6F3402/R1013], may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail:

William H. Miller, Product Manager (PM) 16, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Office location and telephone number: Rm. 211, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2600.

SUPPLEMENTARY INFORMATION: EPA issued a notice published in the **Federal Register** of June 18, 1986 (51 FR 22077), which announced its decision to establish the reduced tolerance for residues of the pesticide on blueberries and cherries for a period extending to March 31, 1989, to cover residues existing from the conditional registration of the chemical. Based on additional information received in response to the June 18, 1986 notice, EPA extended the conditional registration of 3,5-dimethyl-4-(methylthio)phenyl methylcarbamate for use on blueberries and cherries to September 15, 1988. Therefore, the Agency is extending the tolerances for the pesticide on these commodities for the period extending to September 30, 1990, to cover residues existing on blueberries and cherries treated during the period of time the conditional registration was in effect.

The data submitted in the petition and other relevant material have been evaluated. The toxicological data submitted in support of the regulation were discussed in the **Federal Register** document of June 18, 1986 (51 FR 22077).

Based on the 2-year dog feeding study with a NOEL of 5.0 ppm (0.125 mg/kg/day) and using a safety factor of 10, the acceptable daily intake (ADI) for humans is 0.0125 mg/kg of body weight per day and the maximum permissible intake (MPI) is 0.7500 mg/day for a 60-kg human.

The current established tolerances for residues of 3,5-dimethyl-4-(methylthio)phenyl methylcarbamate comprise a theoretical maximum residue contribution (TMRC) of 0.2542 mg/day (1.5 kg) and utilize 33.89 percent of the ADI. As a result of this regulation, the TMRC will be 0.2145 mg/day (1.5 kg) and 28.61 percent of the ADI will be utilized.

No feed items are involved; therefore, it is expected that no secondary residues in meat, milk, poultry, and eggs will result from the use of the pesticide on blueberries and cherries.

The metabolism of the insecticide is adequately understood, and an analytical method, gas liquid chromatography with a flame photometric detector, is available for enforcement purposes. New methodology is forthcoming. If method trials are successful, the new methodology will replace the current methodology in PAM. Because the Agency currently has concerns over this new methodology, the Agency is limiting the period of time that the reduced tolerance is to be in effect. When the Agency receives the additional data needed to verify the analytical method which is due March 1, 1989, it will reassess the tolerance for blueberries and cherries and, if appropriate, will establish a permanent tolerance for these commodities. There are no regulatory actions pending against continued registration of the insecticide/bird repellent, and no other considerations are involved in extending the tolerance.

The pesticide is considered useful for the purpose for which the tolerances are sought. Based on the above information and data, the Agency concludes that extending the tolerances will protect the public health. Therefore, as set forth below, the tolerances are extended to September 30, 1990, to cover residues existing on blueberries and cherries treated during the period of time the conditional registration for these commodities was in effect.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 9, 1989.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, 40 CFR Part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 180.320 [Amended]

2. In § 180.320 *3,5-dimethyl-4-(methylthio)phenyl methylcarbamate; tolerances for residues*, by amending paragraph (b) by revising the interim tolerance expiration date, which currently reads "March 31, 1989," to read "September 30, 1990."

[FR Doc. 89-6709 Filed 3-21-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 261

[SW-FRL-3540-8]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) today is granting a final exclusion from the lists of hazardous wastes contained in 40 CFR 261.31 and 261.32 for specified wastes to be generated by Roanoke Electric Steel Corporation, Roanoke, Virginia. This action responds to a delisting petition submitted under 40 CFR 260.20, which allows any person to petition the Administrator to modify or revoke any provision of Parts 260 through 268, 124, 270, and 271 of Title 40 of the Code of Federal Regulations, and under 40 CFR 260.22, which specifically provides generators the opportunity to petition the Administrator to exclude a waste on a "generator-specific" basis from the hazardous waste lists.

EFFECTIVE DATE: March 22, 1989.

ADDRESS: The public docket for this final rule is located at the U.S. Environmental Protection Agency, 401 M Street SW., Room M2427, Washington, DC 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (202) 475–9327 for appointments. The reference number for this docket is "F–89–RSEF–FFFFF." The public may copy material from any regulatory docket at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline, toll free at (800) 424–9346, or at (202) 382–3000. For technical information concerning this notice, contact Linda Cessar, Office of Solid Waste (OS–343), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475–9828.

SUPPLEMENTARY INFORMATION:

I. Background

A. Authority

Under 40 CFR 260.20 and 260.22, facilities may petition the Agency to remove their wastes from hazardous waste control by excluding them from the lists of hazardous wastes contained at 40 CFR 261.31 and 261.32. Petitioners must provide sufficient information to EPA to allow the Agency to determine that (1) the waste to be excluded is not hazardous based upon the criteria for which it was listed, and (2) that no other hazardous constituents are present in the wastes at levels of regulatory concern.

B. History of This Rulemaking

Roanoke Electric Steel Corporation (Roanoke), located in Roanoke, Virginia, petitioned the Agency to exclude from hazardous waste control a specific waste it intends to generate. After evaluating the petition, on April 29, 1988, EPA proposed to exclude Roanoke's waste from the lists of hazardous waste under 40 CFR 261.31 and 261.32, conditional upon Roanoke meeting certain sampling, analysis, and reporting requirements. See 53 FR 15422.

Roanoke petitioned the Agency for an "upfront" exclusion. A petitioner requests an upfront exclusion for wastes that have not yet been generated or that will be subject to further treatment. When treatment is planned, an upfront delisting petition requests that an exclusion be granted based on untreated waste characteristics, pilot-scale treatment data if available, and process descriptions. As a condition of an upfront exclusion, the Agency may impose batch testing requirements, which often include analytical testing of representative samples obtained from the full-scale system. These data can be used to verify that the treatment system, once on-line, is operating as described in the petition. The Agency may also specify verification testing limitations (*i.e.*, the maximum allowable levels of hazardous constituents of concern in the waste) in the conditions of the granted exclusion. When the actual levels of the constituents of concern are below these levels, the waste will not be considered hazardous. If the actual levels of the constituents are above these levels, the waste is still considered to be hazardous and must be retreated or disposed in accordance with RCRA Subtitle C requirements.

This rulemaking addresses public comments received on the proposal and finalizes the proposed exclusion.

II. Disposition of Petition

Roanoke Electric Steel Corporation, Roanoke, Virginia

1. Proposed Exclusion

Roanoke petitioned the Agency for an upfront exclusion of its chemically stabilized electric arc furnace dust (CSEAFD), presently listed as EPA Hazardous Waste No. K061. Roanoke based its petition on the claim that the constituents of concern, although present in the waste, were in an essentially immobile form (*i.e.*, cement-like). To support its claim that both the non-listed and listed constituents of concern would not be present in the fully-cured CSEAFD above health-based levels of concern, Roanoke submitted results from total constituent, EP toxicity, and multiple extraction procedure (MEP) analyses (used to assess stabilized wastes) for all the EP toxic metals, nickel and cyanide. These analyses were performed on representative samples of the fully-cured CSEAFD as generated using a laboratory-scale treatment system. The verification testing conditions attached to the exclusion are designed to ensure that these constituents will not be present in the fully-cured CSEAFD at concentrations above the health-based levels used in delisting decision-making. See 53 FR 15422, April 29, 1988, for a more detailed explanation of why EPA proposed to grant Roanoke's petition for its fully-cured CSEAFD.

2. Agency Response to Public Comments

The Agency received comments on the proposed rule from five commenters. Three of the five commenters supported the Agency's proposed decision to exclude the fully-cured CSEAFD, while the other two commenters opposed the Agency's decision. The objections raised by the two commenters are discussed below.

Petition-Specific Comments

One commenter opposed the Agency's handling of information on Roanoke's stabilization process as proprietary. The commenter believed that without specific details concerning Roanoke's stabilization process and the physical/chemical composition of the stabilized waste, their ability to provide "meaningful" public comment was seriously restricted.

The Agency disagrees with the commenter. As specified in 40 CFR 260.2(b), Roanoke is entitled to assert a claim of business confidentiality covering part or all of the information submitted to EPA in fulfillment of the information requirements of §§ 260.20 and 260.22. Furthermore, Roanoke followed the procedures set forth in 40 CFR 2.203(b) pertaining to confidential business information. Roanoke provided the Agency confidential information detailing the stabilization process. Substantial resources have been invested to develop the stabilization process, and Roanoke is entitled to protect this information in order to license its process and to maintain commercial viability. Furthermore, Roanoke did not seek to protect as confidential any waste-specific information. Data characterizing the physical and chemical composition of both the untreated waste and the CSEAFD were provided in the exclusion petition. The Agency evaluated all information submitted, and provided a thorough discussion in the proposed exclusion of the important characteristics and constituents of the treated waste. Information that was not claimed to be confidential is available in the RCRA public docket for public inspection.

The same commenter stated that it strongly opposed the Agency's proposal to grant Roanoke an exclusion for five reasons, each of which is discussed in turn below. A sixth concern, regarding the initial and subsequent testing requirements is addressed in a later section—*Conditional Testing and Reporting Requirements.*

The commenter stated that the CSEAFD still exhibits one of the criteria for which it was listed—the presence of significant concentrations of the inorganic constituents of concern (*i.e.*, cadmium, chromium, and lead). The commenter also stated that the waste contains significant concentrations of nickel.

The Agency agrees that the presence in K061 wastes of significant total constituent concentrations of the inorganic constituents of concern was one of the criteria for listing K061 wastes as "T" (toxic) wastes. See 40 CFR 261.11(a)(3)(ii) and "Background Document, Resource Conservation and Recovery Act, Subtitle C, Hazardous Waste Management, Section 3001, Identification and Listing of Hazardous Waste," 1980. The Agency, however, believes that data presented in the Background Document characterize the physical/chemical nature of untreated electric arc furnace dusts and that these data are not representative of the physical/chemical nature of stabilized electric arc furnace dust contained in a cement-like waste matrix. Specifically, EPA believes it is reasonable to expect that, as the total constituent concentration of an unbound or loosely bound metal present in a waste increases, the potential for the metal to leach from the waste also increases (generally, the higher the total constituent concentration of an unbound or loosely bound metal, the higher the potential EP leachate concentration). Thus, wastes having significant total constituent concentrations of unbound or loosely bound metals are more likely to impact the underlying ground water than wastes having lower total constituent concentrations of unbound or loosely bound metals. In this case, however, the metals in Roanoke's waste are tightly bound within the waste's cement-like matrix. Thus, the Agency believes that the elevated levels of the metals present in Roanoke's waste should not pose a threat to either human health or the environment. The Agency's conclusion that the inorganic constituents of concern (including nickel) are bound in the waste matrix and thus are not available for leaching is supported by the results of the EP and MEP leachate analyses.

EPA evaluated the potential mobility of Roanoke's stabilized waste using the maximum EP or MEP leachate concentrations and the vertical and horizontal spread (VHS) model. For the volume of waste to be generated by Roanoke, the VHS model predicted a dilution factor of approximately 6.3. The Agency believes that the VHS model analysis provides a conservative and reasonable worst-case evaluation of the waste's effect on the underlying aquifer. The predicted compliance-point concentrations resulting from this conservative analysis were below the levels of concern used for delisting purposes. See 53 FR 15422, April 29, 1988, for a description of the modeling analysis of Roanoke's waste.

Furthermore, in delisting evaluations, EPA considers all the factors for which the waste was listed, as well as factors other than those for which the waste was originally listed that could cause the waste to be hazardous. See 42 U.S.C. 6921(f). For this specific wastestream, based on the above discussion, EPA does not believe that any other factors, including elevated total constituent concentrations of the inorganic constituents of concern and nickel, could cause this wastestream to present a hazard to human health and the environment.

The commenter also asserted that the Agency only considered the leachable levels of hazardous constituents and did not consider airborne and waterborne dispersal of the waste.

With regard to possible airborne dispersal, the Agency believes that the commenter's concern regarding airborne dispersal of the waste was based primarily on the characterization of K061 wastes in the listing background document as being fine particles or dusts. The Agency believes that direct contact from airborne exposure to hazardous contaminants from Roanoke's EAF dust (fine particles) is not probable because Roanoke's untreated EAF dust will be regulated as a hazardous waste, thus releases of the EAF dust to the atmosphere should be controlled. Additionally, due to the physical and chemical nature of Roanoke's stabilized waste (*i.e.*, monolithic and nonfriable), the Agency believes that direct contact from airborne exposure to hazardous contaminants from the CSEAFD is unlikely.

With regard to waterborne dispersal of the waste, it is important to note that Roanoke's waste will be stabilized to produce a cement-like waste matrix and handled as hazardous until it is fully cured. The VHS model analysis described in the proposal shows that leachate from the waste that travels through ground water will not exceed health based levels.

The Agency acknowledges that it may also be possible for surface water runoff to transport contaminants from the waste to a nearby surface water body. However, the Agency does not believe that analysis of such overland transport of contaminants as a reasonable exposure route for the petitioned waste would compel a different result for this petition. First, as described in the proposed rule, the Agency believes that landfill disposal is a reasonable worst-case management scenario for Roanoke's solidified waste. Contamination of surface water might occur, therefore, through runoff from the petitioned waste. However, EPA believes that the concentrations of any hazardous constituents in that runoff will tend to be lower than the levels in the EP leachate analyses reported in the proposal due to the acidic medium of the EP test. Furthermore, any transported constituents would be further diluted in the surface water body.

Secondly, the Agency believes that, in general, the leachate derived from this waste will not directly enter a surface water body without first traveling through the saturated (subsurface) zone where dilution and attenuation of hazardous constituents may occur. The VHS model takes this saturated zone into account as it predicts the ultimate fate and transport of hazardous constituents. Lastly, if the wastes were exposed to any long-term weathering, the Agency believes that any significant overland transport of hazardous constituents through erosion and runoff is highly unlikely for solidified (cement-like) wastes such as Roanoke's waste.

The commenter also asserted that the calculated hypothetical at-the-well contribution of cadmium, chromium, and lead from Roanoke's waste alone would be substantially more than half of the amount allowed in drinking water under the current standards for these contaminants (*i.e.*, the predicted compliance-point concentrations (CPCs) for cadmium, chromium, and lead are very close to their respective regulatory standards). The commenter, therefore, stated that disposing of this waste with any other contaminant source within the same landfill could readily cause exceedences of the standards.

As the Agency discussed in the **Federal Register** on February 26, 1985 and November 13, 1986 (50 FR 790Q and 51 FR 41085), the VHS model analysis assumes that there are no other potential contaminant sources at the disposal site (*i.e.*, leachate from the waste mixes with non-contaminated ground water). Additionally, without specifying management conditions or considering site-specific characteristics, the Agency cannot modify the VHS model to assess the effects of additional contaminant sources on the underlying aquifer within the same disposal site. The commenter is inferring that wastes should not be delisted unless the predicted at-the-well concentrations of the contaminants are significantly less (*e.g.*, 50 percent, 75 percent, 95 percent) than their respective health-based levels. The Agency does not have any technical basis to support a determination of an appropriate percentage reduction and believes that, without a technical basis, any resulting percentage reduction would be arbitrary. Therefore, until the Agency develops a more sophisticated modeling procedure and, in light of the conservative nature of the VHS model, EPA will continue to allow wastes to exhibit CPC's up to 100 percent of the health-based standard.

The commenter was further troubled by the CPC for lead since EPA is considering lowering the drinking water standard for lead to 0.02 mg/l. The commenter believes that the waste should be considered hazardous since, if the 0.02 mg/l standard is adopted, the calculated CPC would exceed the standard by a factor of two.

In making delisting decisions, EPA uses the existing health-based levels cited in "Docket Report on Health-Based Levels and Solubilities Used in the Evaluation of Delisting Petitions," June 8, 1988 (located in the RCRA public docket). EPA cannot predict the final drinking water standard until it is actually promulgated (the standard could be less than or greater than the proposed level or the 0.02 mg/l level cited by the commenter), nor can the Agency be certain when the new standard might be promulgated. Without a new final drinking water standard, the Agency does not believe it is fair to the petitioner to postpone a final rulemaking until a new drinking water standard for lead is promulgated.

The commenter also believes that the Agency did not consider the possibility of dioxin contamination. The commenter's concern of the possibility of dioxin contamination was based on data obtained through the Agency's National Dioxin Study, Tier 4 Combustion Report. (See "National Dioxin Study Tier 4 Combustion Sources: Engineering Analysis Report," U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, EPA-450/4-84-014h, September 1987.)

The Agency disagrees with the commenter. EPA evaluated Roanoke's petition and did not believe that any other hazardous constituents, including dioxins, were present in Roanoke's waste. In response to the commenter's specific concern regarding the possibility of dioxin contamination, EPA reviewed the Tier 4 report cited by the commenter. Although data presented in the Tier 4 report indicated that dioxins were present in wastes generated by secondary copper smelters and wire reclamation incinerators, the Agency does not consider it likely for dioxins to be present in Roanoke's waste. As discussed in the Tier 4 report, the principal reasons for the possible presence of dioxins in wastes generated by secondary copper smelters and wire reclamation incinerators are the presence of dioxin-forming precursors in raw materials and low combustion temperatures.

The report noted that secondary copper smelters' raw materials can contain quantities of polyvinyl chloride wire insulation (telephone wire), electrical parts, and other sources of copper (including circuit boards and electrical switches). Wire reclamation incinerators can process polyvinyl chloride wire insulation and polychlorinated biphenyls (PCBs)-containing transformer cores and parts. These types of raw materials contain dioxin-forming precursors.

The report also found that combustion temperatures maintained by both secondary copper smelters and wire reclamation incinerators are low enough to promote the formation of dioxins. Surveyed secondary copper smelting furnaces operated at approximately 1500° F, and wire reclamation incinerators operated at approximately 1000° F (some had afterburners operating at 1900° F).

The Agency reviewed the list of scrap materials Roanoke reported it uses to charge its furnaces, and the Agency does not believe that Roanoke uses wire or electronic scrap. The Tier 4 report states that secondary copper smelters and wire reclamation incinerators are less likely to generate dioxin-containing wastes if they do not use polyvinyl coated wire and low combustion temperatures. Additionally, the Tier 4 report stated that dioxins generally are destroyed at temperatures above 800° C (1472° F), especially in incinerators with residence times of 1.5–2.0 seconds or more. Roanoke's furnaces heat the molten steel to 3000° F. Therefore, Roanoke's furnaces run at more than two times the temperature required to destroy polychlorinated dibenzo-p-dioxins (PCDDs), PCBs, and polychlorinated dibenzofurans (PCDFs). EPA, based on the above discussion, does not believe that it is reasonable to expect dioxins to be present in Roanoke's waste.

The second commenter opposed the Agency's proposal to grant Roanoke an exclusion because it believes that Roanoke's process cannot work, that the process incorporates unnecessary dilution, and that the Agency has allowed Roanoke to use unnecessary dilution.

The Agency disagrees with the commenter. The Agency evaluated Roanoke's treatment process and results from total constituent and EP leachate analyses, and believes that: (1) Roanoke's stabilization process effectively immobilizes all of the EP toxic metals, nickel, and cyanide and, (2) Roanoke's process does not employ unnecessary dilution in order to meet the delisting levels. Table 1 presents a comparison of both the total constituent concentrations of lead and cadmium and the EP leachate concentrations of lead and cadmium in the untreated and treated electric arc furnace dust, respectively. As evidenced by Table 1, the pilot-scale stabilization process reduces the mobility of these metals by significantly more than the two times reduction in total concentration attributable to dilution through the addition of reagents (*i.e.*, 944:1 and 775:1 versus 2.06:1 and 2.23:1, respectively). Put another way, the stabilization process added to the total volume of the waste such that the total concentrations of the constituents of concern decreased to about one-half of the concentrations in the untreated waste yet, the concentrations of these same constituents in the EP-leachate samples decreased by nearly one-thousand fold.

TABLE 1.—COMPARISON OF THE TOTAL AND EP LEACHATE CONCENTRATIONS OF LEAD AND CADMIUM IN THE UNTREATED ELECTRIC ARC FURNACE DUST (EAFD) WITH THE TREATED EAFD

Constituent	Untreated EAFD	Treated EAFD	Ratio
	Total Concentration (mg/kg)	Total Concentration (mg/kg)	Untreated: Treated
Lead	37,330	18,100	2.06:1

TABLE 1.—COMPARISON OF THE TOTAL AND EP LEACHATE CONCENTRATIONS OF LEAD AND CADMIUM IN THE UNTREATED ELECTRIC ARC FURNACE DUST (EAFD) WITH THE TREATED EAFD—Continued

Constituent	Untreated EAFD	Treated EAFD	Ratio
Cadmium	591	265	2.23:1
	EP Concentration (mg/1)	EP Concentration (mg/1)	
Lead	255	0.27	944:1
Cadmium	31	0.04	775:1

The commenter believed that Roanoke's stabilization process utilized a greater quantity of reagent than needed and that other stabilization processes were capable of reducing leachable levels of the metals of concern without the large volume increases incurred by Roanoke's process. The commenter stated that the Agency should adjust the leachate concentrations from the treated wastes to account for the "unnecessary" dilution it believes that Roanoke's process uses. The commenter further suggested that the leachate concentrations from the treated wastes should be adjusted by multiplying the leachate concentrations by the increase in volume from the untreated waste to the treated waste. The commenter is correct, in that other available stabilization processes may utilize a smaller volume of regents than does Roanoke's stabilization process. However, based on the Agency's analysis of Roanoke's stabilization process, Table 1, and the above discussion, EPA does not believe that Roanoke's process incorporates "unnecessary" dilution since there does not appear to be a disproportionate relationship between the increase in waste volume of the treated waste and the resulting decrease in the constituent concentrations. Therefore, the Agency does not believe it is necessary to adjust the leachate concentrations as specified by the commenter.

Conditional Testing and Reporting Requirements

One commenter stated that if the Agency granted Roanoke an exclusion, the conditional requirements of the exclusion should include analyses for total constituent concentrations and MEP constituent concentrations of the hazardous constituents.

The Agency disagrees with the commenter. The Agency expects that this waste will be disposed of in a municipal waste disposal scenario, where soil conditions are generally expected to be mildly acidic. EPA believes that the EP extraction procedure is the most appropriate analytical tool to evaluate the potential leachability of this waste in an acidic environment. For this waste, EPA believes that continued evaluation of the EP leachable concentrations as required by the conditions of this exclusion will be adequate to protect human health and the environment. Furthermore, the Agency does not have health-based standards regulating the total constituent concentrations of any of the EP toxic metals or nickel. To require Roanoke to continually monitor for the total constituent concentrations of all the EP toxic metals and nickel will not ensure further protection of human health or the environment.

Lastly, the Agency does not believe it is necessary to require Roanoke to perform continuous MEP analyses. First, the Agency's belief that the stabilization process is effective is substantiated by the analytical data obtained from the previous MEP leachate tests. Additionally, if the stabilization process were ineffective and an increase in the leachability of the hazardous constituents from the waste were to occur, the Agency believes that the EP leachate analyses would adequately measure such an increase.

The Agency, when evaluating Roanoke's petition, realized that the concentration of the constituents of concern would vary depending on the type and quality of scrap metal charged in the steel making process. To address the possible variation in constituent concentrations, the Agency limited Roanoke's exclusion to cover wastes generated from a specific percentage range of steel turnings, #1 bundles, #2 bundles, #1 steel, #2 steel, busheling, railroad steel, plate and structural steel, shredded scrap, and railroad specialties. See 53 FR 15427, April 29, 1988. The Agency reasoned that, by fixing the percentage of each type of steel scrap within the range used by Roanoke during the time period when Roanoke collected its samples of unstabilized EAF dust, the variation in constituent concentrations would be controlled to within the range that Roanoke demonstrated could be rendered non-hazardous. However, while responding to the comments concerning the proposed testing conditions, the Agency realized that the specifications of the Institute of Scrap Iron and Steel (ISIS) for grading scrap metal were only voluntary guidelines. Therefore, potentially significant variation in the specific type of scrap within a particular category (*e.g.*, #1 bundles, #2 bundles) could occur. As a result, fixing the percentage of each type of steel scrap using the ISIS grading system would not prevent Roanoke's untreated waste from exhibiting variations in metal concentrations outside of the range addressed by Roanoke's petition.

For this reason, the Agency has modified condition (1)(B) in the final rule to require Roanoke to collect and analyze weekly composite samples of the treated CSEAFD indefinitely:

(1)(B) Subsequent testing: Roanoke must collect representative grab samples from every treated batch of CSEAFD generated daily and composite all of the grab samples to produce a weekly composite sample. Roanoke then must analyze each weekly composite sample for all of the EP toxic metals and nickel. Analyses must be performed according to SW-846 methodologies. The analytical data, including quality control information, must be compiled and maintained on site for a minimum of three years. These data must be furnished upon request and made available for inspection by any employee or representative of EPA or the State of Virginia.

The Agency believes that it is necessary to require the petitioner to analyze weekly composites of the CSEAFD in order to ensure that the stabilization process effectively handles the potential variation in constituent concentrations. As stated above, the potential variation in constituent concentrations results from potential changes in the composition of scrap charges. The Agency, however, believes that the composition of the scrap charges will not vary from day-to-day. Rather, the Agency expects that the composition of the scrap charges will change gradually since scrap generally is not purchased daily. Therefore, the Agency believes that collecting composite samples on a weekly basis, will be sufficient to ensure that the stabilization process generates non-hazardous CSEAFD.

The commercial availability of different types of scrap metal are subject to change with time. Therefore, as described above, the Agency believes it is possible that the composition of the untreated EAF dust will vary over time. The Agency stated in the proposed rule, that future upfront delisting proposals and decisions may include different testing requirements based on an evaluation of the uniformity of the process and the waste. See 53 FR 15427, April 29, 1988. The proposed rule also noted that wastes with variable constituent concentrations, including those discussed in previous delisting decisions (*e.g.*, 51 FR 41323, November 14, 1986), would require continuous batch testing. In the Roanoke exclusion, the Agency believes that the potential variations in waste composition (*i.e.*, constituent concentrations) resulting from changing scrap, warrant the continued testing of weekly composite samples of CSEAFD. As a result, the Agency removed condition (3) *Termination of Testing* in order to reflect the requirement for continual testing of weekly composite samples of the CSEAFD.

The Agency is requiring the petitioner to compile and store on site, all analytical data obtained through the subsequent testing condition (1)(B). The Agency realized that requiring the submission of these analytical data every six months would place an undue burden on both the petitioner and EPA. As condition (1)(B) states, however, the Agency, may at any time, either visit the facility for inspection purposes or request the petitioner to report these data. Therefore, the Agency is maintaining the same level of protection without requiring the petitioner to report these analytical data every six months. Condition (4) *Data submittals* has been renumbered as (3) and now reads:

(3) Data submittals: Within one week of system start-up, Roanoke must notify the Section Chief, Variances Section (see address below) when their full-scale stabilization system is on-line and waste treatment has begun. All data obtained through the initial testing condition (1)(A), must be submitted to the Section Chief, Variances Section, PSPD/OSW, (OS-343), U.S. EPA, 401 M Street, SW., Washington, DC 20460 within the time period specified in condition (1)(A). Failure to submit the required data or keep the required records will be considered by the Agency, at its discretion, sufficient basis to revoke Roanoke's exclusion. All data must be accompanied by the following certification statement:

"Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code which include, but may not be limited to, 18 U.S.C. 6928), I certify that the information contained in or accompanying this document is true, accurate and complete.

As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete.

In the event that any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of wastes will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion."

____

(Name of Certifying Person)

____

Date

____

(Title of Certifying Person)

EPA's Modeling Approach

One commenter stated that the Agency has the discretion to adjust the VHS model to account for waste-specific factors, including increased reserve cation exchange capacity, and reduction in waste permeability. Furthermore, the commenter asserted that the Agency should adjust the VHS model to account for the physical and chemical properties of a stabilized waste. To support this claim, the commenter provided analytical data from studies performed on its own stabilized waste. (The Agency notes that the commenter submitted these comments and data in response to the Agency's proposed exclusion for VAW of America, RCRA public docket no. "F-88-VWEP-FFFFF." The Agency elected to include its response to these comments here because VAW of America does not generate a stabilized waste and this proposal was published in the **Federal Register** on the same date, leading us to believe that the comment was intended for this rulemaking.)

As the Agency previously stated in 50 FR 7882 (February 26, 1985), the overall permeability of stabilized waste is generally not taken into account by the VHS model. The Agency, however, does not believe that the commenter provided adequate information in 1985 or now to support its contention that EPA should modify the VHS model to account for waste-specific factors. As the commenter stated: "It is difficult to accurately determine the exact levels of leachate reduction that will occur under actual environmental conditions." Until such a procedure exists, the Agency cannot modify the VHS model to account for waste-specific factors and will continue to use reasonable, worst-case assumptions in its modeling activities. Furthermore, the Agency does not believe that the commenter supplied adequate data to support the claim that the commenter's waste will remain monolithic, maintain a low permeability, or remain stable indefinitely.

A second commenter supported EPA's proposed use of the VHS model as applied to Roanoke's petitioned waste, and strongly supported EPA's assertion that "it is inappropriate for the Delisting Program to consider extensive site-specific factors in its evaluation of delisting petitions." (See 53 FR 15418 and 15423.) The commenter believed that it is unlawful and inappropriate for EPA to consider any site-specific factors in its evaluation of delisting petitions. This comment does not pertain to this petition or affect the proposed decision since the Agency did not consider any site-specific factors in its evaluation of the petitioned waste. The Agency, therefore, will independently respond to this comment in terms of a separate rulemaking petition filed by the Hazardous Waste Treatment Council which raises this issue with the Agency.

Inconsistencies Between the Delisting Program and the Land Disposal Restrictions Program

Two commenters believed that there are inconsistencies between delisting levels proposed for Roanoke and the Land Disposal Restrictions Program's proposed best demonstrated available technology (BDAT) treatment levels for K061 wastes. See 53 FR 15422, April 29, 1988 and 53 FR 11742, April 8, 1988, respectively. (On August 17, 1988, the Agency promulgated BDAT treatment levels for K061 non-wastewaster wastes. See 53 FR 31138.) Specifically, the first commenter believed that for cadmium, chromium, lead, and mercury, either the total constituent concentration or the leachable constituent levels of Roanoke's CSEAFD substantially exceed the BDAT treatment standards that EPA had proposed for K061 waste. The second commenter believed that the Agency should allow chemical fixation/stabilization as a viable treatment technology for purposes of the Land Disposal Restrictions Program.

The Agency agrees with the commenters that there are differences in approach between some of the decision criteria used in individual delisting decisions and those used in the Land Disposal Restrictions Program (LDRP). However, these differences are appropriate given the separate functions of the two programs and their different statutory bases. The Delisting Program and the LDRP are fundamentally different in that the Delisting Program's standards are health-based and the LDRP's treatment standards are technology-based. See RCRA section 3001 (42 U.S.C. 6921) and RCRA section 3004 (42 U.S.C. 6924(m)), respectively. The Agency, however, believes that both the health-based and technology-based approaches of the Delisting Program and the LDRP, respectively, are protective of human health and the environment.

3. Final Agency Decision

For the reasons stated in the proposal, the Agency believes that the CSEAFD, when subject to the verification testing requirements specified in the exclusion, should be excluded from hazardous waste control. The Agency, therefore, is granting a final conditional exclusion to Roanoke Electric Steel Company, located in Roanoke, Virginia, for its fully-cured chemically stabilized electric arc furnace dust treatment residue, described in its petition as EPA Hazardous Waste No. K061. The exclusion only applies to the processes covered by the original demonstration. The facility would require a new exclusion if either its manufacturing or treatment processes (including stabilization reagents) are significantly altered, such that an adverse change in waste composition occurs. Accordingly, the facility would need to file a new petition for the altered waste. The facility must treat waste generated from changed processes as hazardous until a new exclusion is granted.

Although management of the waste covered by this petition is relieved from Subtitle C jurisdiction, the generator of a delisted waste must either treat, store, or dispose of the waste in an on-site facility, or ensure that the waste is delivered to an off-site storage, treatment, or disposal facility, either of which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste. Alternatively, the delisted waste may be delivered to a facility that beneficially uses or reuses, or legitimately recycles or reclaims the waste, or treats the waste prior to such beneficial use, reuse, recycling or reclamation.

III. Limited Effect of Federal Exclusion

The final exclusion being granted today is being issued under the Federal (RCRA) delisting program. States, however, are allowed to impose their own, non-RCRA regulatory requirements that are more stringent than EPA's, pursuant to 3009 of RCRA. These more stringent requirements may include a provision which prohibits a federally-issued exclusion from taking effect in the State. Since a petitioner's waste may be regulated under a dual system (i.e., both Federal (RCRA) and State (non-RCRA) programs), petitioners are urged to contact their State regulatory authority to determine the current status of their wastes under State law.

IV. Effective Date

This rule is effective immediately. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance. That is the case here because this rule reduces, rather than increases, the existing requirements for persons generating hazardous wastes. In light of the unnecessary hardship and expense that would be imposed on this petitioner by an effective date six months after promulgation and the fact that a six-month deadline is not necessary to achieve the purpose of section 3010, EPA believes that this rule should be effective immediately upon promulgation. These reasons also provide a basis for making this rule effective immediately, upon promulgation, under the Administrative Procedures Act, pursuant to 5 U.S.C. 553(d).

V. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This rule to grant an exclusion is not major since its effect is to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction is achieved by excluding waste generated at a specific facility from EPA's lists of hazardous wastes, thereby enabling the facility to treat its waste as non-hazardous. There is no additional economic impact, therefore, due to today's rule.

VI. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

This amendment will not have an adverse economic impact on small entities since its effect will be to reduce the overall costs of EPA's hazardous waste regulations and is limited to one facility. Accordingly, I hereby certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation, therefore, does not require a regulatory flexibility analysis.

VII. Paperwork Reduction Act

Information collection and recordkeeping requirements associated with this final rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511, 44 U.S.C. Chapter 35) and have been assigned OMB control number 2050–0053.

List of Subjects in 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

Date: March 6, 1989.

Jeffery D. Denit,

Deputy Director, Office of Solid Waste.

For the reasons set out in the preamble, 40 CFR Part 261 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: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921, and 6922).

2. In Table 2 of Appendix IX, add the following wastestream in alphabetical order:

Appendix IX—Wastes Excluded Under §§ 260.20 and 260.22

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * *
Roanoke Electric Steel Corp..	Roanoke, VA.....	Fully-cured chemically stabilized electric arc furnace dust/sludge (CSEAFD) treatment residue (EPA Hazardous Waste No. K061) generated from the primary production of steel after March 22, 1989. This exclusion is conditioned upon the data obtained from Roanoke's full-scale CSEAFD treatment facility because Roanoke's original data were obtained from a laboratory-scale CSEAFD treatment process. To ensure that hazardous constituents are not present in the waste at levels of regulatory concern once the full-scale treatment facility is in operation, Roanoke must implement a testing program for the petitioned waste. This testing program must meet the following conditions for the exclusion to be valid: (1) *Testing:* (A) *Initial testing:* During the first four weeks of operation of the full-scale treatment system, Roanoke must collect representative grab samples of each treated batch of the CSEAFD and composite the grab samples daily. The daily composites, prior to disposal, must be analyzed for the EP leachate concentrations of all the EP toxic metals, nickel and cyanide (using distilled water in the cyanide extractions), and the total constituent concentrations of reactive sulfide and reactive cyanide. Analyses must be performed according to SW-846 methodologies. Roanoke must report the analytical test data obtained during this initial period no later than 90 days after the treatment of the first full-scale batch. *(B) Subsequent testing: Roanoke must collect representative grab samples from every treated batch of CSEAFD generated daily and composite all of the grab samples to produce a weekly composite sample. Roanoke then must analyze each weekly composite sample for all of the EP toxic metals and nickel. Analyses must be performed according to SW-846 methodologies. The analytical data, including all quality control information, must be compiled and maintained on site for a minimum of three years. These data must be furnished upon request and made available for inspection by any employee or representative of EPA or the State of Virginia.* (2) *Delisting levels:* If the EP extract concentrations for chromium, lead, arsenic, or silver exceed 0.315 mg/l; for barium exceeds 6.3 mg/l; for cadmium or selenium exceed 0.063 mg/l; for mercury exceeds 0.0126 mg/l; for nickel exceeds 3.15 mg/l; or for cyanide exceeds 1.26 mg/l, or total reactive cyanide or total reactive sulfide levels exceed 250 mg/kg and 500 mg/kg, respectively, the waste must either be re-treated or managed and disposed in accordance with Subtitle C of RCRA. *(3) Data submittals: Within one week of system start-up, Roanoke must notify the Section Chief, Variances Section (see address below) when their full-scale stabilization system in on-line and waste treatment has begun. All data obtained through the initial testing condition (1)(A), must be submitted to the Section Chief, Variances Section, PSPD/OSW, (OS-343), U.S. EPA, 401 M Street, SW., Washington, DC 20460 within the time period specified in condition (1)(A). Failure to submit the required data or keep the required records will be considered by the Agency, at its discretion, sufficient basis to revoke Roanoke's exclusion.* All data must be accompanied by the following certification statement: "Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code which include, but may not be limited to, 18 USC 6928), I certify that the information contained in or accompanying this document is true, accurate and complete. As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete. In the event that any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of wastes will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion."
*	*	* * * * *

[FR Doc. 89-6706 Filed 3-21-89; 8:45 am]
BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 5

Policies and Procedures for Testimony, Production and Disclosure of Material or Information by FEMA Employees

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: The Director of the Federal Emergency Management Agency (FEMA) is amending FEMA regulations (44 CFR Part 5, Subpart F) which govern the production and disclosure of records and information contained in materials generated, developed or held by FEMA. The amendment publicizes the delegation to the General Counsel, contained in FEMA Instruction No. 1130.1 (March 3, 1982), of the Director's authority to approve production or disclosure of FEMA materials or information in response to subpoenas or other demands. Where the materials or information sought are contained in the records of the Office of Inspector General, the amendment provides for determinations as to disclosure or production to be made by the Inspector General. The amendment seeks to clarify the prohibition against the production or disclosure of Agency records in response to a subpoena duces tecum by any officer or employee without prior approval of the General Counsel, or the Inspector General as to officers and employees of his or her Office. In addition, material is added governing oral testimony of employees in response to subpoenas or other official demands. The new subpart generally provides that FEMA employees may not give testimony as part of their official duties in litigation in which the United States or FEMA is not a party. This general prohibition is, of course, subject to waiver by the General Counsel (or, as to employees of the Office of Inspector General, by the Inspector General) at his or her discretion. The purpose of this regulation is to maintain FEMA's policy of strict impartiality with respect to private litigants and to minimize the disruption of official duties.

EFFECTIVE DATE: Date of publication.

FOR FURTHER INFORMATION CONTACT: Leneta G. Gregorie, General Attorney, Federal Emergency Management Agency, Room 840, 500 C Street SW., Washington, DC 20472, (202 646-4111).

SUPPLEMENTARY INFORMATION: On December 23, 1988, FEMA published for comment in the **Federal Register** (Vol. 53, Page 51863) a proposed rule to prescribe a uniform policy for employee conduct in response to subpoenas for testimony or the production of documents in litigation in which neither the United States nor FEMA are parties. This final rule adopts, with one minor exception, the provisions as set forth in the proposed rule. Although no formal comments were received, internal coordination has prompted the inclusion of provisions allowing for determination by the Inspector General as to production or disclosure of information by employees of the Office of Inspector General in response to subpoenas duces tecum or ad testificandum. Pursuant to the Inspector General Act of 1978 (Pub. L. 95–452; 5 U.S.C. App. 3), as amended on October 18, 1988 (Pub. L. 100–504; 102 Stat. 2515), the FEMA Office of Inspector General is an independent and objective unit of the Agency.

Subpoenas to testify concerning information which employees have acquired in the course of performing official duties, or to produce official documents, are essentially legal actions against the United States as to which there has been no statutory waiver of sovereign immunity. The courts have recognized the authority of Federal agencies to limit compliance with such subpoenas. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Swett* v. *Schenk*, 792 F.2d 1447 (9th Cir. 1986); *Giza* v. *Secretary of HEW*, 628 F.2d 748 (1st Cir. 1980); *Reynolds Metals Co.* v. *Crowther*, 572 F.Supp. 288 (D. Mass. 1982). Moreover, subpoenas by State courts or legislative committees which attempt to assert jurisdiction over Federal agencies are inconsistent with the Supremacy Clause of the U.S. Constitution, and a federal regulation prohibiting compliance with such subpoenas reinforces this principle. *See McCullouch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *U.S.* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *Municipal Court* v. *Civiletti*, 172 Cal Rptr. 83, 116 Cal. App. 3d 105 (1981).

FEMA's current regulation (44 CFR Part 5, Subpart F) governing response to subpoenas duces tecum provides that such subpoenas should be served on the appropriate Regional Director for regional records, or the General Counsel for any other records held by FEMA. It further provides that employees (other than the General Counsel or Regional Directors) served with a subpoena duces tecum should, unless otherwise directed by the Director, decline to produce the requested documents on the grounds that they are without authority to do so. By FEMA Instruction 1130.1, dated March 3, 1982, the Director delegated to the General Counsel the authority to determine whether Agency personnel should disclose documents or information in response to subpoenas or other demands. By this amendment, the Inspector General is given similar authority to make the necessary determinations for disclosure of documents or information in response to subpoenas duces tecum served on employees of the Office of Inspector General. In addition, this amendment provides that the Inspector General has sole authority to receive service of subpoenas duces tecum for the production of documents or information maintained by the Office of Inspector General. This final rule, therefore, makes it clear that no Agency records are to be produced in response to a subpoena duces tecum, even where served upon an official authorized to acknowledge service of subpoenas, without the approval of the General Counsel or, where appropriate, the Inspector General. These procedures for the central handling of subpoenas are designed to prevent the improper disclosure of Agency documents. They in no way impact upon the Agency's present policy of providing documents for use in private litigation to the fullest extent permitted by law. The amendment also makes clear that absent the approval of the General Counsel (or Inspector General) to respond in strict compliance with the terms of the subpoena, the appropriate response to a subpoena duces tecum is to furnish the private litigant with authenticated copies of Agency documents. This amendment is promulgated in the interest of preserving resources for performance of the official work of the Agency.

FEMA regulations do not currently address the terms on which FEMA employees may testify in response to subpoenas ad testificandum. Accordingly, this rule is intended to fill that void by prohibiting, subject to waiver by the General Counsel (or, as to employees of the Office of Inspector General, by the Inspector General), any employee from appearing in proceedings on behalf of any party other than the United States to testify as to any material contained in the files of the Agency or any information acquired by an employee as part of that person's official duties or because of that person's official status, including the meaning of official Agency documents. The general prohibition against voluntary appearances and compliance with subpoenas is designed to maintain the Agency's policy of strict impartiality with respect to private litigants. Moreover, to the extent that such requests or demands are designed to elicit testimony on official actions and policies, FEMA believes that the best proof can be derived from FEMA records.

FEMA recognizes that there are situations where the Agency would wish to cooperate with State or local authorities as part of the joint responsibility for developing and enforcing floodplain management regulations and other policies. This rule does not preclude such activities in cases where, in the discretion of the General Counsel (or Inspector General), a determination is made that such activity (including the testimony of FEMA employees) wold directly further a FEMA interest or matters of mutual concern and not infringe upon the Agency's resources or ability to maintain its objectivity.

With respect to the related issue of subpoenas for the testimony of FEMA employees in litigation or other adjudicatory proceedings in which the United States or FEMA is a party, this rule provides the Agency the flexibility to substitute other FEMA employees for those named in the subpoena where the public interest and smooth functioning of the Agency so requires.

This rule is an administrative action in support of maintaining normal day-to-day Agency operations, a category of action which has been determined by FEMA to have no significant effect on the human environment. 44 CFR 10.8(c)(2)(viii). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared.

This rule relates solely to internal Agency management and, therefore, is not a "major" rule subject to the requirements of Executive Order 12291.

No information collection requirements are imposed by this final rule. Therefore, the rule is not subject to the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35).

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 et seq.), FEMA certifies that the amendment will not have a significant economic impact on a substantial number of small entities. The rule represents only a change in Agency procedures and practices regarding the availability of Agency documents and employees under compulsory legal process.

List of Subjects in 44 CFR Part 5

Testimony, Production and Disclosure of Information.

For the reasons set forth in the preamble, 44 CFR Part 5, Subpart F is revised to read as follows:

PART 5—[AMENDED]

1. The authority citation of Part 5 is revised to read as follows:

Authority: 5 U.S.C. 552 as amended by sections 1801–1804 of the Omnibus Anti-Drug Abuse Act of 1986 which contains the Freedom of Information Reform Act of 1986 (Pub. L. 99-570); 5 U.S.C. 301 (Pub. L. 85-619); Reorganization Plan No. 3 of 1978; E.O. 12127; and E.O. 12148.

2. Subpart F is revised to read as follows:

Subpart F—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

Subpart F—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

§ 5.80 Scope and applicability.

(a) This subpart sets forth policies and procedures with respect to the disclosure or production by FEMA employees, in response to a subpoena, order or other demand of a court or other authority, of any material contained in the files of the Agency or any information relating to material contained in the files of the Agency or any information acquired by an employee as part of the performance of that person's official duties or because of that person's official status.

(b) This subpart applies to State and local judicial, administrative and legislative proceedings, and federal judicial and administrative proceedings.

(c) This subpart does not apply to Congressional requests or subpoenas for testimony or documents, or to an employee making an appearance solely in his or her private capacity in judicial or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents, domestic relations, etc.).

§ 5.81 Statement of policy.

(a) It is the policy of FEMA to make its records available to private litigants to the same extent and in the same manner as such records are made available to members of the general public, except where protected from disclosure by litigation procedural authority (e.g., Federal Rules of Civil Procedure) or other applicable law.

(b) It is FEMA's policy and responsibility to preserve its human resources for performance of the official functions of the Agency and to maintain strict impartiality with respect to private litigants. Participation by FEMA employees in private litigation in their official capacities is generally contrary to this policy.

§ 5.82 Definitions.

For purposes of this subpart, the following terms have the meanings ascribed to them in this section:

(a) "Demand" refers to a subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority (e.g., an administrative or State legislative body), signed by the presiding officer, for the production, disclosure, or release of FEMA records or information or for the appearance and testimony of FEMA personnel as witnesses in their official capacities.

(b) "Employee of the Agency" includes all officers and employees of the United States appointed by or subject to the supervision, jurisdiction or control of the Director of FEMA.

(c) "Private litigation" refers to any legal proceeding which does not involve as a named party the United States Government, or the Federal Emergency Management Agency, or any official thereof in his or her official capacity.

§ 5.83 Authority to accept service of subpoenas.

In all legal proceedings between private litigants, a subpoena duces tecum or subpoena ad testificandum or other demand by a court or other authority for the production of records held by FEMA Regional offices or for the oral or written testimony of FEMA Regional employees should be addressed to the appropriate Regional Director listed in § 5.26. For records or testimony of the Office of Inspector General, the subpoena should be addressed to the Inspector General, FEMA, Washington, DC 20472. For all other records or testimony, the subpoena should be addressed to the General Counsel, FEMA, Washington, DC 20472. No other official or employee of FEMA is authorized to accept service of subpoenas on behalf of the Agency.

§ 5.84 Production of documents in private litigation.

(a) The production of records held by FEMA in response to a subpoena duces tecum or other demand issued pursuant to private litigation, whether or not served in accordance with the provisions of § 5.83 of this subpart, is prohibited absent authorization by the General Counsel or, as to records of the Office of the Inspector General, by the Inspector General.

(b) Whenever an official or employee of FEMA, including any Regional Director, receives a subpoena or other demand for the production of Agency documents or material, he or she shall immediately notify and provide a copy of the demand to the General Counsel, unless the subpoena or demand seeks the production of documents or material maintained by the Office of Inspector General, in which case a copy of the demand shall be provided to the Inspector General.

(c) The General Counsel (or Inspector General), after consultation with other appropriate officials as deemed necessary, shall promptly determine whether to disclose the material or documents identified in the subpoena or other demand. Generally, authorization to furnish the requested material or documents shall not be withheld unless their disclosure is prohibited by relevant law or for other compelling reasons.

(d) Whenever a subpoena or demand commanding the production of any record is served upon any Agency employee other than as provided in § 5.83 of this subpart, or the response to a demand is required before the receipt of instructions from the General Counsel (or Inspector General), such employee shall appear in response thereto, respectfully decline to produce the record(s) on the ground that it is prohibited by this section and state that the demand has been referred for the prompt consideration of the General Counsel (or, where appropriate, the Inspector General).

(e) Where the release of documents in response to a subpoena duces tecum is authorized by the General Counsel (or, as to documents maintained by the Office of Inspector General, the Inspector General), the official having custody of the requested records will furnish, upon the request of the party seeking disclosure, authenticated copies of the documents. No official or employee of FEMA shall respond in strict compliance with the terms of a subpoena duces tecum unless specifically authorized by the General Counsel (or Inspector General).

§ 5.85 Authentication and attestation of copies.

The Director, Deputy Director, Associate Directors, Administrators, the General Counsel, the Docket Clerk, Inspector General, Regional Directors, and their designees, and other heads of offices having possession of records are authorized in the name of the Director to authenticate and attest for copies or reproductions of records. Appropriate fees will be charged for such copies or reproductions based on the fee schedule set forth in section 5.46 of this part.

§ 5.86 Production of documents in litigation or other adjudicatory proceeding in which the United States is a party.

Subpoenas duces tecum issued pursuant to litigation or any other adjudicatory proceeding in which the United States is a party shall be handled as provided at § 5.8.

§ 5.87 Testimony of FEMA employees in private litigation.

(a) No FEMA employee shall testify in response to a subpoena or other demand in private litigation as to any information relating to material contained in the files of the Agency, or any information acquired as part of the performance of that person's official duties or because of that person's official status, including the meaning of Agency documents.

(b) Whenever a demand is made upon a FEMA employee, other than an employee of the Office of Inspector General, for the disclosure of information described in paragraph (a) of this section, that employee shall immediately notify the Office of General Counsel. Employees of the Office of Inspector General shall notify the Inspector General of such demands. The General Counsel (or Inspector General through designated legal counsel), upon receipt of such notice and absent waiver of the general prohibition against employee testimony at his or her discretion, shall arrange with the appropriate United States Attorney the taking of such steps as are necessary to quash the subpoena or seek a protective order.

(c) In the event that an immediate demand for testimony or disclosure is made in circumstances which would preclude prior notice to and consultation with the General Counsel (or Inspector General), the employee shall respectfully request from the demanding authority a stay in the proceedings to allow sufficient time to obtain advice of counsel.

(d) If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with paragraph (c) of this section pending consultation with counsel, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to testify or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing these regulations and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

§ 5.88 Testimony in litigation in which the United States is a party.

(a) Whenever, in any legal proceeding in which the United States is a party, the attorney in charge of presenting the case for the United States requests it, the General Counsel shall arrange for an employee of the Agency to testify as a witness for the United States.

(b) The attendance and testimony of named employees of the Agency may not be required in any legal proceeding by the judge or other presiding officer, by subpoena or otherwise. However, the judge or other presiding officer may, upon a showing of exceptional circumstances (such as a case in which a particular named FEMA employee has direct personal knowledge of a material fact not known to the witness made available by the Agency) require the attendance and testimony of named FEMA personnel.

§ 5.89 Waiver.

The General Counsel (or, as to employees of the Office of Inspector General, the Inspector General) may grant, in writing, a waiver of any policy or procedure prescribed by this subpart, where waiver is considered necessary to promote a significant interest of the Agency or for other good cause. In granting such waiver, the General Counsel (or Inspector General) shall attach to the waiver such reasonable conditions and limitations as are deemed appropriate in order that a response in strict compliance with the terms of a subpoena duces tecum or the providing of testimony will not interfere with the duties of the employee and will otherwise conform to the policies of this part. The Director may, in his or her discretion, review any decision to authorize a waiver of any policy or procedure prescribed by this subpart.

Date: March 15, 1989.

Julius W. Becton, Jr.,

Director, Federal Emergency Management Agency.

[FR Doc. 89-6540 Filed 3-21-89; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL MARITIME COMMISSION

46 CFR Part 550

[Docket No. 89-03]

Tariff Filing Notice Periods—Exemption

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce pursuant to the Shipping Act, 1916. This amendment of Part 550 adds a new exemption for carriers providing port-to-port service in the Hawaiian domestic offshore trade. Such carriers now are permitted to publish on one day's notice reductions in existing individual commodity rates, and rates on new tariff items.

DATE: This action is effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:
Robert D. Bourgoin, General Counsel, Federal Maritime Commission, 1100 L Street NW., Washington, DC 20573, (202) 523-5740.
Robert G. Drew, Director, Bureau of Domestic Regulation, Federal Maritime Commission, 1100 L Street NW., Washington, DC 20573, (202) 523-5796.

SUPPLEMENTARY INFORMATION: By Order served January 27, 1989, in Petition No. P5-88, *Matson Navigation Company, Inc.—Application for Section 35 Exemption*, the Federal Maritime Commission ("FMC" or "Commission") granted to Matson Navigation Company ("Matson"), pursuant to section 35 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 833a, an exemption from certain requirements of the Intercoastal Shipping Act, 1933 ("1933 Act"), *id.* 843 *et seq.* Matson is an ocean common carrier providing port-to-port service in the Hawaiian domestic offshore trade ("Trade"). The Commission's Order permitted Matson to put into effect on one day's notice reductions in existing individual commodity rates, and rates on new tariff items. Under the 1933 Act, such tariff actions ordinarily are subject to thirty days' notice. *Id.* 844.

By notice of proposed rulemaking published in the **Federal Register** on February 2, 1989, 54 FR 5253, the Commission proposed a rule that would extend the same exemption to all FMC-regulated carriers in the Trade. Comments in support of the proposed rule were filed by Sause Bros. Ocean Towing Co., Inc. ("Sause Bros."),