Federal Register

Monday,
April 14, 2003

Part VI

Environmental Protection Agency

40 CFR Part 261

Project XL Site-Specific Rulemaking for the IBM Semiconductor Manufacturing Facility in Hopewell Junction, New York; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL–7480–7]

RIN 2090–AA29

Project XL Site-Specific Rulemaking for the IBM Semiconductor Manufacturing Facility in Hopewell Junction, NY

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental proposal; request for comment.

SUMMARY: The Environmental Protection Agency is publishing this site-specific proposal, which supplements the previously published proposed rule for this pilot project under the Project eXcellence and Leadership Program (Project XL). This supplemental proposal is being issued in light of new data received by EPA concerning the cadmium levels in the wastewater treatment sludge that is the focus of this site-specific rulemaking. In particular, this rulemaking effort will allow for the implementation of a pilot project under Project XL that will provide site-specific regulatory flexibility under the Resource Conservation and Recovery Act (RCRA), as amended, for the International Business Machines Corporation (IBM) East Fishkill semiconductor manufacturing facility in Hopewell Junction, New York. The principal objective of this pilot project is to determine whether the wastewater treatment sludge resulting from the treatment of wastewaters from electroplating operations (and therefore meeting the listing description for F006 Hazardous Waste) at IBM's East Fishkill facility may be used as an ingredient in the manufacture of cement in an environmentally sound manner without RCRA regulatory controls.

DATES: Public Comments: Comments on this supplemental proposal must be received on or before May 14, 2003. All comments should be submitted in writing or electronically according to the directions below in the **SUPPLEMENTARY INFORMATION** section.

Public Hearing: Commenters may request a public hearing on or before April 28, 2003, and should specify the basis for the request. If EPA determines there is sufficient reason to hold a public hearing, it will do so by May 5, 2003, during the last week of the public comment period. Requests for a public hearing should be submitted according to the information below in the **ADDRESSES** section. If a public hearing is scheduled, the date, time, and location will be available through a **Federal Register** document or by contacting Mr. Sam Kerns at the U.S. EPA Region 2 office (*see* **FOR FURTHER INFORMATION CONTACT** section, below).

ADDRESSES: Comments may be submitted electronically, by mail, by facsimile, or through hand delivery/courier. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section.

Request for a Hearing: Requests for a hearing should be mailed to the Environmental Protection Agency, EPA Docket Center (EPA/DC), RCRA Docket (5305T), 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please send an original and two copies of all comments, and refer to Docket Number F–2002–IB3P–FFFFF. A copy should also be sent to Mr. Sam Kerns at the U.S. EPA Region 2 office. Mr. Kerns may be contacted at the following address: U.S. Environmental Protection Agency, Region 2, 290 Broadway, New York, NY 10007–1866, (212) 637–4139.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Kerns, U.S. Environmental Protection Agency, Region 2, 290 Broadway, New York, NY 10007–1866. Mr. Kerns can be reached at (212) 637–4139 (or *kerns.sam@epa.gov*). Further information on today's action may also be obtained on the world wide web at *http://www.epa.gov/projectxl/*.

SUPPLEMENTARY INFORMATION:

Outline of Today's Supplemental Proposal

The information presented in this preamble is organized as follows:

I. General Information

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

I. Docket. EPA has established an official public docket for this action under Docket ID No. F–2002–IB3P–FFFFF. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the RCRA Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1742, and the telephone number for the RCRA Docket is (202) 566–0270. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost 15 cents per page.

II. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not

included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket. Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or *see* 67 FR 38102, May 31, 2002.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, by facsimile, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in I.B.2 and I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

I. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

I. EPA Dockets. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and then key in Docket ID No. F–2002–IB3P–FFFFF. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

II. E-mail. Comments may be sent by electronic mail (e-mail) to *rcra-docket@epa.gov*, Attention Docket ID No. F–2002–IB3P–FFFFF. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

III. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in I.B. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

II. By Mail. Send 2 copies of your comments to the RCRA Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. F–2001–IB3P–FFFFF.

III. By Hand Delivery or Courier. Deliver your comments to: Environmental Protection Agency, EPA Docket Center, 1301 Constitution Avenue, NW., Washington, DC 20004, Attention Docket ID No. F–2002–IB3P–FFFFF. Such deliveries are only accepted during the Docket's normal hours of operation as identified in A.1.

IV. By Facsimile. Fax your comments to: 202–566–0272, Attention Docket ID. No. F–2001–IB3P–FFFFF.

C. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: Environmental Protection Agency, EPA Docket Center (EPA/DC), RCRA Docket, 1301 Constitution Avenue, NW., Washington, DC 20004, Attention Docket ID No. F–2001–IB3P–FFFFF. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be

included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

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

You may find the following suggestions helpful for preparing your comments:

I. Explain your views as clearly as possible.
II. Describe any assumptions that you used.
III. Provide any technical information and/or data you used that support your views.
IV. If you estimate potential burden or costs, explain how you arrived at your estimate.
V. Provide specific examples to illustrate your concerns.
VI. Offer alternatives.
VII. Make sure to submit your comments by the comment period deadline identified.
VIII. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Authority

EPA is publishing this proposed regulation under the authority of sections 2002, 3001, 3002, 3003, 3006, 3010, and 7004 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6912, 6921, 6922, 6923, 6926, 6930, 6937, 6938, and 6974).

III. Background

A. How Does This Supplemental Proposal Relate to the Original Proposal Published on June 6, 2001 (66 FR 30349)?

This pilot project assesses the appropriateness of excluding from the RCRA regulatory definition of solid waste the wastewater treatment sludge (designated as F006 Hazardous Waste) generated by one of the two fluoride/heavy metal wastewater treatment plants (the plant designated as B/690 West Complex by IBM) on the IBM East Fishkill facility when the sludge is being used as an ingredient in the manufacture of cement. Information will be obtained and used to evaluate this recycling process and determine whether similar sludges should also be excluded from RCRA regulatory controls when recycled in the same manner. However, additional data will likely be necessary before EPA would be in a position to evaluate this practice at the national level.

Today's supplemental proposal amends the original proposal published on June 6, 2001 (66 FR 30349). As with the original proposed rule, this supplemental proposal is not intended to apply to any other hazardous wastes generated and/or managed at the IBM facility, unless the wastewater treatment sludge (also designated as F006 Hazardous Waste) generated by the other wastewater treatment plant (the B/386 East Complex) at the facility becomes eligible once a Final Project Agreement (or addendum to the current Final Project Agreement) is signed allowing for the additional sludge to be included in this project. The proposed rule does not apply to any wastewater treatment sludges generated at other facilities.

The duration of this pilot project is five years—that is, the site-specific conditional exclusion includes a ''sunset provision'' which will automatically terminate the exclusion five years from the effective date of the final rulemaking. Towards the end of the term of this XL project, EPA, the New York State Department of Environmental Conservation (NYSDEC), and IBM will evaluate the success of the pilot project. If the project is determined to be successful, EPA may consider expanding the scope of the exclusion to the national level (by rulemaking). However, EPA does not expect that this XL project alone can generate all the data that would be necessary on the wide variety of other F006 wastestreams that could potentially be used to make cement to proceed with a national rulemaking.

Today's supplemental proposal, and the original proposed rulemaking will not in any way affect the provisions or applicability of any other existing or future regulations.

EPA is soliciting comments on today's supplemental proposal. EPA will publish responses to comments, and comments to the original proposal in a subsequent **Federal Register** document. Subject to comments received on the proposal, EPA will either promulgate the proposed rule (as supplemented with today's proposal) as a final rule, modify the proposal as necessary to address comments and promulgate the modified proposal as a final rule, or decide to not go final with the rule. If significant changes to the rule are necessary based on comments received, EPA will re-propose the rule to allow for further public notice and comment. The XL project will enter the implementation phase only after a final rule is promulgated by EPA, and NYSDEC has undertaken appropriate action to allow the project to be implemented.

The terms of the overall XL project are contained in a Final Project Agreement (FPA) which was the subject of a Notice of Availability published in the **Federal Register** on September 1, 2000 (65 FR 53298) and which was signed by EPA, NYSDEC and IBM on September 29, 2000. The Final Project Agreement (FPA) is available to the public at the EPA Docket in Washington, DC, in the U.S. EPA Region 2 library, at the IBM East Fishkill facility, and on the world wide web at *http://www.epa.gov/projectxl/.*

For a more complete and detailed discussion of Project XL, the development of the Final Project Agreement (FPA), and the pilot project for which this supplemental proposal is intended, the reader is referred to the original proposal (June 6, 2001, 66 FR 30349). The summary of the proposed rule provided below is not intended to be comprehensive, but only includes those aspects of the proposed rule most relevant to this supplemental proposal.

B. Brief Summary of the June 6, 2001 Proposed Rule

On June 6, 2001, EPA published a proposed rule (66 FR 30349) to amend the RCRA regulatory definition of solid waste to provide a site-specific conditional exclusion for the F006 electroplating sludge generated by the IBM East Fishkill facility located in Hopewell Junction, New York. This rulemaking effort was undertaken to allow for the implementation of a pilot project under Project XL to determine whether the electroplating sludge could be recycled in an environmentally sound manner as an ingredient in the production of cement without RCRA regulatory oversight. (Note that the legitimate recycling of this sludge as an ingredient in cement is currently regulated under Subtitle C of RCRA because the cement is likely to be used on the land—that is, ''used in a manner constituting disposal,'' a form of recycling that is analogous to land disposal. Because the current regulatory framework would subject this sludge to RCRA regulatory requirements, this recycling scenario would likely not be undertaken and implemented without the site-specific exclusion.)

EPA's (and NYSDEC's) decision to proceed with this pilot project was based in large part on the determination

that the use of the sludge as an ingredient in cement is legitimate recycling. In other words, the electroplating sludge in question was determined, based on a comparative analysis of the constituents in both the sludge and the raw materials that the sludge would be replacing, to be a legitimate substitute for the analogous raw materials that would otherwise be used in the production of cement. *See* the June 6, 2001 proposal (66 FR at 30352–30354) for a more detailed discussion of the Agency's basis for defining this activity as legitimate recycling. Having determined the legitimacy of this activity, the proposed site-specific exclusion was conditioned on the sludge remaining consistent with the analogous raw materials, which was accomplished by setting a set of threshold levels for the hazardous constituents contained in the sludge. (Note that the site-specific conditional exclusion also imposes certain other conditions on IBM to be eligible for the exclusion.)

IV. Discussion of Certain Comments Received on the June 6, 2001 Proposed Rule

On June 6, 2001, EPA requested comments on the proposed rule for the IBM East Fishkill Project XL (*see* 66 FR 30349). While the Agency will appropriately address the comments received in the final rule (assuming the rule is finalized), EPA is taking this opportunity to address certain fundamental misconceptions concerning this XL pilot project that are common to many of the comments received on the original proposal. In addition, the Agency would like to address certain comments that question the overall ''legitimacy'' of using this F006 sludge as an ingredient in cement.

A. Shenandoah Road Superfund Site Stakeholders

Comments were submitted by concerned citizens living in a community near the IBM East Fishkill facility who are also involved as stakeholders in the cleanup of the Shenandoah Road Groundwater Contamination Superfund Site, a remediation activity for which the IBM East Fishkill facility was identified as a Potentially Responsible Party (PRP). The Agency is taking this opportunity to address some of the concerns expressed by these citizens. The sludge involved in this XL project was not disposed of at the Superfund site, and the production lines and wastewater treatment systems involved in generating the sludge are not associated with operations which resulted in the groundwater contamination that is the focus of the Superfund remedial activities. Further, the sludge does not contain tetrachloroethene (PCE) or other volatile organic constituents (VOCs), but rather is primarily composed of calcium and fluoride, and includes certain inorganic constituents of concern (*i.e.*, heavy metals) at low levels.

Also, it is worth noting that while the facility may have been involved in past operations that resulted in environmental damages, this in and of itself does not preclude the facility (or any facility) from developing and proposing a pilot project that meets the Project XL criteria.

In addition, several of the commenters requested a public meeting on this XL project and the proposed rule and an extension to the comment period. This request was declined by EPA because the substantive concerns expressed in the comments were primarily based upon a perceived connection between this XL pilot project and the contamination/remediation activities at the Shenandoah Road Superfund Site. Since public meetings concerning the Superfund site were being held, EPA concluded that they provided a more appropriate forum to raise such concerns.

To address any concerns that may have been somewhat related to IBM's XL project, EPA held an Availability Session (an informal forum in which the pilot project could be discussed with interested individuals) in conjunction with one of the Superfund public meetings as an effective first step in addressing those concerns. A fact sheet for the project was updated to respond to comments received before the Superfund public meeting that was scheduled for June 13, 2001, a week following publication of the proposed rule. (Most of the comments received from the residents of the Shenandoah Road area had been received before this meeting.) EPA's project manager for this XL project attended the June 13, 2001 Superfund public meeting, hosted the Availability Session, discussed this XL project with interested persons, and distributed copies of the fact sheet. Comments that were received during and immediately after the Availability Session were subsequently addressed by letter or e-mail. Therefore, although neither a public meeting nor an extension of the comment period was granted specific to this XL project or proposed rule, the Agency took steps to address the concerns raised.

B. Environmental Technology Council

The Environmental Technology Council (ETC) is a national trade association representing the commercial hazardous waste management industry and has historically been an active stakeholder in rulemakings involving RCRA jurisdiction. While ETC commented on several aspects of the proposal which will be addressed in the final rule (assuming the rule is finalized), several comments related to ''legitimate recycling'' and ''dilution'' exhibited a significant misunderstanding that the Agency wishes to address in today's notice.

To begin, ETC asserts that the recycling of IBM's sludge as an ingredient in cement is a sham, rather than legitimate recycling. In other words, ETC claims that the use of the calcium-rich sludge as an ingredient in cement is nothing more than treatment and/or disposal of the sludge in the guise of recycling. While ETC provides support for this assertion by addressing the various ''legitimacy criteria'' as the Agency did in the proposal (*see* 66 FR at 30353), one aspect of ETC's discussion requires clarification from EPA in this supplemental proposal. ETC contends that the sludge contains significantly higher levels of hazardous constituents than the analogous raw materials the sludge would replace. The Agency disagrees with ETC and notes that ETC cites historical analytical data on the sludge rather than the more recent analyses of the sludge to support this claim. Further, ETC fails to acknowledge the threshold levels proposed as a mechanism to ensure that the sludge excluded from RCRA regulation would remain comparable to the analogous raw materials. ETC's claim to the contrary notwithstanding, the sludge that will be recycled pursuant to the proposed conditional exclusion will, in effect, legitimately substitute for the analogous raw materials that would otherwise be used. This is one of the indicators the Agency considered in determining that the use of the sludge as an ingredient in the production of cement is legitimate recycling.

As for ETC's position that this recycling scenario is simply dilution, the Agency acknowledges that the 1:200 ratio of sludge to normal raw materials might, in and of itself, lead one to assume that impermissible dilution is occurring. Indeed, the Agency stated as much in the preamble to the proposed rule (*see* 66 FR at 30354); however, as EPA also discussed, upon further evaluation, one can see that the ratio is merely a function of the relatively small volume of electroplating sludge generated by the IBM facility and the relatively large volume of raw materials typically processed by a cement

manufacturer. It is not, as ETC asserts, an attempt to simply dispose of the sludge by diluting it into a much larger volume of raw materials. In making this claim, ETC ignores the fact that the sludge does indeed contribute a very integral part of the ingredient mixture necessary to produce cement (*i.e.*, calcium). Furthermore, as stated earlier, the concentrations of hazardous constituents in the sludge and in the analogous raw materials are comparable. Therefore, to the extent that there is any ''dilution'' of the hazardous constituents in the sludge, the Agency believes it would be nominal, incidental, and consistent with the processing that the normal raw materials undergo in the production of cement (*i.e.*, similar to the ''dilution'' that occurs when only normal raw materials are used). Finally, the Agency notes that ETC acknowledges in their comments that the Toxicity Characteristic Leaching Procedure (TCLP) data provided in support of this rulemaking indicate that the sludge would meet the applicable Land Disposal Restrictions treatment standards as generated, without requiring further treatment. Given that the sludge already meets the treatment standards that would apply if it was disposed of in a Subtitle C permitted hazardous waste landfill, ''dilution'' as an impermissible substitute for the appropriate treatment of the hazardous constituents is a moot point (*see* 40 CFR 268.3).

V. Discussion of the Change From the June 6, 2001 Proposed Rule

Since the June 6, 2001 proposal, IBM continued to sample and analyze the sludge that is the focus of this pilot project. In the course of this sampling and analysis effort, IBM discovered that the concentration of cadmium in the sludge had increased to 1.5182 ppm. IBM then conducted a thorough inventory of the materials and equipment used in the production processes and determined that cadmium is not used[1]. In the June 6, 2001 proposal, the Agency discussed IBM's assumption that the cadmium detected in the wastewater treatment sludge is present as a contaminant in the lime used in the wastewater treatment process (*see* Footnote 4, 66 FR 30354). This appears to be the case.

Upon learning that in some instances the sludge would not meet the threshold level that the Agency had originally proposed for cadmium (*i.e.*, 0.88 mg/kg) for the sludge to be conditionally excluded from the definition of solid waste, IBM informed EPA; EPA then requested that IBM provide a detailed analysis of the lime used in the wastewater treatment process (which IBM received from the distributor of the lime). This analysis showed that the lime being used by IBM at the time contained 2.0 ppm cadmium. The Agency believes that, because the lime makes up such a high proportion of the sludge (typically more than 90%, according to IBM), the cadmium levels in the sludge are consistent with what would be expected given the cadmium levels in the lime.

In considering how to proceed, one option was to keep the proposed threshold level of cadmium in the wastewater treatment sludge and disallow any sludge not meeting this level from being conditionally excluded from the definition of solid waste under the pilot project. Under this approach, if the Agency finalizes the site-specific exclusion, and did so as originally proposed, IBM could begin to use the sludge as an ingredient in cement once the sludge met the proposed conditions of the exclusion. However, this approach seems inappropriate, especially considering that the lime containing 2.0 ppm cadmium could itself be used as an ingredient in cement outside of RCRA jurisdiction (the lime is a commercial product, not a solid waste). Put another way, the Agency believes it would be inappropriate to disallow the sludge (which is primarily lime) from being used as an ingredient because of a contaminant in the lime. Therefore this was not considered a viable option.

An alternative option is to re-propose a more realistic threshold level for cadmium, based on the potential presence of cadmium in the lime used in wastewater treatment. The Agency notes that the slightly higher concentration of cadmium in the sludge (as well as the proposed change to the cadmium threshold level to reflect that concentration) has no effect on the Agency's determination that the sludge is analogous to the raw materials that would otherwise be used as ingredients in the production of cement. And, as discussed briefly in the proposal (*see* 66 FR 30354, June 6, 2001), a certain amount of variability in the constituent concentrations in the normal raw materials used to produce cement is typical, if not expected. In proposing the original cadmium threshold of 0.88 mg/kg, the Agency assumed that this would account for such variability. Obviously, this was not the case. Therefore, the Agency has determined that it is more appropriate to re-propose a cadmium threshold level that more accurately reflects the potential variability of cadmium concentrations in lime, and its attendant impact on the cadmium concentrations in the sludge generated using the lime.

In defining a cadmium threshold that would be more appropriate and reflect the natural variability in raw materials normally used as ingredients in cement, the Agency learned that the lime IBM uses for treating the electroplating wastewaters is held to a maximum concentration of 2.0 ppm, which is the standard for cadmium concentrations in lime used for conditioning (or treating) drinking water.[2] Assuming that the lime used to generate the sludge will not exceed 2.0 ppm cadmium, the sludge should also not exceed this level. Therefore, the Agency is today proposing that the threshold level for cadmium be set at 2.0 mg/kg (rather than the previously proposed level of 0.88 mg/kg). The Agency believes that this threshold level more accurately reflects the upper limit of the concentration of cadmium naturally occurring in the specific lime used to generate the electroplating sludge.

Finally, the Agency notes that while it is publishing the entire text of the regulatory language that was proposed in the June 6, 2001 **Federal Register** document to provide context for the proposed change in this supplemental proposal, the Agency is only soliciting comment on the revised cadmium threshold level.

[1] Note that, as mentioned in the original proposed rule (*see* Footnote 4, 66 FR at 30354, June 6, 2001), during the development of this XL project, IBM had previously conducted a review of the materials used in the facility's production processes and determined that cadmium is not used at the facility.

[2] In considering a more appropriate cadmium threshold level, the Agency contacted the National Lime Association (NLA) for generic information regarding the variability of metal concentrations naturally occurring in lime on a national basis. Such comprehensive information was not readily available. However, in considering whether the Agency should characterize the constituent concentrations of cadmium in lime on a national basis (a somewhat daunting task), EPA learned that such a characterization may not be necessary to develop a threshold level that appropriately reflects the cadmium concentrations in the lime the IBM East Fishkill facility uses. Rather, as the Agency learned from the NLA, the lime products provided by IBM's distributor are ANSI–60 (UL) certified as water treatment chemicals. This means that these products (including the lime used in IBM's wastewater treatment system) meet the applicable concentration criteria for heavy metals, including cadmium (which is 2 ppm), as long as the products are used per specifications. In other words, the specific lime used by this specific IBM facility is certified to have no more than 2 ppm cadmium. Given that this is a site-specific rulemaking, EPA considers this 2 ppm cadmium concentration to be a more appropriate threshold level for this specific site than a threshold level reflecting the cadmium concentrations developed on a national basis.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order, which include assessing the costs and benefits anticipated as a result of this regulatory action. The Order defines ''significant regulatory'' action as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because this rule affects only one facility, it is not a rule of general applicability and therefore not subject to OMB review and Executive Order 12866. In addition, OMB has agreed that review of site-specific rules under Project XL is not necessary.

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

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business; (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 proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities because it only affects the IBM facility in Hopewell Junction, NY and which does not fit the definition of small entity.

C. Paperwork Reduction Act

This action applies only to one facility, and therefore requires no information collection activities subject to the Paperwork Reduction Act, and therefore no information collection request (ICR) will be submitted to OMB for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq*.

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 by State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating a 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, enable 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.

As noted above, this rule is applicable only to one facility in New York. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has also 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. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132

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

Today's proposal, which supplements the earlier proposal, does not have federalism implications. It will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's supplemental proposal will only affect one facility, providing regulatory flexibility applicable to this specific site. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.'' ''Policies that have Tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal

government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' Today's proposal, which supplements the earlier proposal, does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. EPA is currently unaware of any Indian tribes located in the vicinity of the facility. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045

Executive Order 13045, entitled ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (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 potential effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by 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 because this action raises the threshold level of cadmium to the concentration that naturally occurs in lime used to generate electroplating sludge. The public is invited to submit or identify peer-reviewed studies and data, of which the Agency may not be aware, that assessed results of early life exposure to cadmium that occurs naturally in raw materials that are used in cement production.

H. Executive Order 13211

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. It will not result in increased energy prices, increased cost of energy distribution, or an increased dependence on foreign supplies of energy.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA,'' Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's proposal, which supplements the earlier proposal, does not establish technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. In response to Executive Order 12898, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). To address this goal, EPA conducted a qualitative analysis of the environmental justice issues under the national proposed rule. Potential environmental justice impacts are identified consistent with the EPA's Environmental Justice Strategy and the OSWER Environmental Justice Action Agenda.

Today's proposal, which supplements an earlier proposal, applies to one facility in New York. Overall, no disproportional impacts to minority or low income communities are expected.

VII. RCRA & Hazardous and Solid Waste Amendments of 1984

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program for hazardous waste within the State. (*See* 40 CFR part 271 for the standards and requirements for authorization.) States with final authorization administer their own hazardous waste programs in lieu of the Federal program. Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA.

After authorization, Federal rules written under RCRA (non-HSWA), no longer apply in the authorized State except for those issued pursuant to the Hazardous and Solid Waste Act Amendments of 1984 (HSWA). New Federal requirements imposed by those rules do not take effect in an authorized State until the State adopts the requirements as State law.

In contrast, under section 3006(g) of RCRA, new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time they take effect in nonauthorized States. EPA is directed to carry out HSWA requirements and prohibitions in authorized States until the State is granted authorization to do so.

B. Effect on New York Authorization

The proposed rule, which today's notice supplements, if finalized, will be promulgated pursuant to non-HSWA authority, rather than HSWA. New York has received authority to administer most of the RCRA program; thus, authorized provisions of the State's hazardous waste program are administered in lieu of the Federal program. New York has received authority to administer the regulations that define solid wastes. As a result, if the proposed rule to modify the existing regulations to provide a site-specific exclusion for IBM's wastewater treatment sludge is finalized, it would not be effective in New York until the State adopts the modification. It is EPA's understanding that subsequent to the promulgation of the final rule, New York intends to propose rules or other legal mechanisms to provide the

exclusion. EPA may not enforce these requirements until it approves the State requirements as a revision to the authorized State program.

List of Subjects in 40 CFR Part 261

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

Dated: April 4, 2003.

Christine Todd Whitman,

Administrator.

For the reasons set forth in the preamble, part 261 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

2. Section 261.4 is amended by adding paragraph (a)(22) to read as follows:

§ 261.4 Exclusions.

* * * * *

(a) * * *

(22) Dewatered wastewater treatment sludges generated by the International Business Machines Corporation (IBM) East Fishkill facility in Hopewell Junction, New York, provided that:

(i) The sludge is recycled as an ingredient in the manufacture of cement meeting appropriate product specifications by a cement manufacturing facility.

(ii) The sludge is not stored on the land, and protective measures are taken to ensure against wind dispersal and precipitation run-off.

(iii) The sludge is not accumulated speculatively, as defined in § 261.1(c)(8).

(iv) A representative sample of the sludge undergoes constituent analysis by IBM (using the methods specified in 40 CFR part 264, appendix

IX) demonstrating that the sludge contains constituents at no greater concentrations than the thresholds presented below. Sludges generated by different wastewater treatment systems must be analyzed separately (commingling of the sludges is permissible after sampling). This sampling and analysis must be conducted every three months for an initial 12-month period, which can include the immediate period prior to the effective date of this exclusion. After the initial 12-month reporting period (*i.e.*, four sampling/analysis events), sampling and analysis must be conducted every six months for the duration of the project. Additionally, after any change in either the manufacturing process or the wastewater treatment process that could affect the chemical composition of the wastewater treatment sludge, sampling and analysis must be conducted. In addition to the constituents for which threshold levels are established, IBM must analyze and report the concentration levels of mercury and beryllium. The threshold concentrations are as follows:

Arsenic 3.0 mg/kg
Cadmium 2.0 mg/kg
Chromium (total) 22.9 mg/kg
Cyanide (amenable) 0.815 mg/kg
Cyanide (total) 0.815 mg/kg
Lead 18.8 mg/kg
Nickel 10.4 mg/kg
Silver 2.1 mg/kg

(v) An accounting is made of the volumes of sludge that are recycled, with an assessment of how much less analogous raw materials are used to produce the same volume of cement product, or how much more cement is produced attributable to the volume of sludge that is processed. IBM must acquire this information from the cement manufacturing facility.

(vi) IBM documents each shipment of the sludge, including where the sludge was sent, the date of the shipment, the date that the shipment was received and the volume of each shipment.

(vii) IBM provides EPA and NYSDEC with semi-annual reports detailing all of the information in paragraphs (a)(22)(i)–(vi) of this section for the duration of the project.

(viii) Should any of the conditions of paragraphs (a)(22)(i)–(vii) of this section not be met, the exclusion provided in this provision will not be applicable and the wastewater treatment sludge will be subject to the applicable RCRA Subtitle C regulations until the conditions are once again met.

(ix) The provisions of this section shall expire on [DATE FIVE YEARS FROM EFFECTIVE DATE OF FINAL RULE].

* * * * *

[FR Doc. 03–9047 Filed 4–11–03; 8:45 am]

BILLING CODE 6560–50–P