

recordkeeping requirements, Sulfur oxides, Sulfuric acid plants, Waste treatment and disposal.

Dated: September 19, 2005.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

■ 40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart LL—Oklahoma

■ 2. Section 62.9100 is amended by adding paragraphs (c)(6) to read as follows:

§ 62.9100 Identification of plan.

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(b) * * *

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(6) Control of air emissions from existing commercial and industrial solid waste incineration units, submitted by the Oklahoma Department of Environmental Quality on June 29, 2005. (OAC 252:100–17, Part 9).

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(c) * * *

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(6) Commercial and industrial solid waste incineration units.

■ 3. Subpart LL is amended by adding a new undesignated center heading and new § 62.9190 and new § 62.9191 to read as follows:

Existing Commercial and Industrial Solid Waste Incineration Units

§ 62.9190 Identification of sources.

(a) The plan applies to the following existing commercial and industrial solid waste incineration units:

(a) A&A Enterprises, Ardmore, Oklahoma.

(b) Henryetta Pallet Company, Henryetta, Oklahoma.

(c) Oklahoma AAA Pallet Co., Inc., Oklahoma City, Oklahoma.

(d) Simer Pallet Recycling, Inc., Chickasha, Oklahoma.

§ 62.9191 Effective date.

The effective date of this portion of the State’s plan applicable to existing commercial and industrial solid waste incineration units is December 5, 2005.

[FR Doc. 05–19838 Filed 10–3–05; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[RCRA–2002–0028; FRL–7980–1]

RIN 2050–AE84

Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures (“Headworks Exemptions”)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In today’s action, the Environmental Protection Agency is finalizing the addition of benzene and 2-ethoxyethanol to the list of solvents whose mixtures with wastewaters are exempted from the definition of hazardous waste under the Resource Conservation and Recovery Act. The scrubber waters derived-from the combustion of any of the exempted solvents also are included in the exemption. In addition, the Agency is revising the rule by adding an option to allow generators to directly measure solvent chemical levels at the headworks of the wastewater treatment system to determine whether the wastewater mixture is exempt from the definition of hazardous waste. Finally, the Agency is extending the eligibility for the *de minimis* exemption to other listed hazardous wastes (beyond

discarded commercial chemical products) and to non-manufacturing facilities.

DATES: This final rule is effective on November 3, 2005

ADDRESSES: EPA has established a docket for this action under Docket ID No. RCRA–2002–0028. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

FOR FURTHER INFORMATION CONTACT: Lisa Lauer, Hazardous Waste Identification Division, Office of Solid Waste (5304W), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–7418; fax number: 703–308–0514; e-mail address: Lauer.Lisa@epa.gov.

SUPPLEMENTARY INFORMATION:

General Information

Entities potentially affected by this action are generators of industrial hazardous waste, and entities that treat, store, transport and/or dispose of these wastes. The table below is not intended to be exhaustive, but rather provides a guide for readers regarding the types of entities likely to be affected by this action.

LIST OF ECONOMIC SUBSECTORS POTENTIALLY AFFECTED BY THE EXPANSION IN SCOPE OF THE RCRA HAZARDOUS WASTE “HEADWORKS EXEMPTION” FOR INDUSTRIAL WASTEWATER TREATMENT SYSTEMS

Item	Economic subsector or industry identity		Description
	SIC code	NAICS code	
1	02	112	Agricultural production—livestock.
2	20	311	Food & kindred products.
3	22	313	Textile mill products.
4	24	321	Lumber & wood products.
5	25	337	Furniture & fixtures.
6	26	322	Paper & allied products.
7	28	325	Chemicals & allied products.
8	29	324	Petroleum & coal products.
9	30	326	Rubber & miscellaneous plastics products.
10	31	316	Leather & leather products.
11	32	327	Stove, clay, glass & concrete products.

LIST OF ECONOMIC SUBSECTORS POTENTIALLY AFFECTED BY THE EXPANSION IN SCOPE OF THE RCRA HAZARDOUS WASTE "HEADWORKS EXEMPTION" FOR INDUSTRIAL WASTEWATER TREATMENT SYSTEMS—Continued

Item	Economic subsector or industry identity		Description
	SIC code	NAICS code	
12	33	331	Primary metal industries.
13	34	332	Fabricated metal products.
14	35	333	Industrial machinery & equipment.
15	36	334, 335	Electrical & electronic equipment.
16	37	336	Transportation equipment.
17	38	3333, 3345	Instruments & related products.
18	42	493	Motor freight transportation & warehousing.
19	4581	48819, 56172	Airports, flying fields, & airport terminal services.
20	4789	488999	Transportation services nec.
21	49	221	Electric, gas, & sanitary services.
22	50	421	Wholesale trade—durable goods.
23	51	422	Wholesale trade—nondurable goods.
24	5999	453998	Miscellaneous retail.
25	721	8123	Dry-cleaning & industrial laundry services.
26	73	514, 532, 541, 561	Business services.
27	80	621, 622, 623	Health services.
28	87	712	Engineering & management services.
29	8999	54162	Miscellaneous services.
30	91	921	Executive, legislative & general government.
31	95	924, 925	Environmental quality & housing.
32	97	928	National security & international affairs.

Notes:

(a) SIC=1987 Standard Industrial Classification system (U.S. Department of Commerce's traditional code system last updated in 1987).

(b) NAICS=1997 North American Industrial Classification System (U.S. Department of Commerce's new code system as of 1997).

(c) This list is based upon industry codes reported to the USEPA RCRA hazardous waste 1997 "Biennial Reporting System" database by F002/F005 aqueous spent solvent generators which manage such wastes in wastewater treatment systems, supplemented by industry codes which have USEPA Clean Water Act "Categorical Pretreatment Standards" for indirect discharge of industrial wastewaters to POTWs (as of July 2002).

(d) The USEPA Office of Solid Waste matched 1987 2-digit level SIC codes to 1997 NAICS codes using the U.S. Census Bureau website: <http://www.census.gov/epcd/naics/nsic2ndx.htm#S0>. Refer to the Internet Web site <http://www.census.gov/epcd/www/naicstab.htm> for additional information and a cross-walk table for the SIC and NAICS codes systems.

This table lists the types of entities that EPA believes could be affected by this action, based on industrial sectors identified in the "Economics Background Document" in support of this rule. A total of about 3,266 to 10,446 entities are expected to benefit from the revisions to 40 CFR 261.3 in the 32 industrial sectors listed above, but primarily in the chemicals and allied products sector (i.e., SIC code 28, or NAICS code 325). Other entities not listed in the table also could be affected. To determine whether your facility is covered by this action, you should examine 40 CFR part 261 carefully in concert with the final rules found at the end of this **Federal Register** announcement. If you have questions regarding the applicability of the action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

LIST OF ACRONYMS

LIST OF ACRONYMS—Continued

Acronym	Meaning	Acronym	Meaning
ACC	American Chemistry Council.	NPDES	National Pollutant Discharge Elimination System.
CAA	Clean Air Act.	NSPS	New Source Performance Standard.
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act.	NTTAA	National Technology Transfer and Advancement Act.
CFR	Code of Federal Regulations.	OMB	Office of Management and Budget.
CWA	Clean Water Act	POTW	Publicly Owned Treatment Works.
EPA	Environmental Protection Agency.	ppm	parts per million.
FR	Federal Register.	RCRA	Resource Conservation and Recovery Act.
HSWA	Hazardous and Solid Waste Amendments.	RFA	Regulatory Flexibility Act.
HWIR	Hazardous Waste Identification Rule.	SBREFA	Small Business Regulatory Enforcement Fairness Act.
LDR	Land Disposal Restrictions.	SIC	Standard Industrial Classification.
MACT	Maximum Achievable Control Technology.		
NAICS	North American Industrial Classification System.		

LIST OF ACRONYMS—Continued

Acronym	Meaning
UMRA	Unfunded Mandates Reform Act.
WAP	Waste Analysis Plan.

Outline

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 - H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use
 - I. National Technology Transfer and Advancement Act of 1995
 - J. Congressional Review Act

I. Background*A. What Law Authorizes These Rules?*

These rules are promulgated under the authority of Sections 2002(a), 3001, 3002, 3004 and 3006 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6912(a), 6921, 6922, 6924, 6938.

B. What Is the History of the Headworks Rule?

The current wastewater treatment exemptions (“headworks rule”) under 40 CFR 261.3(a)(2)(iv)(A)–(G) exempt from the mixture rule spent solvents, commercial chemical products, lab wastes, and certain additional listed wastes which are a minuscule and treatable part of the mix in wastewaters. The “mixture rule” dictates that a solid waste becomes regulated as a hazardous waste if it is mixed with one or more listed hazardous waste (40 CFR 261.3(a)(2)(iv)). The rationale for these exemptions is the risk to the environment would be negligible because wastewater treatment systems are capable of easily and effectively handling small volumes of these organic constituents. After the promulgation of the original headworks rule (46 FR 56582, November 17, 1981), the Agency listed four additional solvents (1,1,2-trichloroethane, benzene, 2-nitropropane, and 2-ethoxyethanol) in the F002 and F005 categories (51 FR 6537, February 25, 1986). However, at the time, the Agency did not determine whether or not to add these solvents to the headworks rule exemptions.

In August 1999, EPA received a request from the American Chemistry Council (ACC, formerly the Chemical Manufacturers Association) to add 1,1,2-trichloroethane, benzene, 2-nitropropane, and 2-ethoxyethanol to the headworks exemption. ACC also

asked the Agency to allow direct monitoring as an alternative method for determining compliance with the headworks rule. Other ACC-requested headworks rule changes included allowing those wastes listed in 40 CFR 261.31 and 261.32 to be added to the *de minimis* exemption and expanding the headworks rule to include certain landfill leachates. EPA included a request for comment in the November 19, 1999, proposed Hazardous Waste Identification Rule (HWIR) (64 FR 63382) on these and other ACC-suggested exemptions to the mixture and derived-from rules. Many of the changes in the April 8, 2003, proposed rule (68 FR 17234) are an outgrowth of ACC’s suggested revisions and the public comments that EPA received in response to the discussion of these suggested revisions in the 1999 HWIR proposal.

C. When Will the Final Rule Become Effective?

These final regulations will become effective November 3, 2005.

II. Summary of the Proposed Rule*A. Which Solvents Were Proposed To Be Added to the Headworks Exemption?*

On April 8, 2003, we proposed to add to the headworks exemption two of the four solvents that were listed in 1986 (68 FR 17234). Benzene was proposed to be added at the level of 1 part per million (ppm) with these conditions: wastewaters containing benzene are managed in aerated biological waste management units; and, surface impoundments used prior to secondary clarification are lined (40 CFR 261.3(a)(2)(iv)(A)). The addition of these contingent management practices was supported by data from the groundwater pathway human health risk analysis which demonstrated that non-aerated treatment scenarios resulted in exposures above the level of concern for all components of the treatment scenario and that aerated biological treatment scenarios resulted in exposures above the level of concern only when primary clarifier wastewaters were managed in an unlined surface impoundment. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003).

In addition, we proposed to add 2-ethoxyethanol to the headworks exemption at the level of 25 ppm (40 CFR 261.3(a)(2)(iv)(B)). Data from the groundwater pathway human health risk analysis supported this proposed addition of 2-ethoxyethanol at 25 ppm

in the headworks as it posed no significant human health risk at this level. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003).

The Agency did not take any action to add 2-nitropropane and 1,1,2-trichloroethane to the exemption due to the lack of available risk information and the failures in the groundwater pathway human health risk analysis, respectively.

B. What Revisions Were Proposed for the Headworks Compliance Monitoring Method?

The Agency proposed to add an additional approach for facilities to demonstrate compliance with 40 CFR 261.3(a)(2)(iv)(A), (B), (F) and (G) of the wastewater treatment exemptions. The additional method is an option to directly measure solvent chemical levels at the headworks of the wastewater treatment system in lieu of performing mass balance calculations. Direct monitoring will be an option for those facilities subject to Clean Air Act (CAA) regulations that minimize fugitive process or wastewater emissions (e.g., MACT standards under 40 CFR part 61 or 63 or NSPS requirements under 40 CFR part 60). Facilities taking advantage of the proposed direct monitoring approach will be required to report the entire concentration of the chemical in question if any of it was used as a solvent.

The proposed addition of direct monitoring as a headworks compliance monitoring method required the Agency to address a number of implementation issues not associated with the mass balance approach. To ensure facilities utilizing the direct monitoring method will understand where in the wastewater treatment train sampling is to occur, the Agency provided guidance describing the headworks location in the proposal (67 FR 17242, April 8, 2003). This guidance mirrors the language in the 1981 preamble and provides maximum flexibility by accommodating the numerous facility configurations present in the regulated community.

The Agency also proposed that facilities taking advantage of the direct monitoring approach are to develop a site-specific sampling and analysis plan that demonstrates compliance with the weekly average standards set for the appropriate solvent(s). The sampling and analysis plan must include the monitoring point location, the sampling frequency and methodology, and a list of appropriate constituents to be monitored. The Agency proposed that

facilities file a copy of the sampling and analysis plan with the overseeing agency. However, no approval of the plan is required prior to the commencement of the direct monitoring method; nevertheless, the facility must have confirmation of the plan's receipt (e.g., a certified mail return receipt or written confirmation of delivery from a commercial delivery service) by the overseeing agency prior to implementation of the direct monitoring scheme.

C. What Scrubber Waters Were Proposed To Be Exempted?

The Agency proposed to add those scrubber waters derived-from the combustion of spent solvents that are then subsequently sent to a facility's wastewater treatment system to the headworks exemption. The Agency believes that the scrubber waters derived-from combustion of spent solvent wastes will be comparable in expected constituents and concentration levels with spent solvent wastewaters.

D. Exempting Leachate Derived-From Solvent Wastes

The Agency discussed the ACC request to consider adding leachate from landfills that accept only F001-F005 spent solvent wastes to the headworks exemption. Because we lacked sufficient data concerning the variability, the Agency did not propose an exemption but considered the discussion of the issue as an Advanced Notice of Proposed Rulemaking.

E. Exempting Other Types of Leachate

The Agency also discussed and sought comment regarding a possible future addition of leachate from captive, on-site hazardous waste landfills to the headworks exemption. Again, because EPA lacked adequate information to determine if the levels of constituents present in the leachate pose an unacceptable risk, it did not propose an exemption for non-solvent leachate.

F. What Expansions to the De Minimis Exemption Were Proposed?

The Agency proposed to broaden the scope of the *de minimis* exemption (40 CFR 261.3(a)(2)(iv)(D)) in two ways: (1) By expanding the eligibility for the exemption beyond manufacturing facilities to include non-manufacturing sites such as raw material storage terminals and hazardous waste facilities; and, (2) by expanding the types of waste eligible for the exemption to include the F- and K-listed wastes (§§ 261.31 and 261.32). To qualify for the newly expanded portions of the *de minimis* exemption, we also proposed

that either the manufacturing facilities claiming a *de minimis* loss of F- or K-listed wastes or non-manufacturing facilities claiming a *de minimis* loss of waste listed in §§ 261.31 through 261.33 would need to have limits for the Appendix VII and Land Disposal Restrictions (LDR) constituents associated with their wastes included in their Clean Water Act (CWA) permits or that the facilities had to have eliminated the discharge of wastewater altogether.

In addition, the Agency proposed that the words "unscheduled," "uncontrollable," "inadvertent," and "insignificant" be added to the regulatory definition. The reasoning behind the addition of these words was to provide a clearer understanding of what a *de minimis* release is for all the listed wastes.

III. Changes From the Proposed Rule

A. Exemption for Scrubber Waters Derived-From Spent Solvent Combustion

In the April 8, 2003, notice, EPA proposed to include in the exemption under § 261.3(a)(2)(iv)(A) and (B) those scrubber waters derived-from the combustion of spent solvents that then are sent to a facility's wastewater treatment system. However, specific regulatory language for the inclusion of these scrubber waters in the headworks exemption was not included in the proposal. Based on the comments received, the final rule includes such language.

As discussed in the preamble of the proposed rule, scrubber waters derived-from the combustion of spent solvents previously were not considered eligible for the headworks exemption because they are derived-from residuals of spent solvents and their release into the wastewater treatment system is not incidental (68 FR 17243, April 8, 2003). However, in the carbamates rule (60 FR 7824-7859, February 9, 1995), the Agency allowed scrubber waters derived-from the incineration of carbamate production wastes to be eligible for the headworks exemption because the scrubber waters would be comparable in the expected constituents and concentration levels with the already-exempted wastewaters. Following the rationale in the carbamates rule, the Agency decided to propose in the April 8, 2003 notice that scrubber waters derived-from spent solvent combustion which are then sent to a facility's wastewater treatment system will be eligible for the headworks exemption under § 261.3(a)(2)(iv)(A) and (B). Similar to the carbamate scrubber waters, the

Agency believes that the scrubber waters derived from such combustion will be comparable in expected constituents and concentration levels with spent solvent wastewaters.

Regulatory language has been included under § 261.3(a)(2)(iv)(A) and (B). The Agency notes the requirement that the scrubber waters must be solely derived from the combustion of the listed spent solvents remains unchanged from the proposal.

B. Facilities Using the De Minimis Exemption Will Not Be Required To List Limits for Appendix VII and LDR Constituents in Their Clean Water Act Permits

The proposed rule contained a new requirement for those facilities taking advantage of the expanded *de minimis* exemption. Under this proposed requirement, a manufacturing facility claiming a *de minimis* loss of F- or K-listed wastes or a non-manufacturing facility claiming any *de minimis* loss of waste listed in §§ 261.31 through 261.33 would have needed limits for the Appendix VII and LDR constituents associated with its wastes included in its CWA permit.

However, commenters noted that permit writers usually do not set specific permit limits for every constituent that may be present in the effluent. In response to this comment, the Agency instead is requiring any facility that would like to claim any part of the expanded exemption to list all expected Appendix VII and LDR constituents in the CWA permit application. Alerting the permit writers of all expected Appendix VII and LDR constituents by listing them in the CWA permit application will allow the permit writers to ensure that the permit is sufficiently protective of human health and the environment. Similarly, facilities that discharge to publicly owned treatment works (POTW) must disclose every Appendix VII and LDR constituent that may be released to the POTW, as this will alert the POTW of any potential chemicals that may pass through or interfere with its operation or cause a permit violation. This notification to the permit writer or control authority must occur before the facility claims the newly expanded portions of the *de minimis* exemption. EPA has promulgated updated regulatory language under § 261.3(a)(2)(iv)(D) in response to these comments.

C. "Unscheduled," "Uncontrollable," and "Insignificant," Will Not Remain in the Regulatory Text of the De Minimis Exemption

In the proposed rule, the words "unscheduled," "uncontrollable," "insignificant" and "inadvertent" were added to the regulatory definition of *de minimis* (§ 261.3(a)(2)(iv)(D)). Numerous commenters were opposed to the addition of these four words and requested that they be removed from the regulatory text because the words would cause confusion to the regulated community and narrow the scope of the exemption. The Agency agrees that these descriptors are not necessary and is removing the words "unscheduled," "uncontrollable," and "insignificant" from the regulatory text of *de minimis*. However, the word "inadvertent" will remain in the regulatory language. The purpose for the addition of "inadvertent" in the regulatory definition of *de minimis* is to reinforce the concept that the losses must not be a result of neglectful or careless facility management. Rather, *de minimis* refers to small losses that occur during normal operating procedures at well-maintained facilities. The Agency believes that it is imperative that this concept be conveyed due to the exemption being expanded to include the F- and K-listed wastes (§ 231.31 and § 231.32), as well as to non-manufacturing facilities. Please see Section IV.D.3. for further discussion regarding the addition of the word "inadvertent" to the regulatory definition.

IV. Summary of Responses to Major Comments

The Agency summarizes below the responses to the most significant comments received in response to the proposal. All comments received by the Agency are addressed in the Response to Comments Background Document that is available in the docket associated with this rulemaking.

A. Addition of Benzene and 2-Ethoxyethanol to the Headworks Exemption

Many commenters supported the addition of benzene and 2-ethoxyethanol as proposed stating that their inclusion in the exemption will add consistency to the current regulatory scheme. Several commenters emphasized that the spent solvents will remain a very small and treatable part of the wastewater mixture. In addition, one commenter stated that the contingent management practices placed on the addition of benzene to the exemption were very reasonable.

While there was strong support for the inclusion of the two solvents, one commenter disagreed with the addition of benzene and 2-ethoxyethanol to the exemption at the current concentration levels of 1 ppm and 25 ppm, respectively. The commenter stated that these levels are not protective of human health and the environment and that the calculated and direct measurement concentrations need to be reduced. In addition, the commenter suggested that the current weekly averaging period be decreased to daily or to some other shorter-term averaging period; however, the commenter did not submit data to support the reduction of the calculated and direct measurement concentrations, nor was data submitted to support a reduction in the averaging period.

The Agency disagrees that the concentration limits of 1 ppm and 25 ppm for benzene and 2-ethoxyethanol, respectively, are not protective. The environmentally conservative risk assessment performed on benzene demonstrated that the 1 ppm standard is protective when groundwater is indirectly exposed to the wastewater treatment sludge and when groundwater is directly exposed to wastewaters and sludge from aerated treatment trains (after secondary clarification). Scenarios from non-aerated systems and primary clarifier sludge from the aerated treatment scenario did result in some risks of concern. As a result, we are requiring that wastewaters containing benzene be managed in an aerated biological treatment unit and that surface impoundments used prior to secondary clarification be lined to be eligible for the exemption. The risk assessment performed on 2-ethoxyethanol demonstrated it does not pose a risk of concern for direct air exposure or for indirect and direct groundwater exposures at the concentration limit of 25 ppm. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003). In regards to the commenter's statement that the weekly average be reduced (*i.e.*, that the compliance standard be changed), decreasing the averaging period from weekly to daily or to some other shorter averaging time addresses a provision in the current rule not identified specifically in the proposal as subject to possible amendment. EPA stated in the proposed rule that it would not respond to comments addressing such provisions (68 FR 17241, April 8, 2003).

One commenter supported the addition of benzene but not the conditional management practices. The commenter requested that we reconsider

our proposed conditions and allow benzene to be discharged into wastewater treatment systems in the same manner that the other solvents listed in § 261.3(a)(2)(iv)(A) are allowed. In the commenter's opinion, the conditional management practices are too restrictive and inflexible for the addition of benzene to the exemption to be of any use to facilities.

EPA disagrees that the exemption for benzene be unrestricted. Due to the exemption being based on the concentration level of benzene entering the wastewater treatment system and not wastewater and/or sludge waste leaving a facility, evaluation of the risks associated with benzene at this level required assuming various treatment methods and determining the risks from managing effluents from each interim point in a given treatment method (for further discussion, please see Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003). Aerated and non-aerated biological treatment, the two methods evaluated during the risk assessment, are understood by EPA to be the treatment methods used by the vast majority of facilities potentially affected by this rule. The conditional requirements on benzene are based directly on the results of the risk assessment for benzene (see above). If a facility using a method other than aerated biological treatment wishes to exempt their wastewater, they can apply for a site-specific delisting for their wastewater under § 260.22.

One commenter requested that we include benzene still bottoms in the headworks exemption. This commenter argued that there is no regulatory relief for facilities recycling benzene in a still since the still bottoms must be managed as a hazardous waste (F005). The commenter stated that if the facility's wastewater treatment system has the capability of treating the impurities that can be found in still bottoms, then the facility should be able to benefit from the exemption as well.

EPA did not consider benzene still bottoms or still bottoms resulting from the distillation of other F-listed solvents within the scope of the proposed headworks rule. Therefore, still bottoms were not included in the risk assessment we performed in support of the addition of the spent solvents to § 261.3(a)(2)(iv)(A) and (B). Due to concerns regarding constituents, such as metals, which can be found in still bottoms, EPA does not believe that it is appropriate to include benzene still bottoms in the wastewater treatment exemption without having performed a

risk assessment. EPA notes that if a facility recycling benzene wishes to exempt their benzene still bottoms, they can apply for a site-specific delisting for their still bottoms under § 260.22.

B. Addition of Direct Monitoring as a Headworks Compliance Monitoring Method

1. General Issues

Most commenters supported the addition of direct monitoring as a compliance option. Several cited the complexity for some sites to perform the mass balance calculations and commended the Agency for proposing to allow direct monitoring at the headworks location as an alternative compliance option. No commenters opposed the addition of direct monitoring, although several commenters did raise a number of issues related to direct monitoring. Separate sections discuss commenters' issues and the Agency's responses regarding the informal definition of headworks, eliminating the requirement to submit the sampling and analysis plan, and allowing performance-based reductions in sampling frequency.

In addition to the issues listed above, many commenters expressed support for the requirement that a facility wanting to use direct monitoring be subject to CAA rules that minimize fugitive emissions. One commenter, however, questioned the eligibility status of those facilities that have adopted voluntary limits or controls as part of a federally enforceable permit. The Agency agrees that those facilities having federally enforceable permits that limit fugitive emissions in the facility prior to the headworks are eligible for the exemption as these federally enforceable permits are equivalent to a facility being subjected to CAA regulations that minimize fugitive emissions. Therefore, regulatory language explicitly allowing those facilities that have adopted limits or controls for fugitive emissions as part of a federally enforceable permit has been added in § 261.3(a)(2)(iv)(A), (B), (F), and (G).

Another commenter expressed confusion about whether the CAA rule had to apply to the entire facility or just to the wastewater treatment unit specifically. The purpose of the requirement is to ensure that volatilization of solvents are minimized, and thereby preventing fugitive emissions from lowering spent solvent concentration levels, prior to the monitoring point at the headworks. EPA considered volatilization from the wastewater treatment unit after the headworks point (such as from the

activated sludge unit or primary clarifier) in the Agency's risk assessment and did not find volatilization to be an unacceptable source of risk as long as the solvent concentrations at the headworks did not exceed the specified levels. Because the intention of the requirement is to minimize volatilization prior to the headworks point and the risk assessment found that volatilization from the wastewater treatment unit did not present an unacceptable risk, it is not necessary for the receiving wastewater treatment unit itself to be subject to CAA regulations. However, EPA stresses that the process streams and wastewater streams that lead up to the headworks point must be subject to CAA regulations, or an enforceable limit federal operating permit, that minimizes fugitive emissions.

One commenter objected to the requirement that, under the direct monitoring alternative, the generator must count the total amount of the chemical in the waste stream, even if some portion of it was from a non-solvent source. In addition, another commenter stated that only allowing the sampling to occur at the headworks location is unnecessarily limiting because the chemical not being used for its solvent purposes will be included in the measured level. They asserted that these requirements are overly conservative and should be modified, suggesting that facilities be allowed to reduce the measured concentration by the fraction known to be from non-solvent sources and that facilities be allowed to sample wastewaters closer to the point of generation. The Agency disagrees. The risk assessment performed by the Agency demonstrated that the 1 ppm and 25 ppm standards were protective for the total amount of the chemicals (benzene and 2-ethoxyethanol, respectively) introduced at the headworks. The source of these chemicals is irrelevant for the purposes of determining risk. If the solvent fraction of the chemical in the waste stream contributed to the total chemical concentration in the wastestream which exceeds the 1 ppm or 25 ppm threshold, then that constituent is posing an unacceptable risk to human health. Therefore, facilities cannot use a hybrid of the results from the mass balance and direct monitoring methods to discount the non-solvent source from the total measured concentration, nor can facilities sample at alternate locations in lieu of sampling at the headworks point. The Agency notes that facilities continue to have the option of using mass balance.

Another issue of concern by a commenter is the possibility of the overseeing agency finding a facility to have exceeded the exemption levels on the basis of a compliance method different than the one the facility chose to use (e.g., the facility using mass balance and the agency using sampling). The overseeing agency will not be bound to use the same compliance method chosen by the facility; however, the procedures utilized by the overseeing agency when investigating a potential violation will be comprehensive enough to determine if the facility has exceeded the exemption levels before being found in violation.

Lastly, a commenter requested that we clarify our intent with regards to allowing facilities to alternate between the two compliance methods or to use a combination of the two methods to demonstrate compliance. Facilities will have the option to alternate between the two methods or to concurrently use both methods and report the result of either method. However, as discussed above, facilities cannot use a hybrid of the two methods to demonstrate compliance (e.g., apply the solvent percentage to measured concentrations to discount the non-solvent use). EPA encourages facilities to notify the overseeing agency via the sampling and analysis plan that alternating between the compliance methods may occur. EPA also encourages facilities to provide examples of when a facility may switch from one method to the other. EPA notes that facilities may switch monitoring methods even if their submitted sampling and analysis plan did not discuss examples of when such an occurrence would happen.

2. The Informal Headworks Description

Several commenters supported the Agency's approach of not proposing a formal regulatory definition for the term "headworks," but rather providing guidance on what it considers to be the "headworks" location. In the preamble to the proposed rule, EPA stated that for purposes of this rule, "headworks can include a central catch basin for industrial wastewaters, a pump station outfall, equalization tank, or some other main wastewater collection area that exists in which transport of process wastewaters stops and chemical or biological treatment begins" (68 FR 17242). The Agency did solicit comments on this non-regulatory description. Supporters of the informal description stated that the description of the term "headworks" in the preamble to the proposal is flexible enough to accommodate a myriad of different facilities within the regulated

community. In addition, commenters agreed that creating a regulatory definition for "headworks" would result in the loss of this flexibility.

However, one commenter believed that confusion might result from EPA's headworks description because it assumes that no pretreatment is occurring prior to the wastewaters' arrival at the headworks. The commenter explained that pretreatment frequently occurs upstream to the headworks location, and typically there is no one central location where all wastewaters come together prior to pretreatment. Therefore, the headworks location should be the point where the exemption is claimed regardless of whether or not pretreatment has occurred. The commenter also stated that the definition of headworks should be codified; however, as an alternative to incorporating the definition into the regulatory code, the commenter suggested that clarification of the location be provided in the preamble of the final rule.

First, EPA disagrees with the commenter's statement that a definition of headworks should be codified. The Agency believes that it would be difficult to develop a regulatory definition of the term "headworks" that could apply at all or even most facilities given the varied nature of facility configurations. The guidance approach to identifying the headworks location accommodates a range of facility configurations, thereby providing maximum flexibility. However, EPA does agree that the in-process pretreatment of wastewaters prior to their arrival at the headworks location occurs and is allowable under this provision. Therefore, EPA is modifying its guidance regarding the informal description of the term "headworks" so that the headworks location can now be described as the point at which final combination of raw or pre-treated process wastewater streams typically takes place.

3. Sampling and Analysis Plan Issues

Many supporters of the direct monitoring option commented that it was too burdensome to submit the sampling and analysis plan and to obtain confirmation of its receipt before direct monitoring can begin. One commenter, who misunderstood the proposed requirement, objected to explicit approval having to be obtained by the overseeing agency prior to starting direct monitoring. However, the Agency is not requiring that the facility obtain explicit approval from their overseeing agency prior to the start of direct monitoring. The facility simply is

required to obtain confirmation of receipt (e.g., a certified mail return receipt or written confirmation of delivery from a commercial delivery service) prior to starting direct monitoring.

The Agency disagrees that submittal of the sampling and analysis plan is overly burdensome. Submittal of the sampling and analysis plan will provide notification to the overseeing agency that a change in compliance methodology is planned. This notification is a one-time event, unless there is a change in the facility's operations that causes a change in monitoring that renders the SAP obsolete. The majority of the burden in this requirement is the preparation of the sampling and analysis plan, and no commenter objected to developing the sampling and analysis plan, correctly recognizing that it is the foundation for any rigorous monitoring program.

Several commenters asserted that requiring the facility to submit their sampling and analysis plan ran counter to EPA's recently proposed RCRA Burden Reduction Initiative (67 FR 2518, Jan. 17, 2002). In addition, commenters noted that in 1997, the Agency specifically eliminated the requirement that generators managing and treating prohibited waste in tanks, containers and containment buildings under 40 CFR 262.34 submit sampling and analysis plans to its overseeing Agency under 268.7(a)(5). These commenters also pointed out that neither the chlorinated aliphatics final rule (65 FR 67068) nor the paint production proposed rule (66 FR 10060) required facilities to submit their sampling and analysis plans to the overseeing agency, instead allowing the facilities to keep their plans on-site.

EPA believes that it is inappropriate to compare the proposed chlorinated aliphatics rule¹ (64 FR 46476; August 25, 1999) and the proposed paints rule² to the headworks rule. While it is true that the proposed chlorinated aliphatics rule and the proposed paint production rule required sampling and analysis plans to be developed but not submitted, there are two significant differences between these listing rules and the headworks exemption. First, the testing required under the two listing rules is on currently non-hazardous waste to document that the waste

¹ The provision in the proposed chlorinated aliphatics rule which stated that facilities must develop but do not need to submit their sampling and analysis plan was never finalized.

² The Agency notes that while the paints rule has been finalized, no wastestreams were listed. Therefore, any provisions involving sampling and analysis plans were not finalized.

should continue to be out of the hazardous waste regulatory system. In contrast, the testing required under the headworks rule is on currently hazardous waste to determine whether or not it can safely exit the hazardous waste regulatory system. The Agency has generally taken a different approach for determining whether a waste is hazardous, as opposed to demonstrating that hazardous waste in fact is not hazardous. Second, direct monitoring is not a requirement to qualify for the headworks exemption; it is an option. If the facility determines that submitting the sampling and analysis plan is too burdensome, then the facility can opt not to use the direct monitoring method to demonstrate compliance but can continue to use the mass balance approach.

EPA also disagrees that submitting the sampling and analysis plan is contradictory to the proposed RCRA Burden Reduction Initiative (67 FR 2518, Jan. 17, 2002) and the removal in 1997 of the LDR requirement to submit the facility's sampling and analysis plan. The purpose of the proposed burden reduction rule is to eliminate reports that are found to be duplicative or not used by state or regional agencies to protect human health and the environment. In today's rule, submitting the sampling and analysis plan serves as a notification to the overseeing agency that the facility will be using direct monitoring to demonstrate compliance with the headworks exemption. The sampling and analysis plan also will provide important information on key sampling parameters that the facility intends to use. EPA notes that the facility has a wide latitude to design the sampling and analysis plan, and the facility initially will set the conditions with which they intend to comply. As the sampling and analysis plan is not duplicative of any other requirement and serves as notification to the overseeing agency, EPA believes retaining the requirement to submit the sampling and analysis plan is reasonable and consistent with the proposed burden reduction rule.

In addition, while it is true that in 1997 EPA removed the requirement of submitting waste analysis plans for generators managing and treating prohibited waste in tanks, containers and containment buildings, the purpose of removing this requirement was to streamline the LDR process (60 FR 43678, August 22, 1995). This streamlining was in response to the Burden Reduction Initiative set forth in the President's report on "Reinventing Environmental Regulations," March 16, 1995. EPA stated that due to the growth

of the LDR program and the regulated community's better understanding of the program, it was unnecessary to maintain all of the reporting and recordkeeping requirements. Thus, certain LDR paperwork requirements were eliminated to reduce the regulatory burden (61 FR 2363, January 25, 1996). EPA notes several key differences between the headworks rule and the LDR Phase IV rule. First, while the headworks exemption is not a new exemption, the addition of direct monitoring as a compliance method is a new option. Second, submitting the sampling and analysis plan is not a requirement to qualify for the exemption; it is a requirement for the use of the direct monitoring option. Therefore, EPA is requiring submittal of sampling and analysis plans to provide the overseeing agency the opportunity to ensure that facilities are utilizing the newly instituted compliance method properly.

Two commenters requested further clarification regarding the rejection of the sampling and analysis plan. One commenter stated that if a sampling and analysis plan is submitted in good faith, but only exhibits minor flaws, then that facility should be able to continue to use the direct monitoring method while the minor inadequacies are being addressed. The other commenter requested more explanation regarding the actions that need to be taken in order for a facility to restart direct monitoring if the sampling and analysis plan is rejected.

The Agency notes that the parameters of the sampling and analysis plan must enable the facility to accurately calculate the weekly average concentration, and the plan must include the monitoring point location, the sampling frequency and methodology, and a list of the constituents to be monitored. Therefore, the Agency maintains that if the sampling and analysis plan is rejected for major deficiencies (*e.g.*, fails to include the above information or does not enable the facility to accurately calculate the weekly average) or if the facility is found not to be following the plan, then the facility can no longer use the direct monitoring option until the bases for rejection are corrected. Even if the overseeing agency does reject the sampling and analysis plan, the facility continues to have the option to demonstrate compliance using the mass balance method, while the facility is addressing the sampling and analysis plan issues. The Agency does support the continued use of direct monitoring while deficiencies are being corrected if the sampling and analysis plan is submitted in good faith and the

deficiencies are minor. However, it is left to the discretion of the overseeing agency to determine the severity of the deficiencies and whether or not direct monitoring may continue while the facility addresses such minor deficiencies.

It is the facility's responsibility to determine from the overseeing agency the reason for the rejection and the steps that need to be taken to rectify the insufficiencies. The overseeing agency will determine whether the facility is to resubmit the entire sampling and analysis plan or just the amended sections once the facility corrects the bases for the rejection. Once the facility has received confirmation that the overseeing agency no longer has concerns with the amended sections of the plan, the facility may begin using the direct monitoring option.

4. Allowing Performance-Based Reduction in Sampling Frequency and Changing the Current Compliance Standard

Several commenters offered detailed suggestions of how the proposed site-specific sampling and analysis plan could establish a sampling schedule that would allow a reduced sampling frequency once compliance with the 1 ppm and 25 ppm thresholds was established. The commenters stated that this approach would be analogous to those taken historically in RCRA Waste Analysis Plans (WAP) and in CWA NPDES permits.

The Agency is interested in the possibility of allowing a facility's sampling and analysis plan to include a provision to reduce sampling frequency based on performance as long as the current compliance standards under 261.3(a)(2)(iv)(A) and (B) are maintained and the facility's provisions for reduced sampling frequency are thoroughly discussed in the plan. However, EPA would first need to propose the specific requirements of such a provision in order to allow for adequate notice and comment.

In addition, a number of commenters suggested that EPA increase the length of the current compliance period in order to reduce the costs associated with direct monitoring. The commenters' suggestion to increase the averaging period from weekly to monthly (*i.e.*, the compliance period) addresses a provision in the current rule not specifically identified in the proposal as subject to possible amendment. EPA stated in the proposed rule that it would not respond to comments addressing such provisions (68 FR 17241, April 8, 2003).

C. The Exemption of Scrubber Waters Derived-From the Incineration of F-Listed Wastes

Numerous commenters supported the proposed addition of scrubber waters derived-from the incineration of F-listed solvents to the headworks exemption. Several supporters stated that the rationales used by EPA to advocate the addition of these scrubber waters are both accurate and justifiable. However, many commenters were concerned over the Agency reinterpreting the current regulatory language and requested that the exemption be incorporated into the regulatory text. Even though specific regulatory text for this provision was not proposed, we expressly stated in the preamble that the "Agency is proposing that scrubber waters derived from the combustion of spent solvents and sent to a facility's wastewater treatment system qualify for the exemption under 40 CFR 261.3(a)(2)(iv)(A) and (B)" (68 FR 17243; April 8, 2003). Nevertheless, based on the rational set forth in the preamble to the proposal, EPA is promulgating regulatory text to implement the proposed addition to the headworks exemption.

Many commenters stated that limiting the exemption to only scrubber waters derived-from the incineration of F-listed solvents was too narrow in scope and that the exemption as proposed would not be of much benefit to the regulated community. For the exemption to be useful, commenters requested that the exemption also apply to scrubber waters derived-from the incineration of other F-, K-, P-, and U-listed wastes. The commenters claimed that the rationales used to exempt the scrubber waters derived-from the F-listed solvents and to exempt the *de minimis* quantities of P- and U-listed wastes could be used to support the exemption of the scrubber waters derived-from the incineration of other listed wastes in the headworks exemption. As an alternative, some commenters stated that the other F-, K-, P-, and U-listed wastes in the scrubber waters are analogous to the *de minimis* quantities of the same chemicals. Therefore, the rationale used to exempt the release of *de minimis* quantities of these listed wastes can be applied to justify the addition of these scrubber waters into the *de minimis* exemption (§ 261.3(a)(2)(iv)(D)).

The Agency disagrees that scrubber waters derived-from the incineration of other listed wastes should be included in the headworks exemption. Scrubber waters derived-from the incineration of F-listed solvents are eligible for the exemption because these scrubber waters would be comparable in

expected constituents and concentration levels with the already exempted F-listed solvents (§ 261.3(a)(2)(iv)(A) & (B)). This rationale cannot be applied universally to the scrubber waters derived-from the incineration of the other listed wastes because not all of these listed wastes are currently exempted in § 261.3(a)(2)(iv)(A) & (B). Therefore, if the listed wastes themselves are not exempt, then the scrubber waters derived-from their incineration cannot be exempt using this rationale.

The Agency also will not be including scrubber waters derived-from the incineration of U-, P-, K- and other F-listed wastes in the *de minimis* exemption (§ 261.3(a)(2)(iv)(D)). EPA's proposal discussed expanding the *de minimis* exemption to facilities other than manufacturing facilities and discussed expanding the type of wastes that could qualify for the exemption. The proposal did not discuss expanding the *de minimis* exemption to systematic discharges of small amounts of waste to a wastewater treatment system. Since originally adopted in 1981, the *de minimis* exemption has removed from regulation small amounts of listed wastes that are inadvertently and often unavoidably lost under normal material handling operations at well-maintained facilities. The systematic release of scrubber waters into the wastewater treatment system advocated by some of the commenters would neither be inadvertent or unavoidable as the scrubber water is a segregated wastewater stream at its point of generation. Allowing systematic releases to come within the *de minimis* exemption would be a fundamental change in how the *de minimis* exemption operates and arguably would require additional notice and comment to adopt.

D. Expansion of the De Minimis Exemption

1. General Issues

All who commented on the proposed *de minimis* expansion generally supported it, but many commenters raised specific issues. Separate sections discuss commenters' issues and the Agency's responses regarding the CWA permit requirement, the inclusion of "unscheduled," "uncontrollable," "insignificant" and "inadvertent" in the regulatory language and the removal of "rinsates from empty container" from the regulatory language.

In addition to the issues listed above, one commenter stated that they were interpreting the *de minimis* exemption expansions to include facilities that

have eliminated the discharge of wastewaters using permitted Class I injection wells. The Agency agrees with this interpretation. As explained in the preamble of the original headworks rule, the exemptions not only apply to wastewaters that are managed in wastewater treatment systems whose discharges are subject to regulation under Section 402 or 307(b) of the CWA, but also apply to "those facilities (known as "zero dischargers") that have eliminated the discharge of wastewater as a result of, or by exceeding, NPDES or pretreatment program requirements" (46 FR 56584, November 17, 1981). These wastewater management requirements remain unchanged by the amendments to the final headworks rule.

In addition, EPA continues to believe that underground injection wells can meet the headworks' definition of zero discharge if the injection well is being used for the purposes of complying with a NPDES permit, other applicable effluent guideline, or pretreatment program requirements. See discussion in Third Third Rule (55 FR 22672, June 1, 1990). Wastewaters disposed of via injection well usually are not considered discharges under the CWA. However, if underground injection of wastewaters occurs for reasons other than to comply with a NPDES permit, other applicable effluent guideline or pretreatment program requirements, then those wastewaters are not eligible for the wastewater treatment (headworks) exemptions (in 40 CFR 261.3(a)(2)(iv)).

2. Clean Water Act Permit Requirement

The Agency proposed that for manufacturing facilities claiming a *de minimis* loss of F- or K-listed wastes or non-manufacturing facilities claiming a *de minimis* loss of wastes listed in §§ 261.31 through 261.33, the CWA permit must include limits for the Appendix VII hazardous constituents and the LDR constituents associated with the listed wastes. Many commenters objected to this proposed requirement. Several of these commenters argued that it usually is not the permit writer's practice to set specific permit limits for every constituent that may be present in the facility's effluent. Rather, they argued that listing the waste streams or constituents of concern in the CWA permit application will provide the permit writer or control authority with the necessary information to decide whether or not a specified level or method of treatment is necessary in the permit for the various constituents.

The rationale for requiring a facility's CWA permit to contain limits for Appendix VII and LDR constituents associated with the specific wastes was due to the *de minimis* eligibility being expanded to include F- and K-listed wastes. At the time of the proposal, the Agency wanted to ensure that the releases of F- and K-listed wastes would be minimized so that these wastes would not have a significant effect upon wastewater treatment systems, the quality of effluent discharges, solid wastes generated, occupational safety and health, and human health and the environment (67 FR 17244, April 8, 2003). However, the Agency recognizes that it usually is not the permit writer's practice to set specific permit limits for every constituent that may be present in a facility's effluent. For instance, some constituents are controlled through the use of limits on conventional pollutants (such as biochemical oxygen demand, total suspended solids, or pH), or through limits on other bulk parameters (such as chemical oxygen demand or total organic carbon), while other constituents may require limitations on whole effluent toxicity or special monitoring procedures to be performed, or may be present at such low levels that no permit limit is necessary. Therefore, we agree with the commenters that it is sufficiently protective for direct discharging facilities to list all expected Appendix VII and LDR constituents in their CWA permit application (or for indirect dischargers to POTWs, in their submission to their control authority) and to rely on the permit writer's (or control authority's) judgment to determine if specific permit limits are needed. Further, as discussed in the preamble of the proposed rule, the toxicity characteristics and CERCLA's reportable quantities will remain as additional protective mechanisms (68 FR 17244). Therefore, in the final rule, facilities only will be required to list all Appendix VII and LDR constituents in the CWA permit application or POTW submission which will allow the permit writer or control authority to determine if specific permit limits are needed. In addition, facilities will be required to keep a copy of the CWA permit application or POTW submission on-site as an alert to inspectors that the permit writer or control authority was notified of the possible *de minimis* releases of constituents of concern. Finally, the Agency notes that alerting the permit writer or control authority must occur before the facility claims the newly expanded portions of the *de minimis* exemption.

In addition, several commenters stated that facilities that discharge to POTWs should be allowed to take advantage of the exemption, and if allowed, they should not be required to have pretreatment limits for each constituent that may be released. Further, the POTW's CWA permit should not be required to have specific limits for each of the constituents managed at the indirect discharger's facility.

Indirect dischargers are eligible for the *de minimis* exemption if the POTWs they discharge to have valid CWA permits that include an approved pretreatment program as a condition of the POTW's permit. As discussed above, the rationale for requiring all constituents to have pretreatment limits was to ensure the protection of human health and the environment and to minimize the incentive to "dispose of" F- and K-listed wastes into the wastewater treatment system. However, EPA believes indirect dischargers can qualify for the *de minimis* exemption using mechanisms other than requiring pretreatment limits for each constituent potentially released and still be protective of human health and the environment. The disclosure of each Appendix VII and LDR constituent that may be released to the POTW by the indirect discharger will sufficiently protect human health and the environment by alerting the POTW of any potential chemicals that may pass through or interfere with its operation or cause a permit violation of the POTW's discharge permit. The control authority (*i.e.*, POTW, state, or EPA Region) can determine if specific pretreatment limits are necessary once all potential Appendix VII and LDR constituents are disclosed. In addition, as with the direct dischargers, POTWs do not need to have specific limits listed for each constituent in the indirect discharger's permit (or control mechanism) but must have received a list of all Appendix VII and LDR constituents from the indirect discharger in order for the discharger to use the exemption.

3. Inclusion of "Unscheduled," "Uncontrollable," "Insignificant," and "Inadvertent" in the Regulatory Definition of De Minimis

Commenters also objected to the proposed addition of the words "unscheduled," "uncontrollable," "insignificant," and "inadvertent" which were used to describe *de minimis* releases to a wastewater treatment system (§ 261.3(a)(2)(iv)(D)). Commenters expressed concern that EPA did not adequately announce or explain these qualifiers and that the

qualifiers would cause confusion to the regulated community as well as narrow the scope of the exemption.

Because the expansion of the *de minimis* exemption includes the F- and K-listed wastes for which there is no economic incentive to prevent their loss into the wastestream, the Agency believed that it was necessary to reaffirm its understanding of what is meant by a *de minimis* release. However, EPA has been persuaded by commenters that the intended meanings of "unscheduled" and "uncontrollable" can be misinterpreted and that they should not be included in this final rule. EPA also recognizes the redundancy of including "insignificant" in the regulatory definition of *de minimis*. Therefore, in today's final rule, "insignificant" also will not be included in the regulatory language. However, EPA disagrees that facilities will be confused over the meaning of "inadvertent." The inclusion of "inadvertent" in the regulatory definition of *de minimis* reinforces that these losses, no matter if a F-, K-, P- or U-listed waste, must be minor and must result from normal operating procedures at well-maintained facilities.

The commenters also state that EPA failed to explain how these words would effect the current interpretation of the *de minimis* exemption. Regarding the remaining additional term "inadvertent," it is not the Agency's intent to alter the interpretation of the exemption. It is clearly illustrated in the preamble of the original rule that the *de minimis* exemption was intended for minor losses resulting from normal operating procedures, such as when small amounts of raw material are lost in various unloading or material transfer operations, or when small losses occur as a result from purgings and relief valve discharges. In addition, the original preamble states that it was not the Agency's intention for the exemption to include losses from normal operating procedures occurring at facilities that use neglectful or careless management practices. In fact, the preamble states that the Agency will use its listing authority to list the wastewaters from those facilities whose neglectful or careless management practices cause such high losses of § 261.33 hazardous wastes (46 FR 56586, November 17, 1981). Therefore, "inadvertent" is not altering the interpretation of *de minimis* but is reinforcing the Agency's original intent that the exemption apply only to those minor losses resulting from normal operating procedures at well-maintained facilities. The Agency believes that it is imperative to reinforce that the minor

losses of waste must be inadvertent because the expanded exemption includes listed wastes that are not commercial chemical products. As is discussed in the 1981 preamble, facilities have an economical incentive to minimize the loss of commercial chemical products during normal operating procedures. Id. This economic incentive does not exist for the F- and K-listed wastes being added to the *de minimis* exemption. Therefore, it is imperative that there is an understanding that any large intentional losses of these wastes will not be considered as *de minimis* and accordingly, will not be exempted under § 261.3(a)(2)(iv)(D).

Commenters stated that the inclusion of the four new terms in the regulatory language would narrow the scope of the exemption. However, the Agency disagrees that the inclusion of the remaining term “inadvertent” in the regulatory language will narrow the scope of the exemption. Our use of the term “inadvertent” implies that the *de minimis* loss must not be a result of neglect or carelessness. As stated in the 1981 preamble, small losses of listed wastes do occur during normal operating procedures at well-maintained facilities because it is exceedingly expensive to prevent such losses. In addition, EPA recognized that the segregation and separate management of these losses would also be exceedingly expensive as well as unnecessary because wastewater treatment systems would be capable of efficiently treating these small quantities of listed wastes. Id. Our inclusion of the word “inadvertent” in the regulatory language is not intended to alter the original scope of the exemption, as these small losses that are occurring during normal operating procedures at well-maintained facilities will remain in the exemption. Inclusion of the term “inadvertent” only reinforces that losses, which result from mismanagement, neglectfulness or carelessness during normal operating procedures, are not (and have never been) included in the exemption.

The commenters also suggest that “inadvertent” is not consistent with the examples provided in the existing regulatory language, as the examples describe losses that are “predictable,” not “inadvertent.” As acknowledged in the 1981 preamble, well-maintained facilities will have predictable losses that can be prevented but only at a considerable cost. Id. The Agency recognizes these “predictable” losses as “inadvertent” as long as they are occurring during normal operating procedures at a facility that is not

managed in a neglectful or careless manner.

Finally, some commenters suggested applying the qualifying terms “unscheduled,” “uncontrollable,” “insignificant,” and “inadvertent” to only F- and K-listed wastes. As we have decided not to include the first three of those terms in the final rule, we will address the comment with respect to the remaining term “inadvertent.” We disagree with the comments requesting the qualifiers apply to only F- and K-listed wastes. The universe of the *de minimis* exemption is being expanded to include both the listed wastes in § 261.31 and § 261.32 and non-manufacturing facilities. Therefore, it is imperative that those facilities that do not have a history with the exemption have a clear understanding of what a *de minimis* release is for all the listed wastes.

4. Removal of “Rinsates From Empty Containers” From the Regulatory Definition of De Minimis

Two commenters raise what they believe is an inconsistency between two existing regulatory provisions. The commenters believe that the phrase “rinsates from empty containers” in 40 CFR 261.3(a)(2)(iv)(D) conflicts with language found in 40 CFR 261.7, which excludes “residues of hazardous waste in empty containers” from regulation under part 261. As argued by the commenters, “rinsates from empty containers” are “residues of hazardous waste in empty containers,” and since “residues of hazardous waste in empty containers” are not considered hazardous wastes, it is inconsistent for EPA to retain the “rinsates from empty containers” phrase in the *de minimis* regulatory language. Because the *de minimis* regulatory language is being amended to include the new expansions to the exemption, the commenters claim that the Agency now has the opportunity to fix the apparently inconsistent language.

EPA notes that this comment raises an issue that is outside the scope of the proposed rulemaking. As stated in the preamble, the Agency made clear that it would not respond to any comments addressing any provisions of the headworks rule not specifically identified as subject to possible amendment (68 FR 17233, April 8, 2003).

However, EPA would like to take this opportunity to clarify how the existing “empty container” exemption operates. Under 40 CFR 261.7, a container can contain a small amount of non-acute hazardous waste and still be considered “empty” for the purpose of hazardous

waste regulation. (40 CFR 261.7 includes very specific definitions on how much waste can remain in an “empty container.”) The waste remaining in this “empty” container is not subject to hazardous waste regulation (including the mixture rule).

However, even though rinse water from an “empty” container may often times be non-hazardous, 40 CFR 261.7 does not directly exempt rinse water from Subtitle C regulation. Specifically, rinse water is not a waste “remaining in” an “empty” container. Indeed, while 40 CFR 261.7 clearly exempts residue remaining in an “empty” container from Subtitle C regulation, the Agency has made it clear that when the residue is removed from an “empty” container, the residue is subject to full regulation under Subtitle C if the removal or subsequent management of the residue generates a new hazardous waste that exhibits any of the characteristics identified in Part 261, Subpart C (see 45 FR 78529, November 25, 1980, where it states “[C]ontainer cleaning facilities which handle only “empty” containers are not currently subject to regulation unless they generate a waste that meets one of the characteristics in Subpart D.”). (See also April 12, 2004 letter from Robert Springer, Director, Office of Solid Waste to Casey Coles, Hogan and Hartson, LLP).

Finally, it also should be noted that if the rinsing agent includes a solvent (or other chemical) that would be a listed hazardous waste when discarded, then the rinsate from an “empty” container would be considered a listed hazardous waste. This is not due to the nature of the waste being rinsed from the “empty” container, but rather, because of the nature of the rinsing agent. In this scenario, the rinsate still may be eligible for the exemptions from the mixture rule found in 40 CFR 261.3(a)(2)(iv) (*i.e.*, headworks exemptions) if it meets the conditions of those exemptions (*e.g.*, solvent levels at the headworks below those in 40 CFR 261.3(a)(2)(iv)(A) and (B)).

E. The Potential Exemptions of Leachates Derived-From Solvent Wastes and Leachates Derived-From Other Types of Hazardous Wastes

Commenters generally supported potential exemptions of solvent waste and non-solvent waste leachates and urged EPA to continue developing a future proposal addressing such exemptions. One commenter stated that exempting such leachates would provide facilities flexibility in waste management that currently is not available to them. The commenter also added that if exempted, leachates could

be treated in a biological wastewater treatment unit without the facility having to manage the resulting treatment residue as a listed hazardous waste.

While very supportive of a potential rulemaking addressing leachates, several commenters objected to our use of the most recent EPA study of landfill leachate characteristics (65 FR 3007, January 19, 2000) as a factor in our decision to not exempt non-solvent leachates during this rulemaking. This study, which was conducted as part of data collected to establish technology-based effluent limitations guidelines and standards for landfills, determined that leachates from hazardous waste landfills had a greater number of constituents than leachates from non-hazardous landfills. In addition, the study concluded that the constituents present in the leachates from hazardous waste landfills were an order of magnitude greater than their counterparts in non-hazardous waste landfills.³ The commenters argued that the results of the study might be biased for two reasons. First, the commenters stated that leachates from hazardous waste landfills are analyzed for more constituents as well as analyzed more frequently than leachates from non-hazardous landfills. Therefore, the lack of data resulting from non-hazardous waste landfill leachates not being routinely analyzed cannot be an indicator for the absence of constituents in those leachates. Second, commenters were concerned that the contents of the non-hazardous landfill database may have been skewed towards landfills that do not accept hazardous wastes from households, conditionally exempt small quantity generators, or other wastes that do not require pretreatment, such as construction/demolition types of landfills. Therefore, the commenters question whether or not the comparison made between leachates from hazardous waste and non-hazardous waste landfills is based upon equivalent data. Finally, due to the concern that our decision was based upon an insufficient analysis, one commenter submitted analytical data from their facilities on leachate composition.

The Agency disagrees that it is inappropriate to base the decision not to include leachates in the exemption, in part, on the study of landfill leachate characteristics. The results of the study are based on data gathered to support the final effluent guidelines for the

landfill point source category (65 FR 3007, January 19, 2000) and was therefore designed to be comparable. The Agency analyzed all wastewater samples that it collected for the study for the same list of constituents regardless of whether the landfill was considered a hazardous or non-hazardous waste landfill. While the Agency disagrees with the commenters regarding the appropriateness of utilizing the landfill leachate characteristics study as a decision factor to not include leachates in the exemption at this time, we do believe, as stated in the preamble to the proposed rule, that the results of the study indicate that further analysis is needed before an exemption is considered.

V. State Authorization

A. How Will Today's Regulatory Changes Be Administered and Enforced in the States?

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

Today's rule is finalized pursuant to non-HSWA authority. The finalized changes in the conditional exemptions from the definition of hazardous waste under the headworks rule are less stringent than the current federal requirements. Therefore, states will not be required to adopt and seek authorization for the finalized changes. EPA will implement the changes to the exemptions only in those states which are not authorized for the RCRA program. Nevertheless, EPA believes that this rulemaking has considerable merit, and we thus strongly encourage states to amend their programs and become federally-authorized to implement these rules.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 **Federal Register** 51,735 (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create 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

³ Development Document for Final Effluent Limitations Guidelines and Standards for the Landfills Point Source Category, EPA-821-R-99-019, U.S. EPA, January 2000.

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because this rule contains novel policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or

recommendations will be documented in the public record. EPA's economic analysis suggests that this rule is not economically significant under Executive Order 12866, because EPA estimates that the overall national economic effect of the rule is \$11.4 million to \$48.6 million in average

annual potential cost savings for RCRA regulatory compliance. The following table presents an itemization of EPA's estimated count of affected facilities, affected annual RCRA waste quantities, and estimated annual cost savings for each of the five main features of this final rule.

SUMMARY OF ESTIMATED POTENTIAL NATIONAL ECONOMIC IMPACT FROM THE FINAL REVISIONS TO THE "HEADWORKS EXEMPTION" OF THE RCRA HAZARDOUS WASTE MIXTURE RULE (40 CFR 261.3(A)(2)(IV)(A) TO (E))

Item	Final regulatory revision to "headworks exemption"	Count of potentially affected entities (eligible industrial facilities)	Annual quantity of potentially affected (eligible) RCRA hazardous waste (tons/year)	Estimate of average annual economic impact* (\$/year)
1	Add two F005 spent solvents (benzene & 2-ethoxyethanol) to the "headworks exemption; for the RCRA hazardous waste mixture rule**.	115 to 1,800 facilities	0.036 to 0.594 million tons/year; spent solvent wastes (aqueous & non-aqueous forms).	\$0.32 to \$5.65 million/year in spent solvent waste management cost savings (netting-out implementation paperwork costs).
2	Provide "headworks exemption" for F001 to F005 spent solvent hazardous waste combustion "scrubber waters".	3 to 9 facilities	0.20 to 0.61 million tons/year scrubber wastewater.	\$0.53 to \$1.58 million/year in scrubber wastewater management cost savings.
3	Allow "direct monitoring" of F001 to F005 spent solvent waste concentrations in headworks influent wastewaters, in lieu of "mass balance" computations.	1,811 to 7,300 facilities	1.13 to 4.58 million tons/year; spent solvent wastes; (aqueous & non-aqueous forms).	\$10.09 to \$40.88 million/year in spent solvent waste management cost savings.
4	Revise RCRA hazardous waste "de minimis" exemption to include RCRA F- & K-listed wastes..	71 facilities	30 tons/year; spill incidents	\$0.03 million/year in spill response cost savings.
5	Revise RCRA hazardous waste "de minimis" exemption to include non-manufacturing facilities.	1,266 facilities	570 tons/year; spill incidents	0.48 million/year in spill response cost savings.
	Column totals =	3,266 to 10,446 facilities	1.37 to 5.78 million; tons/year ..	\$11.4 to 48.6 million/year cost savings.

*Economic impact based on year 2000 price levels for waste management systems. Also, for reasons explained in the Economic Background Document, the upper-ends of the numerical ranges in this table probably represent over-estimation of potential impacts; actual impacts are probably closer to the lower-ends of impact ranges.

**In comparison, expansion of the RCRA "headworks exemption" to include all four chemical solvents examined in the 8 April 2003 proposed rule, would likely only result in addition of one wastestream, at an additional annual cost savings of about \$19,000 (consisting tons/year aqueous spent solvent).

A detailed presentation of EPA's methodology, data sources, and computations applied for estimating the number of affected entities (industrial facilities) and economic impacts attributable to today's final rule is provided in the "Economic Background Document."

B. Paperwork Reduction Act

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

The rule requires generators wanting to demonstrate compliance with the RCRA headworks exemptions through

direct monitoring (rather than by the mass balance computation method as required before this rule), to submit a one-time copy of their wastewater headworks sampling and analysis plan (SAP), to the EPA Regional Administrator (or to the State Director in an authorized State), and to maintain in on-site files, all direct monitoring records for a minimum of three years. The SAP requirements for direct monitoring shall be site-specific. As with all other exemptions and exclusions from EPA's RCRA definition of hazardous waste, a facility is required under 40 CFR 268.7(a)(7) to place a one-time notice concerning RCRA hazardous waste generation, subsequent exclusion from the RCRA definition of hazardous waste, or RCRA definition of solid

waste, or exemption from RCRA Subtitle C regulation, and the disposition of the waste, in the facility's on-site files. Generally, such notification, as well as certifications, waste analysis data, and other documentation must be kept in on-site files for a period of three years, unless an enforcement action by the Agency extends the record retention period (40 CFR 268.7(a)(8)).

EPA estimates that the incremental, three-year average annualized respondent burden for the new paperwork requirements in the rule, including initial burden to exemption claimants for reading the rule, is 45,900 hours per year, and the three-year annualized respondent cost for the new paperwork requirements in the rule is \$8.56 million per year. However, in

addition to the new paperwork requirements in the rule, EPA also estimated the burden and cost that generators could expect as a result of complying with the existing RCRA hazardous waste information collection requirements for the excluded materials. Because the addition of benzene and 2-ethoxyethanol would increase the number of facilities that participate in the existing headworks exemptions (and the greater possibility of using direct monitoring), EPA expects there would be both a reduction in some RCRA paperwork requirements (*i.e.*, preparation of RCRA hazardous waste manifests and RCRA Biennial Reports), and an increase in other RCRA paperwork requirements (*i.e.*, demonstrating compliance by using mass balance and submitting a one-time LDR notification under 40 CFR 268.7(a)(7)). Taking both revised and existing RCRA requirements into account, EPA expects the rule's revisions to the headworks exemption, would result in a net annualized burden of about 46,200 hours per year at a cost of \$8.53 million per year. EPA expects this net additional paperwork cost to be offset by annual costs savings to respondents from reduced waste management costs, resulting in a net cost savings of \$11.4 to \$48.6 million per year. In addition to respondent burden, EPA estimates the paperwork burden cost to RCRA-authorized State agencies of administering the rule at about 370 hours per year at a cost of \$13,800 per year. Because of the fact that some of the rule's paperwork requirements are one-time only (*e.g.*, sampling and analysis plan) rather than annually-recurring burden, the actual annual burden hours and burden costs after the first-year in which the rule takes effect, will be lower than the three-year average annual values summarized above. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

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

Because this final rule expands the existing wastewater treatment

exemptions, the Agency believes that the hazardous waste management costs for both small and large entities will be reduced. In addition, these new exemptions are non-mandatory; therefore, the exemptions do not need to be claimed unless it is cost-effective. The net cost savings for affected entities has been estimated to be \$11.4–48.6 million (please refer to the economic background document to this final rule for more information). We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

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

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and

tribal governments, in the aggregate, or the private sector in any one year. This is because this final 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. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

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

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule directly affects primarily generators of hazardous wastewaters containing spent solvents, generators of scrubber waters derived from the incineration of spent solvents, and generators releasing *de minimis* amounts of listed wastes under certain conditions. There are no state and local government bodies that incur direct compliance costs by this rulemaking. State and local government implementation expenditures are expected to be less than \$500,000 in any one year. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR

67249, November 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 Health Risks and Safety Risks

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

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

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

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

This final rule reduces regulatory burden. It thus should not adversely affect energy supply, distribution or use.

I. National Technology Transfer and Advancement Act of 1995

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities

unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking involves environmental monitoring or measurement. Consistent with the Agency's Performance Based Measurement System ("PBMS"), EPA has decided not to require the use of specific, prescribed analytic methods. Rather, the rule will allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 3, 2005.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Waste treatment and disposal.

Dated: September 27, 2005.

Stephen L. Johnson,
Administrator.

■ For the reasons set out 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 6983.

■ 2. Section 261.3 is amended by revising paragraphs (a)(2)(iv)(A), (a)(2)(iv)(B), (a)(2)(iv)(D), (a)(2)(iv)(F) and (a)(2)(iv)(G) to read as follows:

§ 261.3 Definition of hazardous waste.

- (a) * * *
(2) * * *
(iv) * * *

(A) One or more of the following spent solvents listed in § 261.31—benzene, carbon tetrachloride, tetrachloroethylene, trichloroethylene or the scrubber waters derived from the combustion of these spent solvents—*Provided*, That the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 1 part per million, OR the total measured concentration of these solvents entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act, as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 1 part per million on an average weekly basis. Any facility that uses benzene as a solvent and claims this exemption must use an aerated biological wastewater treatment system and must use only lined surface impoundments or tanks prior to secondary clarification in the wastewater treatment system. Facilities that choose to measure concentration levels must file a copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative ("Director" as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the

sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

(B) One or more of the following spent solvents listed in § 261.31—methylene chloride, 1,1,1-trichloroethane, chlorobenzene, o-dichlorobenzene, cresols, cresylic acid, nitrobenzene, toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine, spent chlorofluorocarbon solvents, 2-ethoxyethanol, or the scrubber waters derived from the combustion of these spent solvents—*Provided* That the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 25 parts per million, OR the total measured concentration of these solvents entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 25 parts per million on an average weekly basis. Facilities that choose to measure concentration levels must file a copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative ("Director" as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above

information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

* * * * *

(D) A discarded hazardous waste, commercial chemical product, or chemical intermediate listed in §§ 261.31 through 261.33, arising from *de minimis* losses of these materials. For purposes of this paragraph (a)(2)(iv)(D), *de minimis* losses are inadvertent releases to a wastewater treatment system, including those from normal material handling operations (e.g., spills from the unloading or transfer of materials from bins or other containers, leaks from pipes, valves or other devices used to transfer materials); minor leaks of process equipment, storage tanks or containers; leaks from well maintained pump packings and seals; sample purgings; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinsate from empty containers or from containers that are rendered empty by that rinsing. Any manufacturing facility that claims an exemption for *de minimis* quantities of wastes listed in §§ 261.31 through 261.32, or any nonmanufacturing facility that claims an exemption for *de minimis* quantities of wastes listed in subpart D of this part must either have eliminated the discharge of wastewaters or have included in its Clean Water Act permit application or submission to its pretreatment control authority the constituents for which each waste was listed (in 40 CFR 261 appendix VII) of this part; and the constituents in the table "Treatment Standards for Hazardous Wastes" in 40 CFR 268.40 for which each waste has a treatment standard (i.e., Land Disposal Restriction constituents). A facility is eligible to claim the exemption once the permit writer or control authority has been notified of possible *de minimis* releases via the Clean Water Act permit application or the pretreatment control authority submission. A copy of the Clean Water permit application or the submission to the pretreatment control authority must be placed in the facility's on-site files; or

* * * * *

(F) One or more of the following wastes listed in § 261.32—wastewaters

from the production of carbamates and carbamoyl oximes (EPA Hazardous Waste No. K157)—*Provided* that the maximum weekly usage of formaldehyde, methyl chloride, methylene chloride, and triethylamine (including all amounts that cannot be demonstrated to be reacted in the process, destroyed through treatment, or is recovered, *i.e.*, what is discharged or volatilized) divided by the average weekly flow of process wastewater prior to any dilution into the headworks of the facility's wastewater treatment system does not exceed a total of 5 parts per million by weight OR the total measured concentration of these chemicals entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 5 parts per million on an average weekly basis. Facilities that choose to measure concentration levels must file copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative ("Director" as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

(G) Wastewaters derived from the treatment of one or more of the following wastes listed in § 261.32—organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates, and decantates) from the production of carbamates and

carbamoyl oximes (EPA Hazardous Waste No. K156).—*Provided*, that the maximum concentration of formaldehyde, methyl chloride, methylene chloride, and triethylamine prior to any dilutions into the headworks of the facility's wastewater treatment system does not exceed a total of 5 milligrams per liter OR the total measured concentration of these chemicals entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 5 milligrams per liter on an average weekly basis. Facilities that choose to measure concentration levels must file copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative ("Director" as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 412, 413, 415, 419, 422, and 485

[CMS-1500-F2]

RIN-0938-AN57

Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates; Correcting Amendment

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; correcting amendment.

SUMMARY: This document corrects technical errors in the final rule that appeared in the August 12, 2005 **Federal Register** entitled "Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates."

EFFECTIVE DATE: This correcting amendment is effective August 12, 2005.

FOR FURTHER INFORMATION CONTACT: Marc Hartstein, (410) 786-4548.

SUPPLEMENTARY INFORMATION:

I. Background and Summary of Errors

In FR Doc. 05-15406 (70 FR 47278), the final rule entitled "Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates" (hereinafter referred to as the FY 2006 final rule), there were technical errors that are identified and corrected in the regulations text of this correcting amendment. The provisions of this correcting amendment are effective August 12, 2005.

On page 47487 of the FY 2006 final rule, we made technical errors in the regulation text of § 412.230(d)(2)(iii). In this paragraph, we inadvertently omitted qualifying language related to our reclassification policy. Accordingly, we are revising § 412.230(d)(2)(iii) to accurately reflect our policy on reclassification of a campus of a multicampus hospital. Therefore, on page 47487 first column, lines 23 through 25, the phrase "may seek reclassification to a CBSA in which another campus(es) is located" would be corrected to read "may seek reclassification only to a CBSA in which another campus(es) is located" and on lines 29 and 30, the phrase "may submit" would be corrected to read "must submit."