe this is the best approach for regulating this recycling practice?
III. Detailed description of today's final rule
A. Applicability
B. Removal of exemption for fertilizers made from electric arc furnace dust (K061)
C. Conditional exclusion for hazardous secondary materials used to make zinc fertilizers
1. Applicability
2. Conditions to the exclusion
3. Other provisions
4. Implementation and enforcement
5. Response to comments
D. Conditional exclusion for zinc fertilizers made from excluded hazardous secondary materials
1. Hazardous constituent levels for excluded zinc fertilizers
2. Limits on metal contaminants
3. Limit on dioxins
IV. Mining wastes used to make fertilizers
V. State fertilizer regulatory programs
VI. State authority
A. Applicability of Federal RCRA Rules in Authorized States
B. Authorization of States for Today's Proposal
VII. Administrative Assessments
A. Executive order 12866
B. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.*
C. Paperwork Reduction Act
D. Unfunded Mandates Reform Act
E. Federalism—Applicability of Executive Order 13132
F. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Risks and Safety Risks
H. National Technology Transfer and Advancement Act of 1995
I. Executive Order 12898
J. Executive Order 13211 (Energy Effects)
K. Congressional Review Act

I. Statutory Authority

These regulations are promulgated under the authority of sections 3001, 3002, 3003, and 3004 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 6921, 6922, 6923 and 6924.

II. Background

A. What Is the Purpose of Today's Final Rule?

Today's final rule puts in place a new, more coherent system for regulating the practice of manufacturing zinc fertilizers from hazardous secondary materials, and establishes conditions under which such materials can be recycled to produce fertilizers without the materials or the fertilizers being regulated as hazardous wastes. The rule, which was proposed on November 28, 2000 (65 FR 70954), is the Agency's response to concerns expressed by public interest groups, citizens, industry and state environmental agencies with regard to the RCRA regulations that have previously applied to this practice. We believe that these new regulations will create a more consistent and comprehensive regulatory framework for such recycling activities, will make industry more accountable for those activities, will establish more appropriate limits on contaminants in zinc fertilizers made from hazardous secondary materials, and in general will promote safe, beneficial recycling in the zinc fertilizer industry.

EPA wishes to emphasize that today's regulatory action addresses only one aspect of the larger issue of contaminants in fertilizers. Fertilizers made from recycled hazardous wastes (which are the only types of fertilizers subject to regulation under EPA's RCRA authorities) represent a very small segment-less than one half of one percent—of the total fertilizer market. To our knowledge, virtually all of these are zinc micronutrient fertilizers. Currently, less than half of all zinc fertilizers on the market are made from such recycled materials. In any case, EPA's studies of contaminants in fertilizers have indicated that the great majority of fertilizers are safe when used properly. This general finding is consistent with similar studies done by states such as Washington and California.

Because fertilizers are generally safe, EPA sees no compelling reason to launch a broad new federal regulatory program to address fertilizer contaminants generally (such regulatory authority is potentially available under the Toxic Substances Control Act). This is not to say, however, that there is no need at all to regulate fertilizer contaminants. A wide range of fertilizers and soil amendments, including many products that are not made from recycled wastes, contain appreciable levels of heavy metal contaminants. In addition, EPA's fertilizer studies concluded that a few of these products may contain contaminants at levels approaching those which could pose unacceptable risks to human health and the environment. There is also the potential for tainted feedstocks to be introduced into the market unknowingly, particularly when such materials are imported into the country from unknown sources. A recent incident in the Pacific Northwest involving imported shipments of zinc sulfate material with extremely high cadmium levels is evidence that such problems can occur (*see* Washington Department of Ecology fact sheet at *http://www.ecy.wa..gov/pubs/004025.pdf*).

Traditionally, state agriculture agencies have had responsibility for regulating the content of fertilizers, and in recent years several states (so far, Washington, Texas and California) have developed comprehensive programs to control contaminants in fertilizers and soil amendments. We believe that these state programs have been largely successful, and the Agency supports further state efforts in this area. Additional discussion of state fertilizer regulations and how they relate to this

RCRA rulemaking is presented in section V. of this preamble.

B. Who Will Be Affected by Today's Final Rule?

We expect that the primary impact of this rule will be on manufacturers of zinc fertilizer products who have an interest in using hazardous secondary materials as feedstocks, and the generators who supply them. We expect that a number of manufacturers who have heretofore been avoiding the use of hazardous wastes will use the exclusion in today's rule to begin using materials such as zinc-rich dusts from brass foundries and fabricators as substitutes for other feedstocks. The generators of those materials are thus expected to benefit from this rule. The Agency is aware that the last manufacturer of K061 derived fertilizer (Frit Industries of Ozark, Alabama) has already begun the transition to use of alternative feedstock materials. Nucor Steel, the K061 generator that has been Frit Industries' supplier, is likewise switching to other recycling or disposal options. More detailed discussion of the impacts of this rule is presented in section VII.A of this preamble, and in the economic impact analysis document that has been prepared for this rulemaking.

C. How Were Public Comments on the Proposal Considered by EPA?

EPA received more than 600 comments on the proposal during the formal comment period, which closed on February 26, 2001. The Agency also received a number of letters, cards and emails commenting on the proposal after the comment period, and these comments have been entered into the docket for this rulemaking. In addition, more than seventy individuals made oral statements at the public hearing on the proposal, which was held in Seattle, WA on November 29, 2001. Those statements have been recorded in the transcript of that hearing, which is also in the docket. At the hearing a substantial number of written comments were also submitted to the Agency, and have been included in the docket as well. In total, nearly 1000 comments were received on the proposed rule.

EPA has reviewed each comment on the proposal that was submitted. The major substantive comments that were received, and the Agency's response to them, are discussed in following sections of today's preamble. Other comments (with EPA's responses) are set out in a separate Response to Comments document. Where many commenters expressed similar or identical views on certain issues, these have been consolidated in the document, and the Agency has prepared a collective response to them. The Response to Comments document has been placed in the docket for this rulemaking.

D. How Does This Final Rule Compare to the Proposal?

In today's final rule EPA is promulgating the same basic regulatory approach that was outlined in the November 28, 2000 proposal. To summarize, today's rule:

- Removes the exemption from land disposal restrictions (LDR) treatment standards for zinc fertilizers made from electric arc furnace dust, or K061; and
- Establishes a conditional exclusion from the RCRA regulatory definition of solid waste for hazardous secondary materials that are legitimately recycled to make zinc micronutrient fertilizers; and
- Establishes conditions (chiefly concentration limits for certain heavy metals and dioxins) under which zinc fertilizers produced from hazardous secondary materials are not classified as solid wastes, and hence are not subject to RCRA subtitle C regulation.

Although EPA has finalized the same basic regulatory approach that was outlined in the November 28, 2000 proposed rule, several substantive revisions have been made in response to comments received. The following is a summary of these changes, which are discussed in more detail in following sections of this preamble:

Applicability. The final rule clarifies how the new product specification contaminant limits will apply to zinc fertilizers made from regulated (*i.e.,* non-excluded) hazardous wastes. In short, such fertilizers will need to comply with the existing, applicable land disposal restrictions (LDR) treatment standards for the hazardous wastes the fertilizers contain. Manufacturers of such fertilizers may, however, choose to meet the new, more stringent contaminant limits, if they wish.

Intermediate handlers. Under today's final rule, intermediate handlers (*e.g.,* brokers) of excluded materials will be eligible for the same exclusion as generators, provided they choose to meet the same conditions for reporting, record keeping and storage of excluded materials that apply to generators of such materials. The proposed rule did not contain any provisions specifically addressing intermediate handlers.

Additional testing. Today's final rule provides for additional sampling and analysis of fertilizer products in cases where processes or feedstock materials are changed in ways that could significantly affect contaminant levels in the fertilizers.

One-time notice. Two changes have been made to the condition for one-time notices that generators will need to submit to EPA or to authorized state agencies. One change eliminates the need to provide certain potentially proprietary information in the notices (*e.g.,* estimated quantities of material to be shipped to specific manufacturers). The other change will require that facilities identify in the one-time notice when they intend to begin managing materials under the terms of the conditional exclusion.

Certifications. The final rule eliminates the proposed condition that each shipment of excluded material to another state be accompanied by a certification that the receiving state is authorized to administer the conditional exclusion in this regulation.

Unit Closure. The final rule includes a provision clarifying that storage units which have previously stored hazardous wastes, and that subsequently will only store excluded materials according to these regulations, will not be subject to RCRA closure requirements.

Limits for nickel and arsenic. The proposed level for arsenic has been lowered in this final rule, and the proposed level for nickel has been eliminated.

Storage in supersacks. The proposed condition that would have prohibited outside storage of excluded secondary materials in non-rigid ''supersack'' containers has been revised to allow the use of these types of containers outdoors, provided they are managed within units (*e.g.,* on concrete pads) that have containment systems to prevent releases from leaks, spills or precipitation events.

E. Why Does EPA Believe This Is the Best Approach for Regulating This Recycling Practice?

EPA's main objectives for this rulemaking are to:

- Establish a more consistent, more comprehensive, and more protective regulatory framework for this recycling practice; and
- Establish more appropriate limits on contaminants in recycled zinc fertilizers that effectively distinguish fertilizer products from wastes by adopting limits that are already found in commercial fertilizers, which can be achieved with well-demonstrated manufacturing techniques, and that are protective; and
- Encourage legitimate recycling by streamlining regulatory restrictions on the management of hazardous secondary materials used to make zinc fertilizers,

while making industry more accountable for its recycling activities.

EPA believes that the regulatory approach in today's final rule is the best means of achieving these objectives, for several reasons. We expect it to be environmentally beneficial by removing regulatory anomalies and making zinc fertilizers cleaner—for example, by halting production of K061-derived zinc fertilizers with relatively high contaminant levels (*see* section III.B. of this preamble). A further environmental benefit will be recovery of large volumes of valuable zinc, rather than landfilling this resource. The rule will also enhance the ability of regulatory agencies to effectively monitor this recycling practice, while removing unnecessary regulatory disincentives on legitimate recycling. We also believe that the new contaminant limits in this rule are reasonable and are consistent with the environmental objectives stated above, and can be (and are being) easily achieved by industry using relatively simple, economically viable, existing manufacturing practices. These levels thus reasonably demarcate products from wastes.

While EPA believes that this final rule provides an appropriate balance of conditions and incentives, a large proportion of the more than 1000 total comments we received expressed a clear preference for a more stringent regulatory approach. Most of these comments were received in the form of emails, post cards, form letters and oral statements made at the public hearing. In general, these commenters expressed support for a regulatory approach similar to the option in the preamble identified as ''Maintain current UCD requirements, with additional reporting, record keeping and testing requirements for all hazardous waste derived fertilizers'' (*see* 65 FR 70964–5, November 28, 2000). Under this type of approach, the current hazardous waste regulatory structure would be maintained and made more stringent by requiring lower limits on a wider range of potential fertilizer contaminants, greatly expanded testing requirements, labeling of hazardous waste derived fertilizer products, and much more in-depth reporting of environmental and manufacturing data. Many commenters suggested in addition that there should be a complete prohibition on the use of any dioxin-containing hazardous wastes to make fertilizers.

Such a regulatory approach would likely result in a complete elimination of hazardous secondary materials as a source of zinc to make fertilizers, since it would perpetuate existing regulatory disincentives (*e.g.,* RCRA permit requirements, as explained further in this preamble) and substantially increase compliance costs. To avoid these regulatory disincentives, manufacturers would almost certainly use alternative feedstock materials (which would likely contain the same or similar contaminants as are found in hazardous wastes) to make fertilizers. The resulting fertilizers would be largely unregulated, since they would not be subject to EPA's RCRA regulatory system, and only a few states presently regulate fertilizer contaminants under other legal authorities. Therefore, by eliminating the use of hazardous wastes in fertilizer manufacture, contaminant levels in some fertilizers could actually increase, which we do not believe is a desirable environmental result (not to mention the energy and other resources conserved by avoiding treatment and disposal of zinc-bearing secondary materials).

As explained in the preamble to the proposed rule, EPA has found that a wide variety of zinc-bearing materials—including hazardous wastes—can be safely and legitimately processed and recycled into high-quality zinc fertilizer products by using relatively simple, existing manufacturing techniques. In other words, the quality of the end fertilizer product depends almost entirely on the manufacturing process, rather than on the type of feedstock material that is used. EPA did not receive any comments on the proposal that presented technical or scientific information to challenge these findings, and we therefore have no reason to believe that high-purity zinc fertilizers made from recycled hazardous wastes are any different in composition or risk potential from those made from other types of materials. (*See* proposed rule at 65 FR at 70959 n. 2 discussing the similarity of hazardous constituent levels in zinc fertilizers made from hazardous wastes and from other materials). Given that high purity zinc fertilizers made from hazardous secondary materials are essentially identical to those made from other types of feedstock materials, we see no environmental reason for increasing regulatory restrictions over such products. We believe that today's rule provides the proper balance of protections and incentives for this recycling practice without the need for additional, more prescriptive regulatory controls. The Agency therefore chose not to adopt the more stringent regulatory approach (described above) that was advocated by many commenters.

We also received a number of comments that simply decried the practice of using hazardous waste to make fertilizers, claiming that it creates serious threats to human health, the food supply, and the environment. None of these commenters, however, offered any specific evidence of such threats, or any concrete information indicating that hazardous wastes are being indiscriminately added to fertilizers as a way of disposing of them. It is important to note that any such acts would be considered ''sham'' recycling of hazardous waste, which is illegal.[1] Further, EPA's studies of contaminants in fertilizers have not found evidence to support such serious concerns. We do not wish to minimize the potential for adverse health effects from exposure generally to toxic chemicals such as heavy metals. We believe, however, that with regard to fertilizers, much of this concern is apparently misplaced, and may have resulted from unsubstantiated speculations and exaggerated claims of risk that have appeared in the media and elsewhere. We hope that this final rule, and the record of evidence that supports it, will help to allay unnecessary public fears with regard to fertilizers made from recycled hazardous wastes.

III. Detailed Description of Today's Final Rule

A. Applicability

Today's rule establishes a new regulatory framework for legitimate recycling of ''hazardous secondary materials'' in the manufacture of zinc micronutrient fertilizers. A secondary material is a sludge, by-product, or spent material. *See* 50 FR at 616 n. 4 (Jan. 4, 1985). A hazardous secondary material is a secondary material that would be a hazardous waste (*i.e.,* is listed or exhibits a characteristic of hazardous waste) if it is first a solid waste. Hazardous secondary materials are presently classified as hazardous wastes when recycled to produce

[1] Sham recycling is waste treatment or disposal occurring under the guise of recycling. *United States* v. *Marine Shale Processors,* 81 F. 3d 1361, 1365 (5th Cir. 1996). Sham recycling occurs, for example, ''if extra materials are added to [the material to be recycled] that provide no benefit to the industrial process * * *.'' *American Petroleum Inst.* v. *EPA,* 216 F. 3d 50, 58 (D.C. Cir. 2000). EPA has frequently noted factors that are likely to be relevant in determining whether sham recycling is occurring. *See United States* v. *Marine Shale Processors,* 81 F. 3d at 1365 nn. 3 and 4 (compiling **Federal Register** citations). These include: (a) Whether the secondary material is ineffective or only marginally effective for the claimed use (*i.e.,* does not contribute a significant element to the recycled product or to the recycling process); (b) whether the secondary material is used in excess of the amount needed; and (c) whether the secondary material is handled in a manner consistent with its use as a substitute for an industrial feedstock (*i.e.,* to guard against loss).

fertilizers. *See* 65 FR at 70958–59, explaining the ''use constituting disposal'' provisions in EPA's hazardous waste recycling rules. However, EPA is referring to these materials in this preamble as ''secondary materials'' or ''hazardous secondary materials,'' rather than as ''hazardous wastes,'' since today's rule excludes them from being defined as wastes provided that certain conditions are followed.

The rule will potentially apply to manufacturers of zinc fertilizers who use (or wish to use) hazardous secondary materials as ingredients in their production processes, and to the generators and any intermediate handlers who supply those materials to the manufacturers. The rule will not directly affect any zinc fertilizers that are made from non-hazardous materials (''secondary'' or otherwise), nor will it change the current regulatory requirements for non-zinc fertilizers made from hazardous wastes. A full explanation of the regulatory requirements for hazardous waste fertilizer recycling that have been in effect prior to today's action is presented in the preamble to the proposed rule (*see* November 28, 2000, 65 FR at 70956).

It should be noted that today's final rule creates two separate conditional exclusions-an exclusion from regulation for the hazardous secondary materials used in zinc fertilizer manufacture, and an exclusion for the fertilizer products that are made from these materials. The exclusion for hazardous secondary materials will potentially be available to those parties who handle such materials prior to recycling (*i.e.,* the secondary material generators, any intermediate handlers, and the fertilizer manufacturers). The exclusion provided for the finished zinc fertilizer products will only apply to fertilizer manufacturers, since they are solely responsible for ensuring that their products meet the specifications in today's rule.

To reiterate, today's final rule will not apply to any fertilizers other than zinc fertilizers that are made from recycled hazardous secondary materials. Thus, if a manufacturer were to use hazardous waste as an ingredient in a non-zinc fertilizer, the manufacturer would not be eligible for the conditional exclusion in today's rule, and will need to comply with applicable hazardous waste management requirements [*see* existing § 266.20(b)].

Effective Dates. Except for one provision, today's rule will become effective immediately upon publication in the **Federal Register**. The exception is the provision in the rule that amends § 266.20(b), removing the exemption from treatment standards for fertilizers made from recycled K061. The effective date for that provision will be January 23, 2002.

The RCRA statute establishes six months as the usual effective date for Subtitle C rules (*see* RCRA section 3010 (b)), though the Agency may provide for a shorter or immediate effective date in the case of regulations with which the regulated community does not need six months to come into compliance, as determined by the Admininstrator. Since today's final rule is essentially deregulatory in nature (with the exception noted above), we see no reason to delay its effective date. Thus, except for the provision that removes the exemption for K061 derived fertilizers, today's rule will be effective immediately upon publication in the **Federal Register**.

One commenter (Frit Industries) requested an extended (nine month) effective date for removing the exemption from treatment standards for K061 fertilizers. We note that there is no provision in the RCRA statute for such extended effective dates. In addition, the commenter has had ample notice of the Agency's intent to finalize this provision, and has been aware of the Agency's schedule for completing this regulatory action. Thus, we believe the commenter has had sufficient notice of this action.

Once this provision of the rule becomes effective, sales of K061 derived fertilizers by manufacturers to other parties will not be permitted, unless those fertilizers can meet the specifications for exclusion in today's rule. Assuming they cannot meet the exclusion specifications, remaining manufacturer inventories of K061 fertilizers after the effective date will need to be managed in accordance with applicable hazardous waste regulations. As a practical matter, however, inventories of K061 (or other) fertilizers that have already entered commerce (*i.e.,* have been sold and shipped to other parties) before the effective date will not be affected. Thus, fertilizer dealers and others who may have unsold stocks of K061 fertilizers after this rule's effective date will not be affected, provided the fertilizers were sold and shipped by the manufacturer prior to the effective date. It is our intent to hold manufacturers of K061 fertilizers (and any other affected fertilizers) responsible for ensuring that non-compliant products do not enter commerce after the effective date of this rule.

B. Removal of Exemption for Fertilizers Made from Electric Arc Furnace Dust (K061)

Today's rule eliminates the provision in § 266.20 that has exempted zinc fertilizers made specifically from electric arc furnace dust (K061) from having to meet applicable land disposal restrictions (LDR) treatment standards (*i.e.,* the treatment standards for K061). This exemption was originally promulgated in the ''First Third'' LDR rulemaking (August 17, 1988, 52 FR 31138), based on a determination by EPA that fertilizers made from K061 had metal contaminant levels comparable to those of substitute zinc fertilizers (including those made from non-hazardous waste feedstocks), and that the use of K061 fertilizers did not appear to pose significant risks (*see* 53 FR 31164, August 17, 1998). However, in recent years zinc fertilizers of much higher purity (*e.g.,* zinc sulfate monohydrate, or ZSM fertilizers) have become widely available, and K061 derived zinc fertilizers now have among the highest contaminant (*i.e.,* hazardous constituent) levels of any zinc fertilizers. Thus, EPA believes that the original basis for the K061 exemption is no longer valid, and sees no reason why these fertilizer products should not have to meet the same contaminant limits as other fertilizers made from recycled hazardous wastes (or be excluded from regulation in the same way as other such fertilizers).

Response to Comments. Numerous commenters expressed support for a complete ban on the use of K061 in fertilizer manufacture, often citing the relatively high levels of dioxins in K061 fertilizers compared to other fertilizer products. Others urged a ban on the use of all ''dioxin laden wastes'' to make fertilizer. A few commenters opposed removing the current LDR exemption for K061 derived fertilizers.

EPA chose not to ban the use of K061 to make zinc fertilizers, for several reasons. Most importantly, we believe that with the promulgation of today's rule the issue of dioxins in K061 derived fertilizers will effectively become moot, largely because the new rules will in all likelihood eliminate the use of K061 to make zinc oxysulfate fertilizers. Oxysulfate is a type of zinc fertilizer that is typically made by simply mixing zinc-bearing material (*e.g.,* K061) with sulfuric acid. There is typically no processing step to remove contaminants—whatever impurities are in the feedstock material will usually remain in the finished product. Such products will be unable to meet the new exclusion levels in today's rule, or the

applicable LDR standards. Thus, we do not expect this type of fertilizer to be produced after the effective date of today's regulations.

At the same time, it is possible to remove the contaminants in K061 to make a different type of fertilizer, such as high-purity ZSM fertilizer, which can satisfy the conditional exclusion levels. Most of the zinc in K061 is bound with iron in a zinc ferrite compound that is relatively insoluble and, at normal temperatures, cannot be effectively digested with acids to precipitate and filter out contaminants such as lead and other metals. However, it has been demonstrated that raw K061 can be first processed in high-temperature furnaces to form a zinc oxide material that can then easily be made into ZSM. Such thermal treatment, combined with subsequent manufacturing processes, is likely to destroy most or nearly all dioxins present in K061. The agency thus sees no dioxin-related reason to prohibit this use of K061. Further discussion of dioxins in hazardous waste derived fertilizers is presented in section III.D.3 of this preamble.

A few comments were received that opposed removing the current exemption from LDR treatment standards for K061 derived zinc fertilizers. These commenters did not, however, challenge the Agency's logic for eliminating the exemption, but rather argued that EPA has no legal jurisdiction to regulate these fertilizers at all, based on recent court decisions. EPA rejects these arguments, for the reasons discussed later in this preamble.

C. Conditional Exclusion for Hazardous Secondary Materials Used To Make Zinc Fertilizers

In this final rule, EPA has created a ''conditional exclusion'' from the RCRA definition of solid waste for hazardous secondary materials (which would otherwise be classified as hazardous wastes, as explained above) that are used as ingredients to make zinc micronutrient fertilizers. As mentioned previously, this feature of the final rule is consistent with the proposal, though a few specific changes have been made, as explained below.

The conditional exclusion provided in today's rule is an exclusion only from the RCRA subtitle C regulations, and not from the emergency, remediation and information-gathering sections of the RCRA statute [sections 3004(u), 3007, 3013, and 7003]. This is consistent with the principle already codified for other excluded secondary materials—that the exclusion is only from RCRA regulatory provisions, and not from these statutory authorities. See § 261.1(b). EPA is restating this principle here in the interests of clarity, not to reopen the issue. The legal basis for the distinction of the Agency's authority under these provisions is that they use the broader statutory definition of solid waste (and hazardous waste as well) and so need not (and should not) be read as being limited by the regulatory definition. *See,* for example, 50 FR at 627. See also *Connecticut Coastal Fishermen's Assn.* v. *Remington Arms,* 989 F. 2d 1305, 1313–15 (2d Cir. 1993) (EPA may permissibly ascribe different definitions to the term ''solid waste'' for regulatory and statutory purposes).

Today's conditional exclusion is intended to remove many of the regulatory disincentives that to date have discouraged legitimate recycling in the zinc fertilizer industry. Previously, hazardous wastes that were recycled to make fertilizers were subject to the full suite of hazardous waste regulatory requirements, including the requirement to obtain a RCRA permit for storage of wastes prior to fertilizer production. This permitting requirement in particular has dissuaded a number of fertilizer manufacturers from using valuable secondary materials as feedstocks, since RCRA permits can be time and resource-intensive to obtain and maintain, and a number of alternative materials are readily available that are not subject to subtitle C regulation, either because they are not hazardous (*i.e.,* are not listed and do not exhibit a characteristic), or are raw materials. By allowing companies to manage these hazardous secondary materials in accord with the conditions which are established in today's final rule, EPA expects that the rate of legitimate recovery of zinc values in these materials will increase considerably, which should be environmentally beneficial and result in lower costs to farmers for zinc fertilizers.

Once this rule becomes effective, those who wish to begin managing hazardous secondary materials according to the conditional exclusion will first need to notify EPA or the authorized state of their intent to do so. This will provide overseeing agencies information as to who will be operating under this alternative regulatory system, when they will start, and the type of materials involved. In EPA's view, for this particular recycling practice, this is the minimum information needed to ascertain that legitimate recycling of the zinc-bearing materials will occur, and by whom. The other conditions that must be met to use and maintain the conditional exclusion address the proper storage of materials prior to recycling, and documentation of all off-site shipments of excluded materials. In addition, fertilizer manufacturers will need to submit an annual report to the overseeing agency that identifies the type, quantity and origin of all excluded materials that were used in the previous year. Again, EPA believes that for this recycling practice, these conditions are needed to assure that the materials will be recycled legitimately.

1. Applicability

Several changes have been made to the final rule with regard to its applicability. For one, the final rule has been modified with regard to how it applies to intermediate handlers who act as brokers or middlemen between generators and fertilizer manufacturers. The proposed regulatory language did not specify any requirements or conditions specifically for intermediate handlers, though EPA discussed the issue and solicited comments on it in the preamble (65 FR at 70962–3). Several commenters observed that the use of intermediate handlers in this industry is not uncommon, with one commenter suggesting that in the final rule an intermediate handler should have the same responsibilities as a manufacturer who uses the conditional exclusion.

The conditions in the final rule for excluding hazardous secondary materials are intended to reflect normal, responsible practices for management of valuable material commodities, rather than waste management. Since intermediate handlers may be an integral part of the management chain for these materials prior to recycling, we believe it is reasonable to also establish conditions for them. If intermediate handlers had no responsibilities for maintaining the excluded status of materials they receive, the materials could potentially be mixed or consolidated with other materials, or could in some other way lose their regulatory identity and escape the chain of custody that provides accountability to the government and the public to ensure that these materials are being handled in way that is consistent with the handling of a valuable commodity. They also could simply be stored haphazardly and create the types of damage associated with improper management of discarded materials, as has occurred in past damage incidents within the zinc fertilizer recycling industry (records of these damage cases are in the docket for this rulemaking).

EPA sees no reason to prohibit excluded materials from being shipped through intermediate handlers, since they may provide a useful service to

both generators and manufacturers in this industry. Moreover, use of such middle-men is relatively common in the industry, and so is consistent with the idea of an exclusion conditioned to conform to industry commercial practice. However, their use must not compromise the protections that have been built into this conditional exclusion.

We believe that intermediate handlers have incentives for managing conditionally excluded materials that are very similar to the generators', and thus should have similar responsibilities (*i.e.,* any exclusion for intermediate handlers should be conditioned in the same manner as for generators). The final rule therefore specifies that intermediate handlers who wish to use the conditional exclusion must meet the same set of conditions that apply to the generators of the materials [*see* § 261.4(a)(20)(ii)]. In effect, any intermediate handler who elects to receive conditionally excluded materials and wishes to maintain their excluded status under the terms of today's rule would need to provide prior notice to the appropriate regulatory agency, store the materials in accordance with the conditions in the rule, and meet all other conditions that would otherwise apply to the generator of the material. Alternatively, it is possible that an intermediate handler might choose not to use the conditional exclusion, in which case any excluded materials received by the handler would lose their excluded regulatory status.

2. Conditions to the Exclusion

In general, the conditions established in today's final rule for storage and documentation of excluded material are designed to reflect normal fertilizer industry handling practices for zinc-bearing feedstock materials. They are the same basic conditions that were proposed for establishing and maintaining a regulatory exclusion for hazardous secondary materials used to make zinc fertilizers, with several relatively minor changes.

Under this rule, in order to begin managing hazardous secondary materials that will be used to make zinc fertilizers without being subject to the current hazardous waste regulatory system, the responsible party (*i.e.,* the secondary material generator, the fertilizer manufacturer or an intermediate handler) must initially notify the appropriate regulatory agency that he or she intends to begin doing so, and must then meet the conditions set out in this regulation. These conditions address proper storage of the excluded secondary material, notification of regulatory agencies, and documenting and maintaining records of any off-site shipments of such material. Fertilizer manufacturers who wish to use the conditional exclusion will also need to submit an annual report to EPA or the authorized state agency on the types, origins and quantities of excluded materials used in the previous year.

The storage conditions in today's rule are based on normal industry practices for storing zinc-bearing feedstock materials used to make fertilizers, and thus are analogues to the hazardous constituent specification levels for the fertilizers, which likewise are drawn from existing industry practice. The conditions generally serve to prevent these materials from being discarded via wholesale release into the environment. The conditions also reflect the fact that zinc fertilizer feedstock materials are typically valued commodities, and are thus stored so as to prevent releases or other losses of the material. EPA's review of feedstock storage practices by zinc fertilizer manufacturers indicated, for example, that bulk feedstock materials are usually stored outdoors in hoppers or other types of tanks, while indoor storage is typically in supersack containers or in piles. We are not aware of any zinc fertilizer manufacturer currently storing feedstock materials in ways that readily allow dispersal via wind or precipitation runoff (e.g., open, outdoor piles). See the memorandum ''Industry Storage Practices,'' in the docket for this rulemaking. Thus, we believe that the conditions in today's rule reflect this industry's feedstock storage practices, and thus reasonably serve to demarcate valuable feedstocks from wastes.

EPA has made several changes from the proposed rule to the specific conditions that must be met in order to be eligible for the exclusion. These changes address outside storage of material in supersack containers, initial notifications to regulatory agencies, certifications for off-site shipments of excluded material, and enforcement of the conditions, as discussed in more detail below.

Outdoor storage in supersack containers. Supersacks are flexible, woven resin containers designed to hold approximately one ton of dry material, and are commonly used by generators, manufacturers and others to store various types of solid zinc fertilizer feedstock materials. Several commenters objected to the proposed condition that would have allowed only indoor storage of excluded materials in this type of container, asserting that such a restriction could be a hardship for smaller facilities that may not have sufficient indoor storage capacity, and that with a few simple safeguards supersacks can be safely and reliably used to store this type of material out of doors.

EPA agrees with the commenters' assertions that outdoor storage of excluded material in supersack containers can be safe and does not automatically indicate the material is being discarded, and therefore should be allowed under certain conditions. We are unaware of any environmental damage cases associated with storage of zinc fertilizer feedstock materials in supersack containers. The final rule therefore specifies that storage of excluded material in non-rigid containers (*e.g.,* supersacks) will be allowed outdoors, as long as they are kept closed and are in sound condition, and are managed within storage units (*e.g.,* on concrete pads) that can contain, drain and allow removal of leaks, spills, and accumulated precipitation, and can prevent run-on into the unit. These conditions are intended to assure management commensurate with the secondary material's classification as a valuable feedstock, rather than as a waste. Put another way, the conditions assure both that the material is being managed comparably to other material inputs used in fertilizer manufacture, and that the secondary materials will not be discarded via haphazard management that allows wholesale environmental release of the material, so becoming ''part of the waste disposal problem''. *American Mining Congress* v. *EPA,* 824 F. 2d 1177, 1193 (D.C. Cir. 1987); *Association of Battery Recyclers* v. *EPA,* 298 F. 3d 1047, 1056 n. 6 (D.C. Cir. 2000).

One-time notice. Under the proposed rule, generators would have had to identify in their one-time notices to regulatory agencies the estimated annual quantities of excluded materials that they expected to ship to each fertilizer manufacturer. Some commenters objected to this condition on the grounds that such information would be speculative, commercially sensitive, and of questionable use to regulatory agencies. EPA agrees, largely for the reasons offered by the commenters, and has removed this element of the one-time notice condition from the final rule.

Certification. The proposed rule specified that generators using the conditional exclusion in today's rule would need to ensure that each shipment of excluded material off-site to another state was accompanied by a certification stating that the receiving state is authorized to administer the provisions of this rule. The implication

of this proposed provision was that out-of-state shipments of excluded material would only have been allowed if the receiving state had adopted and obtained authorization from EPA to implement these rules. Several commenters objected to this provision, arguing that shipments to states not authorized for this rule should be allowed, provided the materials are managed as hazardous wastes once they enter the receiving state. EPA agrees with these commenters, and has removed this certification provision from the final rule language.

3. Other Provisions

Burden of Proof. The proposed rule contained a provision stating that in an enforcement action, the burden of proof in establishing conformance with the conditions in § 261.4(a)(20) shall be on the generator, intermediate handler or manufacturer claiming the exclusion. One commenter correctly noted that this provision is redundant with the provision in § 261.2(f), which also addresses assigning burdens of proof (both the burden of going forward and the ultimate burden of persuasion, *see* 50 FR at 642) when conditional exclusions are involved. The proposed provision has therefore been deleted from the final rule.

Unit Closure. Today's final rule specifies that storage units (*e.g.,* tanks and containers) used only to store zinc-bearing hazardous wastes before a conditional exclusion takes effect (*i.e.,* before the facility owner/operator submits the one-time notice provided under § 261.4(a)(20)(ii)(B)), and that will be used thereafter only to store secondary material excluded under today's rule, will not be subject to the closure requirements of 40 CFR part 264 (for units at permitted facilities) or Part 265 (for units at interim status facilities). This provision is intended to address situations where units such as tanks that have been used to store hazardous wastes would be required under the existing regulations to go through RCRA closure before storage of the excluded material could commence. As explained in the preamble to the proposed rule, the existing regulations require closure of units within 90 days of receiving the final volume of hazardous waste (*see* § 264.113(a) and § 265.113(a)). In the case of facilities affected by today's rule, this would mean that for units such as tanks that have been storing zinc-bearing hazardous wastes, the owner/operator would need to remove all waste residues and other contamination from the unit, in order for the unit to then commence storing the identical material under the terms of the conditional exclusion. We believe that requiring closure under these circumstances would serve little, if any environmental purpose, and today's rule explicitly provides that in these situations storage units will not be subject to RCRA closure requirements.

Although these storage units will not be required to undergo closure according to the RCRA hazardous waste regulations, when the use of such a unit for this purpose is ultimately discontinued for some reason, the Agency expects that owner/operators will take common-sense steps to decontaminate and decommission the unit. We encourage owner/operators in these situations to consult with regulatory agencies as to the best way to ensure that such units and their surroundings are cleaned up properly.

EPA wishes to emphasize that relieving storage units from closure requirements in these situations will not relieve facility owner/operators of their responsibility to respond to any releases from such units during their operational life. As explained elsewhere in this preamble, not responding to such releases could be considered an act of illegal disposal under RCRA, and could thus be subject to enforcement action under RCRA section 3008(a), which could impose penalties, as well as require any necessary cleanup actions. The conditional exclusion also will not affect a facility owner/operator's corrective action obligations under RCRA section 3004(u) or section 3008(h). If necessary, other federal or state remedial authorities may also be used to address such releases. We also note that the facilities operating under the terms of today's conditional exclusion will remain subject to regulatory oversight by authorized states and EPA, and as such we expect that environmental conditions at these facilities will continue to be scrutinized by regulatory personnel. Another consideration for not requiring RCRA closure in today's rule is that storage in land-based units (e.g., outdoor piles) will not be allowed under the conditional exclusion. Generally, land-based units are more likely to have releases and are often more difficult to remediate. We thus believe, for the reasons cited above, that eliminating the closure requirement for storage units at facilities affected by today's rule will not compromise environmental protections at these facilities.

4. Implementation and Enforcement

Implementation. The preamble to the proposed rule discussed and requested comments on several issues relating to implementation of this rule once it takes effect (65 FR at 70966–70967). These issues addressed the potential regulatory consequences of the rule on permitted and interim status RCRA facilities, and how the rule would be enforced. EPA has not made any specific regulatory changes in the final rule to address these issues, since we believe they can be satisfactorily resolved by the following explanation.

One key issue has to do with the effects of the rule on facilities that currently have RCRA permits or interim status, and are managing hazardous wastes that will become conditionally excluded under this rule. Under one scenario, a facility that manages a variety of hazardous waste materials, including some that become excluded under this rule, would be affected only to the extent that certain units or procedures at the facility would no longer be subject to hazardous waste regulations. A somewhat different scenario could involve a facility whose hazardous wastes all become conditionally excluded from regulation when this rule takes effect (*i.e.,* the facility no longer operates any hazardous waste management units).

One idea discussed in the proposal was to amend the current regulations to automatically terminate permit conditions, permits and/or interim status at facilities where hazardous waste management units or activities become de-regulated under today's rule. This could eliminate the need for regulatory agencies to process permit modifications or administratively terminate permits or interim status for those facilities. One state agency commenting on the proposal argued, however, for maintaining a government role in managing these facility transitions, asserting that automatically terminating permit conditions would not provide adequate oversight over facilities in these situations. Although cases like this are expected to be relatively few in number (perhaps only one facility in the nation will potentially be able to have its RCRA permit terminated because of this rule), we agree with the state agency commenter that making the transition to non-permitted status may not be entirely straightforward, especially when such facilities are undergoing cleanup actions under RCRA authorities. Thus, we concur that there should be some regulatory agency oversight in changing a facility's permit or interim status obligations under these regulations, and today's rule does not contain any regulatory provision for automatically terminating permits, permit conditions or interim status at

facilities affected by this final rule. We believe that making these changes at affected facilities can be done efficiently under current authorized state administrative procedures for modifying or terminating a facility's RCRA permit or interim status.

Another potential implementation issue that could arise has to do with ensuring cleanup of historic contamination problems at facilities that may no longer need permits or interim status once the conditional exclusion takes effect. An example might be a facility with a RCRA operating permit that is working to remediate ground water contamination under the conditions of the permit. While the facility's operating permit may no longer be needed (since it is no longer actively managing hazardous waste), the owner/operator's obligations to remediate the contamination problems at the facility would not be affected by a change in the facility's operating status. In these situations, the authorized states would have the flexibility to address the facility's cleanup obligations by either maintaining in effect the corrective action-related provisions of the permit, or by using alternative federal or state enforcement mechanisms that may be available.

Enforcement. The exclusion in today's rule for hazardous secondary materials (§ 261.4(a)(20)) will take effect once a generator, intermediate handler or manufacturer provides notice to the appropriate regulatory agency of his/her intent to begin using the exclusion. There is no requirement for the regulatory agency to formally approve or otherwise act on such notices, though some state agencies may wish to do so.

The party claiming the conditional exclusion will be responsible for maintaining the exclusion by ensuring that all of the conditions are met. In the event that a condition is not met, the facility owner/operator will need to remedy the situation as soon as possible in order not to jeopardize the exclusion. Should there be any questions as to whether the facility has properly maintained its exclusion, it will be the responsibility of the owner/operator to demonstrate that the conditions have been and are being met. *See* section 261.2(f), discussed earlier. If necessary, the overseeing regulatory agency may use RCRA inspection and information collection authorities to assist in establishing whether or not a facility is meeting the exclusion conditions.

Facilities that claim the exclusion but fail to meet one or more of its conditions may be subject to enforcement action. For example, if a facility claiming the conditional exclusion failed to store secondary material in accordance with one or more of the conditions, the facility would in effect automatically lose its exclusion, and EPA or an authorized state agency could take enforcement action (under RCRA section 3008(a)), since the facility would likely then be violating hazardous waste regulatory requirements. In these situations a range of specific enforcement actions might be taken. In less serious cases the facility might simply be required to promptly remedy the situation, though fines or other penalties could also be assessed if appropriate. In especially serious cases the facility could be ordered to obtain a RCRA permit and comply with all applicable hazardous waste regulations.

As a general matter, if a facility fails to meet a condition of the exclusion it will not necessarily affect the regulatory status of the secondary material at other facilities. For example, if a fertilizer manufacturer's facility were to lose its exclusion, the facility generating the secondary material would typically be allowed to retain its exclusion, provided that he or she continues to meet the applicable conditions. In such a case, the manufacturer would need to be in compliance with applicable hazardous waste regulations in order to accept any further shipments of excluded (or non-excluded) material from a generator.

With regard to enforcement, it should also be noted that the conditional exclusion in today's rule will not affect a facility owner/operator's obligation to promptly respond to and remediate any releases of excluded secondary material that may occur at the facility. An accident, for example, could rupture or otherwise damage a tank or container, causing spillage of material onto soils. If such released material were not cleaned up promptly, the owner/operator would be subject to enforcement action for illegal disposal of waste. *See* § 264.1(g)(8)(iii).

Today's conditional exclusion will not affect the rights of concerned citizens to bring to regulators' attention any circumstance that might aid authorities in their monitoring and enforcement efforts. A concerned citizen also may file a suit under RCRA section 7002 against a party for violations that may result from failure to meet any of the conditions in this rule. Moreover, imminent and substantial endangerment provisions under Section 7003 of RCRA will continue to apply to conditionally excluded secondary materials as a safeguard, since those materials remain a statutory solid waste. Thus, EPA or an authorized State can act in the unlikely event of circumstances which may endanger human health or environment.

5. Response to Comments

EPA received a number of comments addressing the general issue of whether or not a conditional exclusion from hazardous waste regulations is appropriate in the context of this rulemaking. One set of commenters presented arguments contending that EPA has no legal jurisdiction at all under RCRA to establish conditions or otherwise regulate hazardous secondary materials that are recycled to make zinc fertilizers. On the other hand, a substantial number of commenters expressed support for EPA continuing to regulate these materials as hazardous wastes, and called for adding a number of new, more stringent regulatory controls and restrictions over these waste materials.

With respect to comments challenging EPA's authority to classify hazardous secondary materials used as ingredients in fertilizer as solid wastes at all, EPA notes first that this issue has been long-settled, and was not reopened in this rule. EPA's rules classifying hazardous secondary materials used in a manner constituting disposal—which includes use as fertilizers, or as ingredients in fertilizers—were promulgated in 1985. 50 FR at 664, 666–67. These use constituting disposal rules were never challenged.[2] EPA did not reopen the issue of jurisdiction for comment in this proceeding. 65 FR at 70959 n. 2. Thus, EPA believes that these comments are untimely.

In the event that response is considered necessary, however, EPA believes that it has ample jurisdiction to classify hazardous secondary materials used to produce zinc fertilizers as solid wastes. We also note that the following discussion applies to authority over uses constituting disposal as defined in section 261.2(c)(1), and does not deal with, or apply to, any other type of recycling. First, the generator of the hazardous secondary material is an unrelated entity getting rid of its secondary materials to a different industry sector. Thus, when one entity takes a secondary material for which it has no continuing use and transfers it to an unrelated entity, the materials can be viewed as discarded by that first entity.

[2] EPA promulgated the rules requiring products placed on the land which are produced from hazardous wastes to meet LDR requirements in 1988, which rules also contained the provision exempting K 061-derived zinc fertilizers from this requirement. 53 FR at 31212 (August 17, 1988). There were likewise no challenges to these rules raising the question of EPA's jurisdiction to adopt the provisions.

See *Owen Electric Steel Co.,* v. *EPA,* 37 F. 3d 146, 150 (4th Cir. 1994) EPA properly classified secondary material as a solid waste ''because the slag is sold to others for use in roadbed construction, it is not 'destined for beneficial reuse or recycling in a continuous process *by the generating industry itself*', quoting *AMC I*, 824 F. 2d at 1186 (emphasis in original). See generally *American Petroleum Institute* v. *EPA (''API II''),* 216 F. 3d 50__, 58 (D.C. Cir. 2000); *Association of Battery Recyclers* v. *EPA,* 208 F. 3d 1047, 1059–60 (D.C. Cir. 2000); *American Petroleum Institute* v. *EPA,* 906 F. 2d 729, 741 (D.C. Cir. 1990)[3]; *Specialty Steel Mfrs. Assn* v. *EPA,* 27 F. 3d 642, 646 (D.C. Cir. 1994).

Recycling via land application is a further indication of discarding. As EPA has stated years ago, ''Use constituting disposal involves as a practical matter the disposal of wastes. The wastes are being gotten rid of by placing them directly on the land.'' 53 FR at 31198; *see* also 48 FR at 14484 (April 4, 1983) (''these practices are virtually the equivalent of unsupervised land disposal''). When placed on the land, hazardous secondary materials and the hazardous constituents they contain (few, if any, of which contribute to the recycling activity) could escape via all conceivable exposure pathways—air, runoff, leaching, even (as here) foodchain uptake. Such activities can certainly be viewed as discarding that is ''part of the waste disposal problem.''

The statute supports this position. *See* RCRA section 3004 (l) (use of ''waste or used oil or other material, which is contaminated with dioxin or any hazardous waste * * * for dust suppression or road treatment is prohibited'')[4]; H.R. Rep. No. 198, 98th Cong., 1st Sess. at 46, 67–68 (hazardous waste-derived products that are placed on the land are to be the special object of EPA scrutiny in implementing subtitle C); see also *Association of Battery Recyclers* v. *EPA,* 208 F. 3d 1047, 1059–60 (recycling via uses constituting disposal pose even greater potential risks than conventional land disposal, and thus justify stricter regulation). As the Agency concluded in 1988 (in another determination that was never challenged), ''To say that Congress did not intend to control these use constituting disposal situations under RCRA is to say that Congress had no intention of controlling such damage incidents as the Times Beach dioxin spreading incident where a group of communities were rendered uninhabitable as a result of use of a distillation botto[m] mixed with used oil as a dust suppressant. No credible reading of the statute would authorize this type of conduct.'' 53 FR at 31198. Indeed, some of the fertilizers addressed by today's rule contain dioxin, which comes from the hazardous secondary materials used as a source of zinc. EPA does not consider it plausible that Congress prohibited the use of dioxin-containing secondary materials as dust suppressants, but denied EPA the authority to even consider the question of dioxin-containing hazardous secondary materials used as fertilizers—the more potentially harmful practice given the possibility of food chain contamination.

EPA notes, in addition, that many of the conditions in today's rule serve to demarcate legitimate recycling. The hazardous constitutent levels for fertilizers, for example, are drawn from typical levels in commercial zinc micronutrient fertilizers. To the extent that fertilizers contain non-nutritive hazardous constituents which come from hazardous secondary materials in concentrations significantly in excess of these levels, the recycling practice can be viewed as simply discarding those materials and constituents. *American Petroleum Inst. II,* 216 F. 3d at 58.

This is not to say that EPA lacks discretion to classify some hazardous secondary materials, and products derived therefrom, which are used in a manner constituting disposal as not being solid wastes. The facts justifying such discretion here (stated broadly) are (a) the usefulness of the materials as a source of zinc for fertilizer; (b) the similarity of hazardous constituent levels in hazardous and non-hazardous feedstock materials, and the fact that zinc fertilizers made from hazardous secondary materials are indistinguishable from those made from non-hazardous materials, and are processed identically (*see, e.g.* 46 FR at 44971 (Aug. 8, 1981) (EPA's first announcement of the principle that identity of waste-derived and non-waste derived products justifies cessation of RCRA regulation); and (c) management practices commensurate with the idea that the secondary materials are being managed as a valuable commodity rather than as a waste. The conditions adopted in today's rule are designed to assure that this fact pattern actually occurs, and (as noted above) are further designed to assure that legitimate rather than sham recycling occurs.

As mentioned previously, a number of commenters did not support a regulatory exclusion of any kind for hazardous secondary materials used to make fertilizers, and instead favored maintaining and expanding the current hazardous waste regulatory controls over these materials. Among the suggestions for increased regulatory controls were greatly enhanced reporting by waste generators, middlemen and fertilizer manufacturers with regard to all shipments of hazardous wastes, including reporting on the composition of both the wastes that are used and of the fertilizers that are produced from those wastes. These additional reports would be required as part of the RCRA biennial reporting system (*see* § 262.41). More thorough testing for a wider range of hazardous constituents was also suggested, as was labeling of fertilizer packaging to indicate that the fertilizer was made from hazardous waste.

As discussed earlier, we believe that maintaining RCRA regulatory controls over all hazardous secondary materials

[3] Commenters argued that *API I* was not on point because EPA there had compelled recovery of K 061 by establishing a treatment standard mandating metals recovery, and so had simply forced the recycling of material that would otherwise be disposed of, so that the material could be regarded as ''discarded''. Although it is correct that the opinion states that K061 was subject to a treatment standard of mandatory metal reclamation, 906 F. 2d at 741, it is incorrect that steel mills were otherwise disposing of their electric arc furnace dust, or that EPA had through its treatment standard converted a disposed-of waste into a recycled secondary material. Metals reclamation of K 061 was widespread at the time EPA adopted the treatment standard, and EPA based the standard on this well-established, existing practice. *See* 53 FR 11742, 11752 (April 8, 1988) (high temperature metal recovery currently in use by at least four domestic facilities to recover zinc from K061, and the proposed treatment standard is taken from measurements from one of those existing operations). It also should be noted that the recycling practice at issue in *API I* is arguably more continuous than the types of practices involved in this rulemaking. When electric arc furnace dust is smelted for zinc recovery, it is captured as a dust by steel mill baghouses, conveyed to a storage bin at the mill (usually by conveyor belt, but sometimes pneumatically), and then shipped directly by truck or rail to the purchasing smelter. Typical storage time at the generating steel mill is two days or less, due to limited storage bin capacity. In contrast, storage times at generators of secondary materials used eventually as a zinc source for fertilizer often is up to 90 days. These generators also often deal through intermediary brokers who find an end use for the secondary material.

[4] Since dioxin is a chemical contaminant, and is not itself a waste, section 3004 (l) thus states that use of contaminated used oil which is recycled via use as a dust suppressant—an example of a use constituting disposal—is prohibited. Congress, by placing this prohibition within section 3004 (which applies only to solid and hazardous wastes) could take this action only if it considered this form of recycling to involve a solid waste. It also bears mention that use of used oil contaminated with dioxin as a dust suppressant is not per se a type of sham recycling. Dioxins bind tenaciously with soils, and so contribute to the dust suppression use. The Congressional prohibition in section 3004 (l) thus applies to a form of recycling, not to illicit disposal. Note also that today's rule deals (in part) with the issue of dioxin contamination in the secondary materials used to produce zinc fertilizers.

used to make zinc fertilizer is counter-productive, in that it discourages legitimate, safe recycling of these valuable materials, and can actually encourage production of fertilizers with higher contaminant levels . Adding further regulatory requirements would almost certainly ensure that this recyling practice would be eliminated completely, which we do not believe would be beneficial environmentally. With regard specifically to requiring additional testing of wastes and materials, the commenters did not supply any data to demonstrate why such additional testing is necessary, or any evidence indicating that fertilizers which meet today's exclusion levels are likely to contain meaningful levels of contaminants other than those for which we have established limits. EPA thus sees no reason to impose such additional requirements without a clear rationale for doing so.

With regard to commenters who supported labeling of hazardous waste derived fertilizer products, we note that there is no legal authority under RCRA to impose such a labeling requirement on products that are made from legitimately recycled hazardous wastes or conditionally excluded secondary materials. We also question the appropriateness of requiring such labels, since they would likely unnecessarily stigmatize products that are identical in composition to fertilizers made from other types of materials.

D. Conditional Exclusion for Zinc Fertilizers Made From Excluded Hazardous Secondary Materials

As mentioned previously, today's rule finalizes the same basic approach as was proposed with regard to setting conditional limits on contaminants in zinc fertilizers made from recycled hazardous secondary materials. This rule therefore establishes specific limits on heavy metals and dioxins that may be contained in these zinc fertilizers (the limits serving as the means for distinguishing wastes from fertilizer products under the conditional exclusion), and sets conditions for sampling, analysis and recordkeeping to verify compliance with these limits (i.e., to verify that excluded recycling is occurring). In effect, these conditions must all be met in order for zinc fertilizers made from hazardous secondary materials to be considered products, rather than wastes.

1. Hazardous Constituent Levels for Excluded Zinc Fertilizers

Today's rule establishes a new set of product specification limits for contaminants in zinc fertilizers made from hazardous secondary materials. Zinc fertilizers that meet these specification limits will in effect be considered products, rather than wastes.

The new exclusion limits in today's final rule address five metal contaminants—i.e., metals coming from zinc-containing hazardous secondary materials that are both non-nutritive and toxic (lead, cadmium, arsenic, mercury and chromium)—and dioxins (likewise non-contributing). In absolute terms, the exclusion limits for the five metals are numerically higher than the LDR treatment standards for those metals (*i.e.,* the ''universal treatment standards'' specified at § 268.48). However, direct comparisons between the two sets of limits are difficult to make. This is because the LDRs are measured according to a leachate extraction procedure (the toxicity characteristic leaching procedure, or TCLP—*see* § 261.24), while the new exclusion levels are expressed as total concentrations. Since the leachability of metal constituents varies according to a number of factors, it is difficult to predict the relationship between TCLP-measured levels vs. total concentration levels with any degree of certainty. To illustrate, the new exclusion level for lead in a 20% zinc fertilizer formulation would be 56 ppm, while the universal treatment standard for lead is 0.75 ppm (milligrams per liter). If in this case the tested sample contained 56 ppm total lead, the TCLP result could be either higher than 0.75 ppm, or lower if the lead was in (for example) a relatively insoluble compound form.

The exclusion limit for dioxins in today's rule is more stringent than the LDR standards, since dioxins are typically not ''underlying constituents'' subject to treatment in the secondary materials that are likely to be excluded under today's rule (*i.e.,* secondary materials that exhibit a hazardous characteristic—*see* § 268.40(e)). Because of this, and in light of the uncertainties inherent in comparing LDR standards for metals with the new exclusion levels, EPA considers today's exclusion levels to be generally more stringent than the LDR standards.

The product specifications in today's rule must be met for any zinc fertilizer that is made from excluded secondary materials. In this sense the two exclusions are linked—a manufacturer who uses the exclusion for hazardous secondary materials must meet the new, more stringent exclusion levels for the zinc fertilizers he or she produces. The LDR standards will continue to apply to any non-zinc fertilizer that is made from recycled hazardous waste.

It is possible under some circumstances that a zinc fertilizer manufacturer might choose not to use the conditional exclusion for hazardous secondary materials, and instead use fully regulated hazardous wastes as feedstock materials. This might happen, for instance, if the manufacturer has already obtained a RCRA permit and made the necessary investments to comply with hazardous waste regulations. In such a case the LDR standards would apply to the hazardous waste derived fertilizers. Such a manufacturer would have the option, however, of meeting the generally more stringent product specifications in today's rule if there were some incentive (*e.g.,* a marketing advantage) to do so.

To reiterate, today's conditional exclusions apply only to *zinc* fertilizers and the secondary materials used to produce them. Thus, if hazardous wastes are used to make non-zinc fertilizers, both the wastes and the fertilizers will be subject to applicable hazardous waste regulations (*see* § 262.20(a)).

2. Limits on Metal Contaminants

Table 1 presents the final limits on five metal contaminants in zinc fertilizers that are made from hazardous secondary materials:

TABLE 1.—LIMITS ON METAL CONTAMINANTS

Metal Constituent	Maximum allowable total concentration in fertilizer, per unit (1%) of zinc content
Arsenic	0.3 ppm
Cadmium	1.4 ppm
Chromium	0.6 ppm
Lead	2.8 ppm
Mercury	0.3 ppm

As noted in the table, these limits are expressed as total concentrations of the metal in the fertilizer product. The alternative of establishing limits based on a different type of test procedure, such as the TCLP used in the RCRA program to identify hazardous wastes, was not supported by any of the commenters on the proposal (one obvious reason being that satisfying a leach test would normally mean that the material is unusable as a fertilizer, since the nutritive metal would be bound up along with the hazardous constitutents). It should also be noted that the limits are tied to the percentage of zinc in the fertilizer. This is primarily because the zinc content of fertilizers varies widely. If the limits were not tied to the percentage of zinc in the product, it is possible that manufacturers could

comply with the limits simply by lowering the zinc content of the product, in effect diluting the contaminants with other ingredients. 55 FR at 70969.

These limits on metals are based on the levels of contaminants in commercial zinc fertilizers that have been well demonstrated as technically and economically practical, by using sound, relatively simple manufacturing techniques. They thus are reasonable levels for demarcating products from wastes. As explained in the preamble to the proposed rule, a widely-marketed zinc fertilizer formulation known as zinc sulfate monohydrate, or ZSM, was used as the basis for developing these limits. 55 FR at 70969.

EPA has made three substantive changes in finalizing the conditional limits for metal contaminants. One change was made in response to a commenter who suggested that additional sampling and testing for metal contaminants should be required whenever a change in manufacturing processes or ingredients is made that could significantly affect the amounts of contaminants in the fertilizer product. The Agency has added this condition to the final rule, since we believe it to be a reasonable precaution that prudent manufacturers would likely take in the normal course of production, even without such a regulatory provision. As such, we believe it a reasonable condition to demarcate products from wastes and to assure that legitimate recycling occurs.

Another substantive change that has been made to the proposed limits on metal contaminants is that the final rule does not include a limit for nickel. Several commenters expressed the view that the proposed limit on nickel (1.4 ppm per percent of zinc in the fertilizer) was unnecessary from an environmental perspective, in that nickel is generally less toxic than the five other metal contaminants, and EPA's background data did not reveal especially high levels of nickel in any of the fertilizer products that were studied [*see* ''Background Document on Fertilizer Use, Contaminants and Regulation'' (EPA 747–R–98–003, January, 1999)]. Some of these commenters also opined that setting a limit on nickel in the context of this EPA rulemaking could create an unnecessary and unwarranted perception that exposure to nickel generally poses serious human health and/or environmental risks.

EPA agrees that nickel is generally less toxic to humans than metals such as lead, cadmium, arsenic and others, and we acknowledge that our review of fertilizer contaminant data did not identify any fertilizer product with nickel at levels that could pose significant health or ecological risks. Further, the processing and filtering steps that are required to manufacture high-purity zinc fertilizers (such as ZSM fertilizers) remove nickel along with other metal contaminants. It is therefore highly unlikely that fertilizers which meet the RCRA contaminant limits for other metals (lead, cadmium, arsenic, mercury and chromium) would contain elevated levels of nickel.

Given that excessive levels of nickel are unlikely in zinc fertilizers that meet the limits for the other five metals in today's rule, and given the relatively lower toxicity of nickel as compared with those metals, the Agency is persuaded that specifying a limit for nickel in today's final rule would serve no real environmental or regulatory purpose. We have therefore removed the limit for nickel in today's final rule.

The third change that has been made to the proposed limits for metals is that the final conditional limit for arsenic has been lowered, from 0.6 ppm per unit of zinc, to 0.3 ppm. This change was made in response to a commenter who questioned the validity of certain data that were used to derive the numerical limit for arsenic. Specifically, the commenter noted that the proposed limit appeared to be based on test results that represented analytical detection limits, rather than actual measured levels of arsenic in tested fertilizers. Our further review of the data confirmed this to be the case, and we have therefore established an arsenic limit that more accurately reflects what we believe to be the actual levels of arsenic in ZSM fertilizers.

Response to comments. EPA received comments reflecting a wide range of viewpoints (in addition to those described above) regarding the proposed limits on metals in recycled zinc fertilizers. One group of commenters questioned the Agency's legal authority to establish any limits at all on contaminants in these fertilizers, arguing that recent court decisions have narrowed the scope of EPA's regulatory jurisdiction over this type of hazardous waste recycling (an issue addressed earlier in this preamble). Some of these commenters also argued that, legal issues aside, it is unnecessary to set any limits on fertilizer contaminants, since EPA's own studies have concluded that fertilizers are generally safe when used properly. Other commenters expressed the view that the technology-based limits (*i.e.* conditional levels reflecting demonstrated fertilizer production process capabilities) as proposed were unnecessarily stringent from a risk perspective, and that any such contaminant limits should be risk-based (*i.e.,* set at levels that are ''safe,'' based on an assessment of potential risks to humans and ecosystems). Some of these commenters further suggested that the risk-based guidelines for metal contaminants in fertilizers that were recently adopted by the Association of American Plant Food Control Officials (AAPFCO) (*see http://aapfco.org/SUIP25Aug08.htm*) could be used for this purpose. Other commenters expressed the view that the proposed limits for metals were not stringent enough, and should be set at the lowest levels that can be technically achieved. Some of these commenters further suggested that limits should be set for additional metals (*e.g.,* selenium, vanadium, beryllium, antimony). One commenter further argued that the limit on chromium should apply only to the more toxic, hexavalent form of chromium, rather than to total chromium as proposed.

EPA chose not to use risk-based limits in this final rule, primarily because we continue to believe that technology-based limits are more appropriate in the context of this rulemaking. Our rationale for using technology-based limits for metals in fertilizers—viz. as explained above, establishing a specification based on contaminant levels found in normal commercial fertilizers in order to reasonably distinguish products from wastes—was explained in detail in the preamble to the proposal, and many commenters supported the approach. Given that today's rule is an exclusion of these materials from being solid wastes, rather than an exclusion from being a hazardous waste (which would more naturally call for a risk-based justification), EPA continues to believe that this approach is reasonable. We did not receive any comments persuading us that the use of technology-based limits in the context of this rulemaking is inappropriate, technically difficult or unduly burdensome for industry.

Moreover, developing risk-based limits for zinc fertilizers would be a highly complex and resource intensive undertaking, and risk-based limits might actually allow contaminant levels in fertilizers to increase substantially, which we do not believe is an environmentally desirable result. To illustrate, Table 2 compares today's exclusion levels with AAPFCO's recommended standards (which were developed from risk assessment studies) for five metals in micronutrient fertilizers, assuming a 35.5% zinc content that is typical for zinc sulfate monohydrate fertilizers:

TABLE 2.—COMPARISON OF RCRA EXCLUSION LEVELS WITH AAPFCO RECOMMENDED GUIDELINES

Metal	RCRA Exclusion Levels (ppm)	AAPFCO Guideline (ppm)
Arsenic	10.7	3,976
Cadmium	49.7	2,947
Chromium	21.3	No limit
Lead	99.4	16,437
Mercury	10.7	213

It should be noted that the AAPFCO recommended standards listed in Table 2 were based primarily on a risk assessment study commissioned by The Fertilizer Institute (an industry trade organization). As with other similar risk assessments, including EPA's (''Estimating Risk from Contaminants Contained in Agricultural Fertilizers,'' September 1, 1999; Web site address *www.epa.gov/epaoswer/hazwaste/recycle/fertiliz/risk/report.pdf*), a number of simplifying assumptions and models were used to address data gaps and other uncertainties inherent in that analysis. EPA does not necessarily accept or dispute the validity of the AAPFCO recommended levels as accurate indicators of potential risks; any such technical judgment would of necessity have to be based on additional data and more rigorous analysis. We note, however, that the general findings of EPA's risk assessment did not differ dramatically from those of the TFI-sponsored study. In any case, we simply wish to underscore the point that any risk-based standards for fertilizer contaminants, including those adopted by AAPFCO, have a considerable uncertainty factor associated with them.

The comparison in Table 2 indicates that risk-based limits for zinc fertilizers are likely to be far higher than the levels of contaminants that are now found in many commonly marketed products. At best, therefore, risk-based standards would have very little effect in terms of actually limiting the amounts of toxic metals in fertilizer products. In fact, as noted already, such standards could allow contaminant levels in zinc fertilizers to increase substantially over current levels. From an environmental perspective, and in light of the public policy debate that has recently taken place over fertilizer contamination, we believe such a result to be inappropriate from an environmental and public policy perspective. In EPA's view, regulatory efforts to control contaminants in fertilizers should be focused mainly on ensuring that fertilizers remain relatively clean, rather than allowing fertilizers to become increasingly contaminated to the point where they may begin to pose unacceptable human health or ecological risks. More importantly for the purposes of this rulemaking, risk-based levels are inappropriate as a measure of distinguishing zinc fertilizer products from wastes, since they bear no relation to the levels that are found in currently marketed zinc fertilizers, and therefore bear no relation to the question of whether the waste-derived fertilizers should be viewed as being or containing waste.

As for the comment suggesting that it is unnecessary to place any limits on contaminants in fertilizers because EPA's studies indicate fertilizers are generally safe, we disagree. In our view, it would be difficult, if not unconscionable, to assure the public and other stakeholders as to the safety and legitimacy of using hazardous secondary materials—*i.e.,* what otherwise are hazardous wastes—to make fertilizers without having any means of limiting contaminants in the resulting fertilizer products. Moreover, opportunities for sham recycling obviously would become rife under such an approach.

Some commenters expressed support for EPA's proposal to use technology-based limits for metals in recycled zinc fertilizers, but suggested that lower limits can and should be achieved. One industry commenter agreed, noting that his company consistently produces pharmaceutical grade zinc sulfate monohydrate with lower contaminant levels than those proposed, and that other companies could meet similar levels.

EPA does not question the assertion that lower contaminant levels than those proposed are technically achievable through the use of more refined (and more expensive) manufacturing processes. However, it is not the Agency's intent to set these limits at the very lowest levels that can be technically achieved. Cf. 63 FR at 33784–33785 (June 19, 1998) (explaining a similar benchmark approach for establishing levels to distinguish products from waste fuels based on comtaminant levels found in normal fossil fuels, rather than the very ''cleanest'' or ''dirtiest'' fossil fuels). The Agency's fertilizer risk assessment indicates that the proposed limits are considerably below levels that we estimate (albeit roughly) to be safe for humans and ecosystems. Thus, the actual environmental benefit to be gained from more stringent limits would likely be negligible. Further, we find highly questionable the notion that there would be any real public benefit in requiring zinc fertilizers to be suitable for pharmaceutical use, or that such exceptional purity (necessary for such a specialized use) is a reasonable means of demarcating fertilizer products from wastes. Finally, setting stricter limits in this rule would almost certainly force most manufacturers to either raise prices for finished zinc fertilizer products, or avoid regulatory requirements altogether by simply switching to alternative feedstock materials that are unregulated by RCRA. We see little if any benefit in either outcome. We have therefore not adjusted the final limits for metals in response to these comments.

Some commenters expressed the view that this rule should set limits for additional metals such as selenium, vanadium, beryllium, antimony and others, citing the possibility that potentially harmful levels of such metals could occur in zinc fertilizers. These commenters did not, however, provide any data to establish that elevated levels of such metals occur in ZSM products (or any other types of fertilizers), or that the purification techniques used in manufacturing ZSM would fail to remove these metals. We note, too, that the data we have reviewed to date on fertilizer contaminants did not indicate the presence of elevated levels of such additional contaminants in zinc fertilizers or any other fertilizer products. We are therefore not persuaded that there is any real need to set limits on additional metals in this rule, and the final rule addresses only the five metal constituents listed above.

A few commenters questioned the proposed limit on chromium (0.6 ppm per unit of zinc), contending that it would be unnecessarily stringent since it does not differentiate between the hexavalent and trivalent forms of chromium, and only the hexavalent form is a potential threat to human health. One commenter also stated that there is no basis or precedent in RCRA to establish controls on the less toxic forms of chromium. That commenter argued further that new fertilizer manufacturing techniques under development may be unable to meet the proposed limit if it applied to total chromium, but could presumably meet that level if it applied only to the hexavalent form.

EPA does not dispute that the potential adverse health effects from exposure to hexavalent chromium are considerably greater than for trivalent chromium, although we do not agree with the commenter's assertion that RCRA controls only apply to hexavalent chromium. As one example, the listing

of chromium as a ''hazardous constituent'' in Appendix VIII of 40 CFR part 261 does not distinguish between the hexavalent and trivalent forms. Similarly, the ''land disposal restrictions'' treatment standard for chromium (see § 268.48) applies to total chromium. There are a number of other examples, as well. We acknowledge, however, that some regulatory provisions of RCRA do make risk distinctions between hexavalent and trivalent chromium. One example is the exemption from the definition of hazardous waste for certain wastes that, upon specific demonstration, are shown to contain only trivalent chromium (see § 261.4(b)(6)).

The proposed limit for total chromium (0.6 ppm per unit of zinc) represents the level that has been demonstrated as readily achievable in ZSM fertilizers, including a small margin to account for variabilities in the manufacturing process. The commenter who proposed applying the limit only to hexavalent chromium did not question EPA's assertion that this level can be easily achieved in ZSM products, but instead referred to an unspecified ''advanced technology'' for making zinc fertilizer that is not designed to remove these contaminants. We note that the commenter did not supply any description of this advanced process, or submit any data to substantiate the claim that this technology would be unable to meet the proposed limit for total chromium. In fact, it is unclear from the commenter's discussion that this unspecified technology has been actually used in full-scale manufacture of zinc fertilizers. We also note that there is little, if any, available ZSM analytical data that differentiates between the different forms of chromium, although the basic chemical properties of chromium suggest that the presence of hexavalent chromium in ZSM fertilizers is likely to be relatively rare. In any case, it is certainly not EPA's intent in this rule to stifle development of new technologies for legitimate recycling in the fertilizer industry. However, without additional data and/or considerably more substantiation of the commenter's claims it is difficult for the Agency to conclude that the proposed limit on chromium is inappropriate or will otherwise be a hardship for zinc fertilizer manufacturers. The final limit on (total) chromium is therefore unchanged from the proposal.

3. Limit on Dioxins

Today's rule finalizes the proposed limit of eight (8) parts per trillion of dioxins in zinc fertilizers, as measured according to the ''toxicity equivalence'' or TEQ method (see ''Estimating Exposures to Dioxin-like Compounds'' (EPA publication #600/6–88/005 Ca)). The eight part per trillion limit is based on EPA's estimate of average national background levels of dioxins in soils (*see* EPA report ''Estimating Exposure to Dioxin-Like Compounds, Review Draft'' (EPA/600/6–88/000Ca; June 1994)). EPA has included dioxins in its list of priority ''persistent, bioaccumulative and toxic'' (PBT) chemicals that are of particular concern environmentally and are the focus of new control strategies being developed by EPA. Further information on the Agency's overall strategy for addressing PBTs can be found on our Web site (*see www.epa.gov/pbt.htm*).

Significant levels of dioxins (in the hundreds of parts per trillion range) have been found in zinc oxysulfate fertilizers made from K061 hazardous wastes. EPA's fertilizer risk assessment concluded that exposure to dioxins in fertilizers at these levels is unlikely to pose unacceptable risks, based on currently available dioxin health effects information. However, available data on dioxin levels in fertilizers are admittedly very limited, so it is possible that dioxin levels in some fertilizer products could be higher than the current data suggest. It is also possible that, when finished, the Agency's ongoing reassessment of dioxin health effects could conclude that even more aggressive measures to control this class of PBT compounds are warranted. Because of these uncertainties, and because EPA is committed generally to a multifaceted national strategy aimed at reducing PBTs in the environment, we believe it is appropriate and prudent to limit dioxins in fertilizers in today's final rule. Moreover, given the presence of dioxins in at least some of the hazardous secondary materials used to produce zinc fertilizers, the extreme health risks associated with dioxins, and the fact that they contribute nothing to the efficacy of fertilizer products, some limit on dioxins is necessary for distinguishing product fertilizers from wastes, and to guard against sham recycling.

As explained in the preamble to the proposed rule, EPA chose to use a ''background'' approach to setting a limit for dioxins in zinc fertilizers primarily because we do not have sufficient data on dioxin levels in zinc fertilizers to establish a technology-based limit, which would be consistent with the approach used in this rulemaking to set limits for metals. The limited data that are available on dioxin concentrations in zinc sulfate monohydrate (the zinc fertilizer formulation used to develop the technology-based limits for metals) indicate dioxin levels of approximately one part per trillion (TEQ) or less. We did not receive any additional data from commenters with regard to dioxin levels in ZSM products, nor did any commenters offer persuasive evidence that the 8 ppt limit would be technically or economically difficult for ZSM producers to achieve in their products. Thus, we believe that the 8 ppt limit can be (and is being) easily achieved by industry, should not impose any significant economic burden on zinc fertilizer manufacturers, and serves as a reasonable level for distinguishing fertilizer products from wastes.

Response to comments. Many of the commenters on the proposal cited the need to limit dioxins in fertilizers as one of their primary concerns with regard to this rulemaking. Most of these commenters argued for either a more stringent limit than was proposed (e.g., a technology-based limit), or a complete ban on the recycling of any dioxin-containing waste material to make fertilizers. Some commenters suggested that a limit based on average national soil background levels would be appropriate only if it were based on ''pre-industrial'' background levels (which would presumably be lower than eight parts per trillion). In contrast, a number of other commenters opposed setting any limit on dioxins in this rule, arguing that it would increase costs to industry and would have little or no net environmental benefit. Other commenters suggested that if a limit on dioxins in fertilizer is established it should be risk-based, rather than based on national background soil levels. One commenter suggested that a dioxin limit of 100 parts per trillion would be more reasonable and appropriate than the proposed limit, though the basis for that specific limit was not provided.

None of the commenters who argued for more stringent limits on dioxins in this rule offered any scientific evidence establishing an environmental need for such additional controls, or questioning EPA's basic risk findings with regard to dioxins in zinc fertilizers. In addition, it is likely that more stringent limits would raise costs for this rule considerably. We see no reason to impose such additional costs without a convincing environmental rationale for doing so; thus, we chose not to adopt more stringent controls for dioxins in this final rule.

We disagree with the commenters who questioned the need for any limit on dioxins in this rule. As explained above, we believe that a limit on dioxins

is appropriate as part of the Agency's broader strategy to control PBT chemicals in the environment, and should moreover have minimal cost impacts on industry. We also believe that a limit on dioxins in this rule is useful in distinguishing products from wastes, and in guarding against sham recycling of dioxin-containing secondary materials (dioxin being a non-contributing hazardous constituent in fertilizers). We do not agree with the commenters who suggested using a risk-based approach to setting limits on dioxins in this rule, for reasons similar to those in the preceding discussion of risk-based levels for metal contaminants. A risk-based limit on dioxins would likely be much higher than the actual levels of dioxins in high-quality zinc fertilizer, or the national soil background level of eight parts per trillion. Thus, a risk-based limit on dioxins would likely allow dioxin levels in these fertilizer products to increase greatly, to the point where they could pose unacceptable risks. EPA does not believe this to be a desirable environmental result, particularly in light of the current scientific uncertainty over the health effects of dioxins.

We also chose not to adopt a limit of 100 parts per trillion, as was suggested by one commenter. That commenter did not offer any scientific, technical or economic basis for this particular limit, nor did the commenter offer any evidence to refute our assumption that the eight ppt limit would be easily achievable by manufacturers of high-quality zinc fertilizers. We thus see no reason to adopt this higher, alternative limit for dioxins in this rule.

IV. Mining Wastes Used To Make Fertilizers

In the preamble to the proposed rule, EPA discussed and requested comment as to the regulatory status of certain fertilizers that are made from mining wastes which exhibit a hazardous characteristic (*e.g.,* are toxic when tested according to the TCLP, cited earlier). One particular iron fertilizer product, which is widely marketed to consumers through retail outlets under the name ''Ironite,'' has been identified as being made from such material. This product is notable for containing approximately 4400 parts per million of arsenic—to our knowledge, the highest arsenic levels of any fertilizer, by several orders of magnitude. At issue is the fact that the hazardous mining wastes used to make Ironite are presently exempt from regulation as hazardous wastes, under the so-called Bevill exemption in the RCRA statute (section 3001(b)(3)(A)(ii)).

In the proposed rule we invited comment as to whether EPA should undertake a regulatory initiative to remove the current exemption for this type of fertilizer. Most of the commenters on the proposed rule supported the idea of regulating Ironite (and other similar fertilizers, though we are not aware of any) under the same set of regulations that apply to hazardous waste derived fertilizers. Several commenters, in fact, expressed strong concerns as to the potential adverse health effects of Ironite, particularly acute effects that could result from direct ingestion (*e.g.,* by children) of Ironite products. Some of these commenters also questioned the validity of the studies that have been cited by the Ironite Products Company as demonstrating the safety of their products. One commenter, however (the American Mining Association), disputed the idea that Ironite is unsafe, suggesting that EPA's actual motive in this regard is to ''backdoor'' its way into narrowing the scope of the Bevill exemption. These commenters also cited the argument made by others that EPA has no legal authority at all to regulate hazardous wastes that are recycled to make fertilizers, let alone mining wastes that are specifically exempt from hazardous waste regulations.

EPA continues to believe that concerns regarding exposure to arsenic in Ironite products are worthy of serious consideration, particularly since it is a widely marketed consumer product intended for use by home gardeners and others. As such, the potential for misuse and/or accidental exposure (especially to children) cannot be discounted. At the same time, however, we recognize that there are technical issues associated with estimating risks from exposure to contaminants in Ironite that merit further study before the Agency can reach any definitive conclusions as to the potential risks of the product. For example, there has been some controversy regarding the bio-availability of the arsenic and lead compounds in Ironite and Ironite-amended soils.

EPA's Office of Solid Waste is partnering with EPA's Office of Research and Development and EPA's Region 8 Office to further evaluate the potential human health and environmental risks that may occur from the use of Ironite fertilizer. We expect that these efforts will provide the Agency with a much clearer sense of the environmental implications of Ironite use, and whether or not there is a need to pursue regulatory action to impose RCRA controls. The Agency will be coordinating this effort with state environmental and public health agencies and others who may have conducted similar studies or may have supporting analyses underway. Preliminary results of EPA's evaluation should be available in calendar year 2003. We hope to announce the Agency's follow-up regulatory strategy with regard to specific mining waste-derived fertilizers, such as Ironite, subsequently.

V. State Fertilizer Regulatory Programs

Virtually all States have regulatory programs for fertilizers, which are usually administered by state agricultural agencies. Traditionally, the primary focus of these regulatory programs has been to ensure that fertilizers are accurately classified and labeled, and meet manufacturers' plant nutrient claims. Until quite recently, state regulatory programs did not explicitly address the issue of controlling contaminants such as heavy metals in fertilizer products. In 1998 the State of Washington enacted legislation to create this country's first comprehensive system for regulating fertilizer contaminants. A key feature of Washington's program is a publicly accessible internet website containing data on all fertilizers registered in the State of Washington, including data on levels of non-nutrient metals in each registered product. This database can be accessed at *http//www.wa.gov/agr/pmd/fertilizers.*

The States of Texas and California have also recently established regulatory programs for fertilizer contaminants, and a number of other states are likewise considering regulatory initiatives in this area.

EPA supports state efforts to regulate contaminants in fertilizers. EPA regulates only a small fraction of the fertilizers currently on the market (one half of one percent or less) under its RCRA authorities. The potential certainly exists, however, for contaminant problems in other types of fertilizers. For example, cadmium levels in certain phosphate fertilizers (which typically are not waste derived) have been the subject of some concern recently by researchers, state regulators and others. We believe that the State of Washington's fertilizer regulatory program has been highly successful in controlling, and in a number of cases reducing, contaminants in fertilizer products sold in that state, and we thus encourage other states to develop similar programs.

VI. State authority

A. Applicability of Federal RCRA Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer the RCRA hazardous waste program within the state. Following authorization, the state requirements authorized by EPA apply in lieu of equivalent federal requirements and become federally enforceable as requirements of RCRA. EPA maintains independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. Authorized states also have independent authority to bring enforcement actions under state law.

A state may receive authorization by following the approval process described in 40 CFR part 271. Part 271 of 40 CFR also describes the overall standards and requirements for authorization. After a state receives initial authorization, new Federal regulatory requirements promulgated under the authority in the RCRA statute which existed prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements (this does not, however, preclude a state from adopting and implementing such new regulations under state law only, prior to being authorized for them). The state must adopt such requirements to maintain authorization. In contrast, under RCRA section 3006(g), (42 U.S.C. 6926(g)), new Federal requirements and prohibitions imposed pursuant to HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized States. Although authorized states are still required to update their hazardous waste programs to remain equivalent to the Federal program, EPA carries out HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so. Authorized states are required to modify their programs only when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements.

RCRA section 3009 allows the states to impose standards more stringent than those in the Federal program. *See* also 40 CFR 271.1(i). Therefore, authorized states are not required to adopt Federal regulations, either HSWA or non-HSWA, that are considered less stringent.

B. Authorization of States for Today's Proposal

Today's rule is promulgated pursuant in part to HSWA authority and in part to non-HSWA authority. The conditional exclusion from the definition of solid waste for hazardous secondary materials used in zinc fertilizers is promulgated pursuant to non-HSWA authority, and is also less stringent than the current Federal requirements. Therefore, States will not be required to adopt and seek authorization for the conditional exclusion. EPA will implement the exclusion only in those States which are not authorized for the RCRA program. EPA believes, however, that this final rulemaking has considerable merit, and we thus strongly encourage States to amend their programs and become federally authorized to implement these rules.

The elimination of the exemption from LDR treatment standards for K061 derived fertilizers is promulgated pursuant to RCRA section 3004(g), a HSWA provision.[5] Therefore, the Agency is adding this rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. Table 2 in 40 CFR 271.1(j) is modified to indicate that these requirements are self-implementing. Until the States receive authorization for these more stringent HSWA provisions, EPA will implement them. Once authorized States adopt an equivalent rule and receive authorization for such rule from EPA, the authorized state rule will apply in that State as the RCRA Subtitle C requirement in lieu of the equivalent federal requirement.

VII. Administrative Assessments

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order, which include assessing the costs and benefits anticipated as a result of the proposed regulatory action. 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 a 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. Pursuant to the terms of Executive Order 12866, the Agency has determined that today's proposed rule is a significant regulatory action because this proposed rule contains novel policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket to today's proposal.

EPA's economic analysis suggests that this rule is not economically significant under Executive Order 12866.

Detailed discussions of the methodology used for estimating the costs, economic impacts and the benefits attributable to today's rule for regulatory modifications to the definition of solid waste for zinc-containing hazardous waste-derived fertilizers, followed by a presentation of the cost, economic impact and benefit results, may be found in the background document: ''Economic Analysis for Regulatory Modifications to the Definition of Solid Waste For Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Final Rulemaking,'' which is in the docket for today's final rule.

Methodology. To estimate the cost, economic impacts to potentially affected firms and benefits to society from this rulemaking, we analyzed data from zinc micronutrient producers, firm financial reports, trade associations and chemical production data. The Agency has used both model facilities and actual facilities in analyzing the effects of this proposed regulation.

To estimate the incremental cost or cost savings of this rule making, we reviewed baseline management practices and costs of potentially affected firms. The Agency has modeled the most likely post-regulatory scenario resulting from this action (*e.g.,* shifts to non-hazardous fertilizer feedstocks, shifting from zinc oxysulfate to zinc sulfate monohydrate production) and the estimated cost of complying with it.

[5] In Aug. 17, 1988, through a rule promulgated pursuant to HSWA, EPA imposed treatment standards prior to land application on all other commercial fertilizers containing recyclable waste, except for those derived from K061 (53 FR 31198, 31202). Today's rule simply extends the application of treatment standards to K061 derived fertilizers.

The difference between the baseline management cost and the post-regulatory cost is either the incremental cost or cost savings resulting from the rulemaking.

To estimate the economic impact of today's rule, we compared the incremental cost or cost savings of the rule with model firm sales. The Agency has also considered the ability of potentially affected firms to pass compliance costs on in the form of higher prices.

To characterize the benefits of today's rule, we evaluated available data and presented a qualitative assessment of benefits including ecological benefits and protection of natural resources such as groundwater.

Results. Volume. Data reviewed by the Agency indicates that there are 3 to 4 zinc micronutrient producers, one zinc producer, one steel mill, and 23 brass fume dust generators (ingot makers, mills, and foundries) potentially affected by today's rule. Although the exact amount of hazardous waste used in zinc micronutrient fertilizer production on annual basis varies from year to year, in 1997, data indicate that approximately 46,000 tons of hazardous waste were used in the production of zinc micronutrient fertilizer. The principal hazardous waste feedstocks were tire ash, electric arc furnace dust (K061) and brass fume dust from ingot makers, mills and foundries.

Costs. For the part of today's rule pertaining to zinc micronutrient fertilizers, we estimate the total annual cost savings from today's proposal to be $2.14 million for all facilities. Costs savings for different groups are summarized in Table 1.

TABLE 1.—ESTIMATED INCREMENTAL COSTS AND COST SAVINGS BY FACILITY CATEGORY

Potentially affected facility	Incremental annual costs (cost savings) (1999$)
Zinc Oxysulfate Producers.	($0.49 million).
Zinc Sulfate Monohydrate Producers.	($0.75 million).
Primary Zinc Producers.	($1.0 million).
Steel Mill	$1.5 million.
Brass Fume Dust Generators.	($1.4 million).
Total	($2.14 million).

Costs and cost savings to zinc oxysulfate producers are estimated from either shifting production to zinc sulfate monohydrate or shifting to nonhazardous sources of oxysulfate feedstocks. Zinc sulfate monohydrate producers and primary zinc producers are estimated to realize cost savings from shifting brass fume dust currently used in animal feed production to fertilizer production. Under current zinc sulfate markets, fertilizers are sold at a higher price than animal feed. One steel mill that has generated baghouse dust used in fertilizer manufacturing is expected to incur additional costs from having to shift their dust from fertilizer production to land disposal. And brass fume dust generators (mills, ingot makers, foundries) are estimated to incur cost savings from shifting their dust from zinc reclamation and animal feed to fertilizer production.

Economic Impact Results. To estimate potential economic impacts resulting from today's rule, we use a first order economic impacts measure: the estimated incremental costs or cost savings of today's rule as a percentage of affected firms sales. Because of data limitations, EPA was unable to obtain profit information for potentially affected firms. For two zinc oxysulfate producers the estimated impact of the rule is 1.42 percent in incremental costs for one firm and 0.64 percent in cost savings for the other. Two zinc sulfate monohydrate producers are estimated to realize cost savings of 0.1 and 15 percent of revenue. For the primary zinc producer, the rule is estimated to result in cost savings equal to 1 percent of firm sales. More detailed information on this estimate can be found in the economic analysis placed into today's docket.

Benefits Assessment. Because EPA did not use any risk assessments of current or projected metals and dioxin concentrations in zinc fertilizers in the development of this rulemaking, the Agency cannot make any quantitative conclusions about the risk reduction from today's final rule. To estimate the benefits resulting from today's rule, EPA looked at available literature and records regarding hazardous waste feedstocks used to make zinc micronutrient fertilizers. The data suggest that today's rule will reduce loading of toxic non-nutritive constituents to the soil. Two zinc oxysulfate samples produced from hazardous waste and analyzed by the State of Washington had dioxin concentrations between 17 and 42 times background level (''Final Report Screening Survey for Metals and Dioxins in Fertilizer Products and Soils in Washington State,'' Washington State Department of Ecology, April 1999, Figures 1–1 and 1–2). In addition, the zinc oxysulfate manufacturing process does not remove any of the lead or cadmium from the feedstock material. If promulgated, today's proposal would reduce annual loadings of these metals to the soil.

In addition, today's proposal may reduce natural resource damage and contamination to groundwater. EPA is aware of at least two damage incidents caused by land placement of hazardous waste prior to fertilizer production that resulted in contamination of either groundwater or surrounding surface water bodies adjacent to the site. (''Report of RCRA Compliance Inspection at American Microtrace Corporation,'' US EPA Region VII, December 4, 1996, Editorial, The Atlanta Journal/Constitution, April 11, 1993). Today's proposal may increase non-use values for these environmental amenities as well.

The Agency also believes that this rule has the potential for reducing what may be considered low probability but high consequence adverse human health or environmental impact if contamination from hazardous secondary material used in fertilizer production should, because of geological conditions such as karst terrain, reach a major population drinking water source or sensitive environmental location. This rule should lessen the chances of this type of event even though the probabilities of such occurrences and the magnitude of any impacts are not known.

B. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 USC 601 et. seq.

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, we have determined that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' (5 U.S.C. 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.

There is one small entity incurring incremental costs and offsetting increased revenues resulting from this rulemaking. This firm is Frit Inc, a zinc oxysulfate fertilizer producer. Frit has one facility co-located onsite with Nucor Steel's Norfolk, Nebraska facility. Frit has been producing zinc oxysulfate fertilizer from Nucor's baghouse dust (K061, a listed hazardous waste). As result of this rulemaking, Frit will no longer be able to make zinc oxysulfate from Nucor's dust. This is due to both the removal of the exemption of K061 derived fertilizer's from LDR requirements and metal limits on zinc fertilizers made from hazardous secondary materials. EPA understands that Frit is ceasing operations at the Norfolk, Nebraska facility. In the economic analysis of the proposed rulemaking, EPA had modeled Frit switching from zinc oxysulfate to zinc sulfate monohydrate at Nucor's facility as the most cost-effective post-regulatory alternative. In public comment on the proposed rulemaking, The Fertilizer Institute, a trade association of which Frit is a member, commented that EPA's economic analysis had not accounted for costs of switching and operating from zinc oxysulfate to zinc sulfate monohydrate. Although EPA agrees with some of The Fertilizer Institute's comments and disagrees with others (for more information see the Response to Comments document to today's rulemaking), when EPA reevaluated two possible alternative regulatory responses for Frit to this rulemaking (1. switching from zinc oxysulfate to zinc sulfate monohydrate, and 2. switching from hazardous secondary sources to nonhazardous secondary sources), we determined that switching to nonhazardous sources of zinc-bearing secondary materials would be more cost-effective for Frit than switching its production to ZSM. This is because although it costs more to purchase nonhazardous zinc-bearing secondaries, the fertilizers produced from the nonhazardous sources are sold at a higher price due to lower nonnutritive mineral content (i.e. lead and cadmium). Because Frit is ceasing operations at the Nucor site, EPA has modeled the firm consolidating its operations at another company facility to produce zinc oxysulfate from nonhazardous sources. EPA has estimated that Frit's costs for nonhazardous feedstocks will increase by $2.9 million. Also, Frit should realize increased revenues of $3.4 million that offset these costs and increase profit by $0.49 million. Thus, Frit should not be significantly impacted by this rule even though it will be required to incur additional costs when substituting to nonhazardous sources.

Moreover, EPA does not believe that one regulated entity constitutes a substantial number of small entities in the zinc micronutrient industry. There are several other firms producing zinc micronutrient fertilizers, some of them small businesses. As discussed below, this rule will benefit many of these firms.

It is also likely that even in the absence of this rulemaking that opportunities to market K061 derived fertilizers would become more limited in response to decreased consumer demand for fertilizers with high non-nutritive mineral content. EPA notes that there is currently a market trend away from zinc fertilizers with high heavy metal content (*see www.chemexpo.com/news/newsframe.cfm?framebody=/news/profile.cfm* as obtained April 12, 2002 for zinc sulfate). Therefore, it is likely that even in the absence of this rulemaking, the market for zinc fertilizers with relatively high heavy metal content, such as K061-derived zinc oxysulfate, is declining in favor of cleaner zinc fertilizers. And in the past 3 years, there has been a trend away from using K061 in fertilizer production. Two of the three firms that had used K061 in 1997 in zinc oxysulfate production had ceased using this hazardous feedstock prior to EPA's proposed fertilizer rulemaking.

EPA also notes that this rulemaking will assist many small businesses that either generate hazardous zinc-bearing secondary feedstocks or use those feedstocks in fertilizer production by opening up markets for these materials including brass dust, tire ash, and zinc oxides from steel waste. Brass foundries, brass mills, and brass ingot makers are examples of the types of small business generators likely to benefit from today's final rule. The Agency has received favorable public comments from trade associations representing small business generators of hazardous zinc-bearing secondaries. Other small business producers of zinc sulfate monohydrate such as Big River Zinc, and Madison Industries will benefit from increased supplies of zinc-bearing secondaries. For more information, please refer to the background document entitled ''Economic Analysis for Regulatory Modifications to the Definition of Solid Waste For Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Final Rulemaking,'' which was placed in the docket for today's final rule.

For the reasons discussed above, I hereby certify that this rule will not have a significant adverse economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this final 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.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1189.XX). A copy of this ICR may be obtained from Sandy Farmer, OPIA Regulatory Information Division, U.S. Environmental Protection Agency (2137), 1200 Pennsylvania Avenue, NW., Washington DC 20460, or by calling (202) 260–2740 and a copy may be obtained from Sandy Farmer by mail at OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW.; Washington, DC 20460, by e-mail at *farmer.sandy@epamail.epa.gov,* or by calling (202) 260–2740. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.*

EPA has finalized the following conditions for reporting and recordkeeping by generators and manufacturers: The rule requires generators to submit a one-time notice to the EPA Regional Administrator (or the state Director in an authorized state) and to maintain all records of all shipments of excluded hazardous secondary materials for a minimum of three years As a condition of the exclusion, manufacturers will be required to submit a one-time notice, retain for a minimum of three years

records of all shipments of excluded hazardous secondary materials that were received by the zinc fertilizer manufacturer during that period, and submit an annual report identifying the types, quantities and origins of all such excluded materials that were received by the manufacturer in the preceding year. The manufacturer will also be required to perform sampling and analysis of the fertilizer product to determine compliance with the contaminant limits for metals no less than every six months, and for dioxins no less than every twelve months. Additional testing will be required when changes to processes or feedstock materials are made that could significantly alter the composition of the fertilizer products. These conditions replace the current hazardous waste regulatory requirements for reporting and recordkeeping, and are designed to improve the accountability system, and government oversight capabilities, over the handling of secondary materials used to make zinc fertilizers.

EPA estimates that the total annual respondent burden for the new paperwork requirements in the rule is approximately 61 hours per year and the annual respondent cost for the new paperwork requirements in the rule is approximately $12,653. However, in addition to the new paperwork requirements in the rule, EPA also estimated the burden and cost savings that generators and manufacturers could expect as a result of no longer needing to comply with the existing RCRA hazardous waste information collection requirements for the excluded materials. This cost savings of $21,149 minus the $12,653 cost for the new paperwork requirements will result in an overall cost savings $8,496. The net cost to EPA of administering the rule was estimated at approximately $244 per year. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written analysis, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of § 205 do not apply when they are inconsistent with applicable law. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under § 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule does not include a Federal mandate that may result in expenditures of $100 million or more to State, local, or tribal governments in the aggregate, because this rule imposes no enforceable duty on any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Therefore, today's proposed rule is not subject to the requirements of Sections 202, 203, and 205 of UMRA.

E. Federalism—Applicability of Executive Order 13132

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

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

Section 4 of the Executive Order contains additional requirements for rules that preempt State or local law, even if those rules do not have federalism implications (*i.e.,* the rules will not have substantial direct effects on the States, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government). Those requirements include providing all affected State and local officials notice and an opportunity for appropriate participation in the development of the regulation. If the preemption is not based on express or implied statutory authority, EPA also must consult, to the extent practicable, with appropriate State and local officials regarding the conflict between State law and Federally protected interests within the agency's area of regulatory responsibility.

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in

Executive Order 13132. This rule directly affects primarily zinc micronutrient producers and generators of hazardous wastes used in zinc fertilizer production. There are no State and local government bodies that incur direct compliance costs by this rulemaking. And State and local government implementation expenditures are expected to be less than $500,000 in any one year (for more information, please refer to the background document entitled ''Federalism Analysis (Executive Order 13132) for Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Proposed Rulemaking: Substantial Direct Effects'', August 2000). Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

This rule preempts State and local law that is less stringent for these zinc-bearing hazardous wastes. Under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 to 6992k, the relationship between the States and the national government with respect to hazardous waste management is established for authorized State hazardous waste programs, 42 U.S.C. 6926 (section 3006), and retention of State authority, 42 U.S.C. 6929 (section 3009). Under section 3009 of RCRA, States and their political subdivisions may not impose requirements less stringent for hazardous waste management than the national government.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

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

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

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this rule present a disproportionate risk to children. EPA's fertilizer risk assessment modeled a number of pathways by which farmers and their children could be exposed to metals and dioxins in fertilizer products applied at recommended rates and frequencies. Exposure was modeled through both direct and indirect pathways. The direct pathways considered were the inhalation pathway, including inhalation of windblown emissions, and from emissions during product application and tilling. Direct ingestion of soils amended with fertilizers was also modeled. The indirect exposure pathways considered were ingestion of plants (vegetables, fruits, and root vegetables) grown on soils amended with fertilizer products containing metals and dioxins, ingestion of beef and dairy products produced on land amended with these products, and ingestion of home-caught fish from a stream adjacent to the farmer's agricultural field.

EPA's fertilizer risk assessment used a probabilistic methodology to estimate incremental lifetime cancer and non-cancer risks to farmers and farm children. The general conclusion of the risk assessment was that fertilizers generally do not pose harm to human health or the environment. Since today's final rule is expected to reduce the overall levels of contaminants in zinc fertilizers made from hazardous secondary materials, the Agency expects that the impacts of this rule on childrens' health will be positive, albeit relatively small.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule establishes a conditional exclusion for zinc fertilizers based on contaminant levels for metals and dioxins. After considering alternatives, EPA has determined that it would be impractical and inappropriate to use voluntary consensus standards in this rulemaking, for the reasons discussed in more detail in in Section III.D of this preamble.

I. Executive Order 12898

EPA is committed to addressing environmental justice concerns and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all populations in the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income bears disproportionately high and adverse human health or environmental impacts as a result of EPA's policies, programs, and activities, and that all people live in safe and healthful environments. In response to Executive Order 12898 and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

Today's rule pertains to hazardous wastes used in zinc micronutrient production, and is intended to reduce risks of excluded hazardous secondary materials, and benefit all populations. As such, this rule is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities versus non-minority or affluent communities.

Excluded hazardous secondary materials will be subject to protective conditions regardless of where they are generated and regardless of where they may be managed. Although the Agency understands that the exclusion may affect where these wastes are managed in the future, the Agency's decision to conditionally exclude these materials is

independent of any decisions regarding the location of waste generators and the siting of waste management facilities. Today's rule will reduce loadings of toxic non-nutritive constituents to the soil, and will ensure proper management of secondary materials at affected facilities. EPA believes that these provisions of the rule will benefit all populations in the United States, including low-income and minority communities.

J. Executive Order 13211 (Energy Effects)

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule applies to a discrete sector of the economy and potentially adversely affects fewer than 20 firms. This rule reduces regulatory burden and creates markets for hazardous zinc-bearing secondary materials. It thus does not adversely affect energy supply, distribution or use.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on July 24, 2002, except for the amendment to 40 CFR 266.20(b), which eliminates the exemption from treatment standards for fertilizers made from recycled electric arc furnace dust. The effective date for that provision in today's final rule is January 24, 2003.

List of Subjects

40 CFR Part 261

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

40 CFR Part 266

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

40 CFR Part 268

Environmental protection, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 271

Environmental proteciton, Hazardous waste, Reporting and recordkeeping requirements.

Dated: July 15, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set forth in the preamble, title 40, chapter I 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, 6924(y), and 6938.

Subpart A—General

2. Section 261.4 is amended by adding paragraphs (a)(20) and (a)(21) to read as follows:

§ 261.4 Exclusions.

(a) * * *

(20) Hazardous secondary materials used to make zinc fertilizers, provided that the following conditions specified are satisfied:

(i) Hazardous secondary materials used to make zinc micronutrient fertilizers must not be accumulated speculatively, as defined in § 261.1 (c)(8).

(ii) Generators and intermediate handlers of zinc-bearing hazardous secondary materials that are to be incorporated into zinc fertilizers must:

(A) Submit a one-time notice to the Regional Administrator or State Director in whose jurisdiction the exclusion is being claimed, which contains the name, address and EPA ID number of the generator or intermediate handler facility, provides a brief description of the secondary material that will be subject to the exclusion, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(B) Store the excluded secondary material in tanks, containers, or buildings that are constructed and maintained in a way that prevents releases of the secondary materials into the environment. At a minimum, any building used for this purpose must be an engineered structure made of non-earthen materials that provide structural support, and must have a floor, walls and a roof that prevent wind dispersal and contact with rainwater. Tanks used for this purpose must be structurally sound and, if outdoors, must have roofs or covers that prevent contact with wind and rain. Containers used for this purpose must be kept closed except when it is necessary to add or remove material, and must be in sound condition. Containers that are stored outdoors must be managed within storage areas that:

(*1*) have containment structures or systems sufficiently impervious to contain leaks, spills and accumulated precipitation; and

(*2*) provide for effective drainage and removal of leaks, spills and accumulated precipitation; and

(*3*) prevent run-on into the containment system.

(C) With each off-site shipment of excluded hazardous secondary materials, provide written notice to the receiving facility that the material is subject to the conditions of this paragraph (a)(20).

(D) Maintain at the generator's or intermediate handlers's facility for no less than three years records of all shipments of excluded hazardous secondary materials. For each shipment these records must at a minimum contain the following information:

(*1*) Name of the transporter and date of the shipment;

(*2*) Name and address of the facility that received the excluded material, and documentation confirming receipt of the shipment; and

(*3*) Type and quantity of excluded secondary material in each shipment.

(iii) Manufacturers of zinc fertilizers or zinc fertilizer ingredients made from excluded hazardous secondary materials must:

(A) Store excluded hazardous secondary materials in accordance with the storage requirements for generators and intermediate handlers, as specified in paragraph (a)(20)(ii)(B) of this section.

(B) Submit a one-time notification to the Regional Administrator or State Director that, at a minimum, specifies the name, address and EPA ID number of the manufacturing facility, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(C) Maintain for a minimum of three years records of all shipments of excluded hazardous secondary materials received by the manufacturer, which must at a minimum identify for each shipment the name and address of the generating facility, name of transporter and date the materials were received, the quantity received, and a brief description of the industrial process that generated the material.

(D) Submit to the Regional Administrator or State Director an annual report that identifies the total quantities of all excluded hazardous secondary materials that were used to manufacture zinc fertilizers or zinc fertilizer ingredients in the previous year, the name and address of each generating facility, and the industrial process(s) from which they were generated.

(iv) Nothing in this section 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) Interim status and permitted storage units that have been used to store only zinc-bearing hazardous wastes prior to the submission of the one-time notice described inparagraph (a)(20)(ii)(A) of this section, and that afterward will be used only to store hazardous secondary materials excluded under this paragraph, are not subject to the closure requirements of 40 CFR Parts 264 and 265.

(21) Zinc fertilizers made from hazardous wastes, or hazardous secondary materials that are excluded under paragraph (a)(20) of this section, provided that:

(i) The fertilizers meet the following contaminant limits:

(A) For metal contaminants:

Constituent	Maximum Allowable Total Concentration in Fertilizer, per Unit (1%) of Zinc (ppm)
Arsenic	0.3
Cadmium	1.4
Chromium	0.6
Lead	2.8
Mercury	0.3

(B) For dioxin contaminants the fertilizer must contain no more than eight (8) parts per trillion of dioxin, measured as toxic equivalent (TEQ).

(ii) The manufacturer performs sampling and analysis of the fertilizer product to determine compliance with the contaminant limits for metals no less than every six months, and for dioxins no less than every twelve months. Testing must also be performed whenever changes occur to manufacturing processes or ingredients that could significantly affect the amounts of contaminants in the fertilizer product. The manufacturer may use any reliable analytical method to demonstrate that no constituent of concern is present in the product at concentrations above the applicable limits. It is the responsibility of the manufacturer to ensure that the sampling and analysis are unbiased, precise, and representative of the product(s) introduced into commerce.

(iii) The manufacturer maintains for no less than three years records of all sampling and analyses performed for purposes of determining compliance with the requirements of paragraph (a)(21)(ii) of this section. Such records must at a minimum include:

(A) The dates and times product samples were taken, and the dates the samples were analyzed;

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

(C) A description of the methods and equipment used to take 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 cleanup and sample preparation methods; and

(F) All laboratory analytical results used to determine compliance with the contaminant limits specified in this paragraph (a)(21).

PART 266—[AMENDED]

3. The authority citation for Part 266 continues to read as follows:

Authority: 42 U.S.C. 1006, 2002(a), 3001–3009, 3014, 6905, 6906, 6912, 6921, 6922, 6924–6927, 6934, and 6937.

Subpart C—Recyclable Materials Used in a Manner Constituting Disposal

4. Section 266.20 is amended by removing the last two sentences of paragraph (b), and adding paragraph (d) to read as follows:

§ 266.20 Applicability.

* * * * *

(d) Fertilizers that contain recyclable materials are not subject to regulation provided that:

(1) They are zinc fertilizers excluded from the definition of solid waste according to § 261.4(a)(21) of this chapter; or

(2) They meet the applicable treatment standards in subpart D of Part 268 of this chapter for each hazardous waste that they contain.

PART 268— [AMENDED]

5. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

Subpart D—Treatment Standards

§ 268.40 [Amended]

6. Section 268.40 is amended by removing and reserving paragraph (i).

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

7. The authority citation for Part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

8. In § 271.1(j), tables 1 and 2 are amended by adding the following entries in chronological order by date of publication to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
*	*	*	*
July 15, 2002	Elimination of LDR Treatment Standards Exemption for K061-Derived Fertlizers.	July 24, 2002, FR cite	January 24, 2003.

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984—Continued

Promulgation date	Title of regulation	Federal Register reference	Effective date
* *	*	*	* *

TABLE 2.—SELF IMPLEMENTING PROVISIONS OF THE SOLID WASTE AMENDMENTS OF 1984

Effective date	Self-implementing provision	RCRA citation	Federal Register reference
* *	*	*	* *
January 24, 2003	Elimination of LDR Treatment Standards Exemption for K061 Derived Fertilizers.	3004(g)(6)	July 24, 2002, FR cite.
* *	*	*	* *

[FR Doc. 02–18405 Filed 7–23–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 18

[ET Docket No. 98–80; FCC 02–157]

Conducted Emission Limits

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: On July 10, 2002 (67 FR 45666), the Commission published final rules in the **Federal Register**, which amended the rules for Conducted Emission Limits. This document contains a correction to the effective date of that rule which was inadvertently published incorrectly.

DATE: Effective August 9, 2002.

FOR FURTHER INFORMATION CONTACT: Anh Wride, Office of Engineering and Technology, (202) 418–0577, TTY (202) 418–2989, e-mail: *awride@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission published a document amending parts 15 and 18 in the **Federal Register** of July 10, 2002, (67 FR 45666). This document corrects the **Federal Register** as it appeared. In FR Doc. 02–17264 published on July 10, 2002, (67 FR 45666), the Commission is correcting the ''**DATES**: Effective August 9, 2002 of the Commission's rules to reflect the correct **DATES**: Effective September 9, 2002.''

In rule FR Doc. 02–17264 published on July 10, 2002 (67 FR 45666) make the following correction:

On page 45666, in the third column correct Dates: Effective August 9, 2002 to read as **DATES**: Effective September 9, 2002.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 02–18626 Filed 7–23–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 98–67; DA 02–1490]

Request for Comment on Petition for Clarification on the Provision of and Cost Recovery for Captioned Telephone as an Improved Voice Carry-Over Service for Telecommunications Relay Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; request for comments on petition for clarification.

SUMMARY: This document seeks public comment on a petition requesting clarification of the Commission's rules on telecommunications relay services (''TRS'') with respect to the provision and reimbursement of captioned telephone, an enhanced voice carry-over service (published at 65 FR 38432, June 21, 2000.) *See* Petition for Clarification Provision of and Cost Recovery for CapTel, An Enhanced VCO Service, CC Docket No. 98–67 filed April 12, 2002 on the behalf of Ultratec, Inc. This document also seeks public comment on Ultratec, Inc.'s request for clarification that certain TRS mandatory minimum standards do not apply to this service.

DATES: Interested parties may file comments in this proceeding no later than July 26, 2002. Reply comments may be filed no later than August 12, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC, 20554.

FOR FURTHER INFORMATION CONTACT: Dana Jackson, Disability Rights Office, Consumer and Governmental Affairs Bureau, at (202) 418–2247 (voice), (202) 418–7898 (TTY), or e-mail at *dljackso@fcc.gov.*

SUPPLEMENTARY INFORMATION: When filing comments, please reference CC Docket No. 98–67. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <*http://www.fcc.gov/e-file/ecfs.html*>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of the proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of the proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Services mail