Sunshine Act Meetings

Federal Register
Vol. 57, No. 176
Thursday, September 10, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, September 15, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC. (Ninth Floor).

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration
Internal personnel rules and procedures or matters affecting a particular employee

DATE AND TIME: Thursday, September 17, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC. (Ninth Floor).

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes
Title 26 Certification Matters
Proposed Final Repayment Determination and Statement of Reasons—Lyndon H. LaRouche, Jr., and the LaRouche Democratic Campaign
Advisory Opinion 1992-30; Bevan Morris of Natural Law Party of the United States of America
Advisory Opinion 1992-32; John L. Sharman of Mike Andrews for Congress
Notice of Proposed Rulemaking—Best efforts to obtain and report contributor identification

DATE AND TIME: Wednesday, September 30, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This oral presentation Will Be Open to the Public.

MATTER BEFORE THE COMMISSION: Jackson for President 1988 Committee.

DATE AND TIME: Wednesday, October 21, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This Oral Presentation Will Be Open to the Public.

MATTER BEFORE THE COMMISSION: Americans for Robertson Committee.

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 219-4155.

Marjorie W. Emmons,
Secretary of the Commission.

[FR Doc. 92-22001 Filed 9-8-92; 2:43 pm]

BILLING CODE 6715-01-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: Approximately 11:30 a.m., Monday, September 14, 1992, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: September 4, 1992.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 92-21873 Filed 9-4-92; 4:56 pm]

BILLING CODE 6210-01-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 9:00 a.m., Monday, September 14, 1992.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Proposals to implement section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 on prompt corrective action for troubled depository institutions. (Proposed earlier for public comment; Docket No. R-0763.)
2. Determination with respect to France under the Primary Dealers Act of 1988.
3. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to:

Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: September 4, 1992.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 92-21872 Filed 9-4-92; 4:56 am]

BILLING CODE 6210-01-M

NATIONAL MEDIATION BOARD

TIME AND DATE: 1:00 p.m., Thursday, September 17, 1992.

PLACE: Hearing Room, Suite 850, 1425 K. Street, N.W., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

(1) Representation determinations issued pursuant to the Delegation Order to the Executive Director.
(2) New Governmentwide Standards of Ethical Conduct.
(3) Representation Assistant Position.
(4) Availability of Automated Arbitral information.
(5) Case closings through FY-1992 to date.
(6) Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Mr. William A. Gill, Jr., Executive Director, Tel: (202) 523-5920.

Date of Notice: September 8, 1992.

William A. Gill, Jr.,
Executive Director, National Mediation Board.

[FR Doc. 92-21978 Filed 9-8-92; 2:42 pm]

BILLING CODE 7550-01-M

Corrections

Federal Register
Vol. 57, No. 176
Thursday, September 10, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 92

[Docket No. 86-101-2]

Importation of Birds

Correction

In proposed rule document 92-19912 appearing on page 37737 in the issue of Thursday, August 20, 1992, in the second column, under **SUPPLEMENTARY INFORMATION:**, in the first paragraph, in the fifth line from the bottom, after "United States" insert ", and the offspring of those birds, to be imported into the United States".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP92-657-000, et al.]

Southwest Gas Corporation, et al.; Natural Gas Certificate Filings

Correction

In notice document 92-21001 beginning on page 39678 in the issue of Tuesday, September 1, 1992 make the following corrections:

On page 39679, in the first column, in the table, the Docket numbers now reading "CI92-770-000, CI92-771-000, CI92-772-000, CI92-773-000, CI92-774-000, and CI92-775-000" should read "CI92-70-000, CI92-71-000, CI92-72-000, CI92-73-000, CI92-74-000 and CI92-75-000" respectively.

BILLING CODE 1505-01-D

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research Act of 1984—"Ultra Low Emission Engine Program"

Correction

In notice document 92-17464 appearing on page 33013 in the issue of Friday, July 24, 1992, in the first column, the heading should read as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 49

[PS-17-91]

RIN 1545-AP67

Facilities and Services Excise Tax on Communications

Correction

In proposed rule document 92-18060 appearing on page 33918 in the issue of Friday, July 31, 1992, make the following corrections:

On page 33918, in the 2d column, in the last paragraph, 11 lines from the bottom "not" should read "now".

2. On the same page, in the third column, in paragraph (1), in the fifth line "service" should read "services".

BILLING CODE 1505-01-D

federal register

Thursday
September 10, 1992

Part II

Department of Justice

Antitrust Division

Federal Trade Commission

1992 Horizontal Merger Guidelines; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

FEDERAL TRADE COMMISSION

1992 Horizontal Merger Guidelines

AGENCIES: Department of Justice Antitrust Division, and Federal Trade Commission.

ACTION: Notice.

SUMMARY: This notice announces the joint release by the Department and the Commission of the 1992 Horizontal Merger Guidelines, updating Guidelines issued by the Department on June 14, 1984 (published in the Federal Register June 29, 1984 (49 FR 26823)) and the Commission's 1982 Statement Concerning Horizontal Mergers (reprinted in 4 Trade Reg. Rep. (CCH) ¶13,200). The Guidelines have been revised to clarify the Agencies' enforcement policy concerning horizontal mergers and acquisitions subject to section 7 of the Clayton Act, section 1 of the Sherman Act, or section 5 of the Federal Trade Commission Act. The Guidelines describe the analytical process that the Department and the Commission will use in determining whether to challenge a horizontal merger or acquisition. Publication of the Guidelines is intended to assist businesses in complying with the applicable antitrust laws.

DATE: Issued April 2, 1992.

ADDRESSES: Department of Justice, 10th & Constitution Avenue, NW., Washington, DC 20530; Federal Trade Commission, Sixth & Pennsylvania Avenue, NW., Washington, DC 20580.

Dated: September 1, 1992.

Charles A. James,

Acting Assistant Attorney General, Department of Justice.

Janet D. Steiger,

Federal Trade Commission.

U.S. Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines

April 2, 1992

The U.S. Department of Justice ("Department") and Federal Trade Commission ("Commission") today jointly issued Horizontal Merger Guidelines revising the Department's 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Merger Guidelines. The release marks the first time that the two Federal agencies that share antitrust enforcement jurisdiction have issued joint guidelines.

Central to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines is a recognition that sound merger enforcement is an essential component of our free enterprise system benefitting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anticompetitive mergers yet avoid deterring the larger universe of procompetitive or competitively neutral mergers. The 1992 Horizontal Merger Guidelines implement this objective by describing the analytical foundations of merger enforcement and providing guidance enabling the business community to avoid antitrust problems when planning mergers.

The Department first released Merger Guidelines in 1968 in order to inform the business community of the analysis applied by the Department to mergers under the Federal antitrust laws. The 1968 Merger Guidelines eventually fell into disuse, both internally and externally, as they were eclipsed by developments in legal and economic thinking about mergers.

In 1982, the Department released revised Merger Guidelines which, reflecting those developments, departed dramatically from the 1968 version. Relative to the Department's actual practice, however, the 1982 Merger Guidelines represented an evolutionary not revolutionary change. On the same date, the Commission released its Statement Concerning Horizontal Mergers highlighting the principal considerations guiding the Commission's horizontal merger enforcement and noting the "considerable weight" given by the Commission to the Department's 1982 Merger Guidelines.

The Department's current Merger Guidelines, released in 1984, refined and clarified the analytical framework of the 1982 Merger Guidelines. Although the agencies' experience with the 1982 Merger Guidelines reaffirmed the soundness of its underlying principles, the Department concluded that there remained room for improvement.

The revisions embodied in the 1992 Horizontal Merger Guidelines reflect the next logical step in the development of the agencies' analysis of mergers. They reflect the Department's experience in applying the 1982 and 1984 Merger Guidelines as well as the Commission's experience in applying those Guidelines and the Commission's 1982 Statement. Both the Department and the Commission believed that their respective Guidelines and Statement presented sound frameworks for antitrust analysis of mergers, but that improvements could be made to reflect advances in legal and economic thinking. The 1992 Horizontal Merger Guidelines accomplish this objective and also clarify certain aspects of the Merger Guidelines that proved to be ambiguous or were interpreted by observers in ways that were inconsistent with the actual policy of the agencies.

The 1992 Horizontal Merger Guidelines do not include a discussion of horizontal effects from non-horizontal mergers (*e.g.*, elimination of specific potential entrants and competitive problems from vertical mergers). Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in section 4 of the Department's 1984 Merger Guidelines, read in the context of today's revisions to the treatment of horizontal mergers.

A number of today's revisions are largely technical or stylistic. One major objective of the revisions is to strengthen the document as an analytical road map for the evaluation of mergers. The language, therefore, is intended to be burden-neutral, without altering the burdens of proof or burdens of coming forward as those standards have been established by the courts. In addition, the revisions principally address two areas.

The most significant revision to the Merger Guidelines is to explain more clearly how mergers may lead to adverse competitive effects and how particular market factors relate to the analysis of those effects. These revisions are found in section 2 of the Horizontal Merger Guidelines. The second principal revision is to sharpen the distinction between the treatment of various types of supply responses and to articulate the framework for analyzing the timeliness, likelihood and sufficiency of entry. These revisions are found in sections 1.3 and 3.

The new Horizontal Merger Guidelines observe, as did the 1984 Guidelines, that because the specific standards they set out must be applied in widely varied factual circumstances, mechanical application of those standards could produce misleading results. Thus, the Guidelines state that the agencies will apply those standards reasonably and flexibly to the particular facts and circumstances of each proposed merger.

Department of Justice and Federal Trade Commission Horizontal Merger Guidelines

April 2, 1992.

TABLE OF CONTENTS

0. Purpose, Underlying Policy Assumptions and Overview

These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agency") concerning horizontal acquisition and mergers ("mergers") subject to section 7 of the Clayton Act,[1] to section 1 of the Sherman Act [2], or to section 5 of the FTC Act.[3] They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers.[4] By stating its policy as simply and clearly as possible, the Agency hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Although the Guidelines should improve the predictability of the Agency's merger enforcement policy, it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. Moreover, information is often incomplete and the picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines. Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibily to the particular facts and circumstances of each proposed merger.

0.1 Purpose and Underlying Policy Assumptions of the Guidelines

The Guidelines are designed primarily to articulate the analytical framework the Agency applies in determining whether a merger is likely substantially to lessen competition, not to describe how the Agency will conduct the litigation of cases that it decides to bring. Although relevant in the latter context, the factors contemplated in the Guidelines neither dictate nor exhaust the range of evidence that the Agency must or may introduce in litigation. Consistent with their objective, the Guidelines do not attempt to assign the burden of proof, or the burden of coming forward with evidence, on any particular issue. Nor do the Guidelines attempt to adjust or reapportion burdens of proof or burdens of coming forward as those standards have been established by the courts.[5] Instead, the Guidelines set forth a methodology for analyzing issues once the necessary facts are available. The necessary facts may be derived from the documents and statements of both the merging firms and other sources.

Throughout the Guidelines, the analysis is focused on whether consumers or producers "likely would" take certain actions, that is, whether the action is in the actor's economic interest. References to the profitability of certain actions focus on economic profits rather than accounting profits. Economic profits may be defined as the excess of revenues over costs where costs include the opportunity cost of invested capital.

Mergers are motivated by the prospect of financial gains. The possible sources of the financial gains from mergers are many, and the Guidelines do not attempt to identify all possible sources of gain in every merger. Instead, the Guidelines focus on the one potential source of gain that is of concern under the antitrust laws: market power.

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.[6] In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to excercise market power through unilateral or non-coordinated conduct—conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.

Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

While challenging competitively harmful mergers, the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral. In

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[1] 15 U.S.C. 18 (1988). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly."

[2] 15 U.S.C. 1 (1988). Mergers subject to section 1 are prohibited if they constitute a "contract, combination * * *, or conspiracy in restraint of trade."

[3] 15 U.S.C. 45 (1988). Mergers subject to section 5 are prohibited if they constitute an "unfair method of competition."

[4] These Guidelines update the Merger Guidelines issued by the U.S. Department of Justice in 1984 and the Statement of Federal Trade Commission Concerning Horizontal Mergers issued in 1982. The Merger Guidelines may be revised from time to time as necessary to reflect any significant changes in enforcement policy or to clarify aspects of existing policy

[5] For example, the burden with respect to efficiency and failure continues to reside with the proponents of the merger.

[6] Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.

implementing this objective, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

0.2 Overview

The Guidelines describe the analytical process that the Agency will employ in determining whether to challenge a horizontal merger. First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or to facilitate its exercise.

1. Market Definition, Measurement and Concentration

1.0 Overview

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

The analytic process described in this section ensures that the Agency evaluates the likley competitive impact of a merger within the context of economically meaningful markets—*i.e.*, markets that could be subject to the exercise of market power. Accordingly, for each product or service (hereafter "product") of each merger firm, the Agency seeks to define a market in which firms could effectively exercise market power if they were able to coordinate their actions.

Market definition focuses solely on demand substitution factors—*i.e.*, possible consumer responses. Supply substitution factors—*i.e.*, possible production responses—are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry. See sections 1.3 and 3. A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. The "small but significnat and nontransitory" increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases.

Absent price discrimination, a relevant market is described by a product or group of products and a geographic area. In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses respectively determine the scope of the product market and the geographic market.

In contrast, where a hypothetical monopolist likely would discriminate in prices charged to different groups of buyers, distinguished, for example, by their uses or locations, the Agency may delineate different relevant markets corresponding to each such buyer group. Competition for sales to each such group may be affected differently by a particular merger and markets are delineated by evaluating the demand response of each such buyer group. A relevant market of this kind is described by a collection of products for sale to a given group of buyers.

Once defined, a relevant market must be measured in terms of its participants and concentration. Participants include firms currently producing or selling the market's products in the market's geographic area. In addition, participants may include other firms depending on their likely supply responses to a "small but significant and nontransitory" price increase. A firm is viewed as a participant if, in response to a "small but significant and nontransitory" price increase, it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit. Firms likely to make any of these supply responses are considered to be "uncommitted" entrants because their supply response would create new production or sale in the relevant market and because that production or sale could be quickly terminated without significant loss.[7] Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times. This analysis of market definition and market measurement applies equally to foreign and domestic firms.

If the process of market definition and market measurement identifies one or more relevant markets in which the merging firms are both participants, then the merger is considered to be horizontal. Sections 1.1 through 1.5 describe in greater detail how product and geographic markets will be defined, how market shares will be calculated and how market concentration will be assessed.

1.1 Product Market Definition

The Agency will first define the relevant product market with respect to each of the products of each of the merging firms.[8]

1.11 General Standards

Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a "small but significant and nontransitory" increase in price. That is, assuming that buyers likely

[7] Probable supply responses that require the entrant to incur significant sunk costs of entry and exit are not part of market measurement, but are included in the analysis of the significance of entry. See Section 3. Entrants that must commit substantial sunk costs are regarded as "committed" entrants because those sunk costs make entry irreversible in the short term without foregoing that investment; thus the likelihood of their entry must be evaluated with regard to their long-term profitability.

[8] Although discussed separately, product market definition and geographic market definition are interrelated. In particular, the extent to which buyers of a particular product would shift to other products in the event of a "small but significant and nontransitory" increase in price must be evaluated in the context of the relevant geographic market.

would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow.

Specifically, the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product.[9]

In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following:

(1) Evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;

(2) Evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;

(3) The influence of downstream competition faced by buyers in their output markets; and

(4) The timing and costs of switching products.

The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase, including the price of a product of one of the merging firms. The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test.

In the above analysis, the Agency will use prevailing prices of the products of the merging firms and possible substitutes for such products, unless premerger circumstances are strongly suggestive of coordinated interaction, in which case the Agency will use a price more reflective of the competitive price.[10] However, the Agency may use likely future prices, absent the merger, when changes in the prevailing prices can be predicted with reasonable reliability. Changes in price may be predicted on the basis of, for example, changes in regulation which affect price either directly or indirectly by affecting costs or demand.

In general, the price for which an increase will be postulated will be whatever is considered to be the price of the product at the stage of the industry being examined.[11] In attempting to determine objectively the effect of a "small but significant and nontransitory" increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future. However, what constitutes a "small but significant and nontransitory" increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent.

1.12 Product Market Definition in the Presence of Price Discrimination

The analysis of product market definition to this point has assumed that price discrimination—charging different buyers different prices for the same product, for example—would not be profitable for a hypothetical monopolist. A different analysis applies where price discrimination would be profitable for a hypothetical monopolist.

Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a "small but significant and nontransitory" price increase. If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a "small but significant and nontransitory" price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable. The Agency will consider additional relevant product markets consisting of a particular use or uses by groups of buyers of the product for which a hypothetical monopolist would profitably and separately impose at least a "small but significant and nontransitory" increase in price.

1.2 Geographic Market Definition

For each product market in which both merging firms participate, the Agency will determine the geographic market or markets in which the firms produce or sell. A single firm may operate in a number of different geographic markets.

1.21 General Standards

Absent price discrimination, the Agency will delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a "small but significant and nontransitory" increase in price, holding constant the terms of sale for all products produced elsewhere. That is, assuming that buyers likely would respond to a price increase on products produced within the tentatively identified region only by shifting to products produced at locations of production outside the region, what would happen? If those locations of production outside the region were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise price would result in a reduction in sales large enough that the price increase would not prove profitable, and the tentatively identified geographic area would prove to be too narrow.

In defining the geographic market or markets affected by a merger, the Agency will begin with the location of each merging firm (or each plant of a multiplant firm) and ask what would happen if a hypothetical monopolist of

[9] Throughout the Guidelines, the term "next best substitute" refers to the alternative which, if available in unlimited quantities at constant prices, would account for the greatest value of diversion of demand in response to a "small but significant and nontransitory" price increase.

[10] The terms of sale of all other products are held constant in order to focus market definition on the behavior of consumers. Movements in the terms of sale for other products, as may result from the behavior of producers of those products, are accounted for in the analysis of competitive effects and entry. See Sections 2 and 3.

[11] For example, in a merger between retailers, the relevant price would be the retail price of a product to consumers. In the case of a merger among oil pipelines, the relevant price would be the tariff—the price of the transportation service.

the relevant product at that point imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale at all other locations remained constant. If, in response to the price increase, the reduction in sales of the product at that location would be large enough that a hypothetical monopolist producing or selling the relevant product at the merging firm's location would not find it profitable to impose such an increase in price, then the Agency will add the location from which production is the next-best substitute for production at the merging firm's location.

In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following:

(1) Evidence that buyers have shifted or have considered shifting to relative changes in price or other competitive variables;

(2) Evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables;

(3) The influence of downstream competition faced by buyers in their output markets; and

(4) The timing and costs of switching suppliers.

The price increase question is then asked for a hypothetical monopolist controlling the expanded group of locations. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the price at any or all of the additional locations under its control. This process will continue until a group of locations is identified such that a hypothetical monopolist over that group of locations would profitably impose at least a "small but significant and nontransitory" increase, including the price charged at a location of one of the merging firms.

The "smallest market" principle will be applied as it is in product market definition. The price for which an increase will be postulated, what constitutes a "small but significant and nontransitory" increase in price, and the substitution decisions of consumers all will be determined in the same way in which they are determined in product market definition.

1.22 Geographic Market Definition in the Presence of Price Discrimination

The analysis of geographic market definition to this point has assumed that geographic price discrimination—charging different prices net of transportation costs for the same product to buyers in different areas, for example—would not be profitable for a hypothetical monopolist. However, if a hypothetical monopolist can identify and price differently to buyers in certain areas ("targeted buyers") who would not defeat the targeted price increase by substituting to more distant sellers in response to a "small but significant and nontransitory" price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers,[12] then a hypothetical monopolist would profitably impose a discriminatory price increase. This is true even where a general price increase would cause such significant substitution that the price increase would not be profitable. The Agency will consider additional geographic markets consisting of particular locations of buyers for which a hypothetical monopolist would profitably and separately impose at least a "small but significant and nontransitory" increase in price.

1.3 Identification of Firms that Participate in the Relevant Market

1.31 Current Producers or Sellers

The Agency's identification of firms that participate in the relevant market begins with all firms that currently produce or sell in the relevant market. This includes vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market prior to the merger. To the extent that the analysis under Section 1.1 indicates that used, reconditioned or recycled goods are included in the relevant market, market participants will include firms that produce or sell such goods and that likely would offer those goods in competition with other relevant products.

1.32 Firms That Participate Through Supply Response

In addition, the Agency will identify other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses. These firms are termed "uncommitted entrants." These supply responses must be likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a "small but significant and nontransitory" price increase. If a firm has the technological capability to achieve such an uncommitted supply response, but likely would not (*e.g.*, because difficulties in achieving product acceptance, distribution, or production would render such a response unprofitable), that firm will not be considered to be a market participant. The competitive significance of supply responses that require more time or that require firms to incur significant sunk costs of entry and exit will be considered in entry analysis. See section 3.[13]

Sunk costs are the acquisition costs of tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market, *i.e.*, costs uniquely incurred to supply the relevant product and geographic market. Examples of sunk costs may include market-specific investments in production facilities, technologies, marketing (including product acceptance), research and development, regulatory approvals, and testing. A significant sunk cost is one which would not be recouped within one year of the commencement of the supply response, assuming a "small but significant and nontransitory" price increase in the relevant market. In this context, a "small but significant and nontransitory" price increase will be determined in the same way in which it is determined in product market definition, except the price increase will be assumed to last one year. In some instances, it may be difficult to calculate sunk costs with precision. Accordingly, when necessary, the Agency will make an overall assessment of the extent of sunk costs for firms likely to participate through supply responses.

These supply responses may give rise to new production of products in the relevant product market or new sources of supply in the relevant geographic market. Alternatively, where price discrimination is likely so that the relevant market is defined in terms of a targeted group of buyers, these supply responses serve to identify new sellers to the targeted buyers. Uncommitted supply responses may occur in several different ways: by the switching or extension of existing assets to production or sale in the relevant market; or by the construction or

[12] This arbitrage is inherently impossible for many services and is particularly difficult where the product is sold on a delivered basis and where transportation costs are a significant percentage of the final cost.

[13] If uncommitted entrants likely would also remain in the market and would meet the entry tests of timeliness, likelihood and sufficiency, and thus would likely deter anticompetitive mergers or deter or counteract the competitive effects of concern (See section 3, *infra*), the Agency will consider the impact of those firms in the entry analysis.

acquisition of assets that enable production or sale in the relevant market.

1.321 Production Substitution and Extension: The Switching or Extension of Existing Assets to Production or Sale in the Relevant Market

The productive and distributive assets of a firm sometimes can be used to produce and sell either the relevant products or products that buyers do not regard as good substitutes. Production substitution refers to the shift by a firm in the use of assets from producing and selling one product to producing and selling another. Production extension refers to the use of those assets, for example, existing brand names and reputation, both for their current production and for production of the relevant product. Depending upon the speed of that shift and the extent of sunk costs incurred in the shift or extension, the potential for production substitution or extension may necessitate treating as market participants firms that do not currently produce the relevant product.[14]

If a firm has existing assets that likely would be shifted or extended into production and sale of the relevant product within one year, and without incurring significant sunk costs of entry and exit, in response to a "small but significant and nontransitory" increase in price for only the relevant product, the Agency will treat that firm as a market participant. In assessing whether a firm is such a market participant, the Agency will take into account the costs of substitution or extension relative to the profitability of sales at the elevated price, and whether the firm's capacity is elsewhere committed or elsewhere so profitably employed that such capacity likely would not be available to respond to an increase in price in the market.

1.322 Obtaining New Assets for Production or Sale of the Relevant Product

A firm may also be able to enter into production or sale in the relevant market within one year and without the expenditure of significant sunk costs of entry and exit, in response to a "small but significant and nontransitory" increase in price for only the relevant product, even if the firm is newly organized or is an existing firm without products or productive assets closely related to the relevant market. If new firms, or existing firms without closely related products or productive assets, likely would enter into production or sale in the relevant market within one year without the expenditure of significant sunk costs of entry and exit, the Agency will treat those firms as market participants.

1.4 Calculating Market Shares

1.41 General Approach

The Agency normally will calculate market shares for all firms (or plants) identified as market participants in Section 1.3 based on the total sales or capacity currently devoted to the relevant market together with that which likely would be devoted to the relevant market in response to a "small but significant and nontransitory" price increase. Market shares can be expressed either in dollar terms through measurement of sales, shipments, or production, or in physical terms through measurement of sales, shipments, production, capacity, or reserves.

Market shares will be calculated using the best indicator of firms' future competitive significance. Dollar sales or shipments generally will be used if firms are distinguished primarily by differentiation of their products. Unit sales generally will be used if firms are distinguished primarily on the basis of their relative advantages in serving different buyers or groups of buyers. Physical capacity or reserves generally will be used if it is these measures that most effectively distinguish firms.[15] Typically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time.

In measuring a firm's market share, the Agency will not include its sales or capacity to the extent that the firm's capacity is committed or so profitably employed outside the relevant market that it would not be available to respond to an increase in price in the market.

1.42 Price Discrimination Markets

When markets are defined on the basis of price discrimination (Sections 1.12 and 1.22), the Agency will include only sales likely to be made into, or capacity likely to be used to supply, the relevant market in response to a "small but significant and nontransitory" price increase.

1.43 Special Factors Affecting Foreign Firms

Market shares will be assigned to foreign competitors in the same way in which they are assigned to domestic competitors. However, if exchange rates fluctuate significantly, so that comparable dollar calculations on an annual basis may be unrepresentative, the Agency may measure market shares over a period longer than one year.

If shipments from a particular country to the United States are subject to a quota, the market shares assigned to firms in that country will not exceed the amount of shipments by such firms allowed under the quota.[16] In the case of restraints that limit imports to some percentage of the total amount of the product sold in the United States (*i.e.*, percentage quotas), a domestic price increase that reduced domestic consumption also would reduce the volume of imports into the United States. Accordingly, actual import sales and capacity data will be reduced for purposes of calculating market shares. Finally, a single market share may be assigned to a country or group of countries if firms in that country or group of countries act in coordination.

1.5 Concentration and Market Shares

Market concentration is a function of the number of firms in a market and their respective market shares. As an aid to the interpretation of market data, the Agency will use the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the participants.[17] Unlike the four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the

[14] Under other analytical approaches, production substitution sometimes has been reflected in the description of the product market. For example, the product market for stamped metal products such as automobile hub caps might be described as "light metal stamping," a production process rather than a product. The Agency believes that the approach described in the text provides a more clearly focused method of incorporating this factor in merger analysis. If production substitution among a group of products is nearly universal among the firms selling one or more of those products, however, the Agency may use an aggregate description of those markets as a matter of convenience.

[15] Where all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares.

[16] The constraining effect of the quota on the importer's ability to expand sales is relevant to the evaluation of potential adverse competitive effects. See Section 2.

[17] For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about small firms is not critical because such firms do not affect the HHI significantly.

market shares of the larger firms, in accord with their relative importance in competitive interactions.

The Agency divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800). Although the resulting regions provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues.

1.51 General Standards

In evaluating horizontal mergers, the Agency will consider both the post-merger market concentration and the increase in concentration resulting from the merger.[18] Market concentration is a useful indicator of the likely potential competitive effect of a merger. The general standards for horizontal mergers are as follows:

(a) *Post-Merger HHI Below 1000.* The Agency regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

(b) *Post-Merger HHI Between 1000 and 1800.* The Agency regards markets in this region to be moderately concentrated. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in sections 2–5 of the Guidelines.

(c) *Post-Merger HHI Above 1800.* The Agency regards markets in this region to be highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in sections 2–5 of the Guidelines. Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in sections 2–5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

1.52 Factors Affecting the Significance of Market Shares and Concentration

The post-merger level of market concentration and the change in concentration resulting from a merger affect the degree to which a merger raises competitive concerns. However, in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger. The following are examples of such situations.

1.521 Changing Market Conditions

Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agency may conclude that the historical market share of that firm overstates its future competitive significance. The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.

1.522 Degree of Difference Between the Products and Locations in the Market and Substitutes Outside the Market

All else equal, the magnitude of potential competitive harm from a merger is greater if a hypothetical monopolist would raise price within the relevant market by substantially more than a "small but significant and nontransitory" amount. This may occur when the demand substitutes outside the relevant market, as a group, are not close substitutes for the products and locations within the relevant market. There thus may be a wide gap in the chain of demand substitutes at the edge of the product and geographic market. Under such circumstances, more market power is at stake in the relevant market than in a market in which a hypothetical monopolist would raise price by exactly five percent.

2. The Potential Adverse Competitive Effects of Mergers

2.0 Overview

Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced. However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

This section considers some of the potential adverse competitive effects of mergers and the factors in addition to market concentration relevant to each. Because an individual merger may threaten to harm competition through more than one of these effects, mergers will be analyzed in terms of as many potential adverse competitive effects as are appropriate. Entry, efficiencies, and failure are treated in Sections 3–5.

2.1 Lessening of Competition Through Coordinated Interaction

A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others.

[18] The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, the merger of firms with shares of 5 percent and 10 percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$). The explanation for this technique is as follows: In calculating the HHI before the merger, the market shares of the merging firms are squared individually: $(a)^2 + (b)^2$. After the merger, the sum of those shares would be squared: $(a + b)^2$, which equals $a^2 + 2ab + b^2$. The increase in the HHI therefore is represented by $2ab$.

This behavior includes tacit or express collusion, and may or may not be lawful in and of itself.

Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction. Detection and punishment of deviations ensure that coordinating firms will find it more profitable to adhere to the terms of coordination than to pursue short-term profits from deviating, given the costs of reprisal. In this phase of the analysis, the Agency will examine the extent to which post-merger market conditions are conducive to reaching terms of coordination, detecting deviations from those terms, and punishing such deviations. Depending upon the circumstances, the following market factors, among others, may be relevant: The availability of key information concerning market conditions, transactions and individual competitors; the extent of firm and product heterogeneity; pricing or marketing practices typically employed by firms in the market; the characteristics of buyers and sellers; and the characteristics of typical transactions.

Certain market conditions that are conducive to reaching terms of coordination also may be conducive to detecting or punishing deviations from those terms. For example, the extent of information available to firms in the market, or the extent of homogeneity, may be relevant to both the ability to reach terms of coordination and to detect or punish deviations from those terms. The extent to which any specific market condition will be relevant to one or more of the conditions necessary to coordinated interaction will depend on the circumstances of the particular case.

It is likely that market conditions are conducive to coordinated interaction when the firms in the market previously have engaged in express collusion and when the salient characteristics of the market have not changed appreciably since the most recent such incident. Previous express collusion in another geographic market will have the same weight when the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market.

In analyzing the effect of a particular merger on coordinated interaction, the Agency is mindful of the difficulties of predicting likely future behavior based on the types of incomplete and sometimes contradictory information typically generated in merger investigations. Whether a merger is likely to diminish competition by enabling firms more likely, more successfully or more completely to engage in coordinated interaction depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms.

2.11 Conditions Conducive to Reaching Terms of Coordination

Firms coordinating their interactions need not reach complex terms concerning the allocation of the market output across firms or the level of the market prices but may, instead, follow simple terms such as a common price, fixed price differentials, stable market shares, or customer or territorial restrictions. Terms of coordination need not perfectly achieve the monopoly outcome in order to be harmful to consumers. Instead, the terms of coordination may be imperfect and incomplete—inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars—and still result in significant competitive harm. At some point, however, imperfections cause the profitability of abiding by the terms of coordination to decrease and, depending on their extent, may make coordinated interaction unlikely in the first instance.

Market conditions may be conducive to or hinder reaching terms of coordination. For example, reaching terms of coordination may be facilitated by product or firm homogeneity and by existing practices among firms, practices not necessarily themselves antitrust violations, such as standardization of pricing or product variables on which firms could compete. Key information about rival firms and the market may also facilitate reaching terms of coordination. Conversely, reaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects of their rivals' businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may be limited or impeded by firm heterogeneity, for example, differences in vertical integration or the production of another product that tends to be used together with the relevant product.

2.12 Conditions Conducive to Detecting and Punishing Deviations

Where market conditions are conducive to timely detection and punishment of significant deviations, a firm will find it more profitable to abide by the terms of coordination than to deviate from them. Deviation from the terms of coordination will be deterred where the threat of punishment is credible. Credible punishment, however, may not need to be any more complex than temporary abandonment of the terms of coordination by other firms in the market.

Where detection and punishment likely would be rapid, incentives to deviate are diminished and coordination is likely to be successful. The detection and punishment of deviations may be facilitated by existing practices among firms themselves, not necessarily antitrust violations, and by the characteristics of typical transactions. For example, if key information about specific transactions or individual price or output levels is available routinely to competitors, it may be difficult for a firm to deviate secretly. If orders for the relevant product are frequent, regular and small relative to the total output of a firm in a market, it may be difficult for the firm to deviate in a substantial way without the knowledge of rivals and without the opportunity for rivals to react. If demand or cost fluctuations are relatively infrequent and small, deviations may be relatively easy to deter.

By contrast, where detection or punishment is likely to be slow, incentives to deviate are enhanced and coordinated interaction is unlikely to be successful. If demand or cost fluctuations are relatively frequent and large, deviations may be relatively difficult to distinguish from these other sources of market price fluctuations, and, in consequence, deviations may be relatively difficult to deter.

In certain circumstances, buyer characteristics and the nature of the procurement process may affect the incentives to deviate from terms of coordination. Buyer size alone is not the determining characteristic. Where large buyers likely would engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate. However, this only can be accomplished where the duration, volume and profitability of the business covered by such contracts are sufficiently large as to make deviation more profitable in the long term than honoring the terms of coordination, and buyers likely would switch suppliers.

In some circumstances, coordinated interaction can be effectively prevented or limited by maverick firms—firms that have a greater economic incentive to deviate from the terms of coordination

than do most of their rivals (*e.g.*, firms that are unusually disruptive and competitive influences in the market). Consequently, acquisition of a maverick firm is one way in which a merger may make coordinated interaction more likely, more successful, or more complete. For example, in a market where capacity constraints are significant for many competitors, a firm is more likely to be a maverick the greater is its excess or divertible capacity in relation to its sales or its total capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market.[19] This is so because a firm's incentive to deviate from price-elevating and output-limiting terms of coordination is greater the more the firm is able profitably to expand its output as a proportion of the sales it would obtain if it adhered to the terms of coordination and the smaller is the base of sales on which it enjoys elevated profits prior to the price-cutting deviation.[20] A firm also may be a maverick if it has an unusual ability secretly to expand its sales in relation to the sales it would obtain if it adhered to the terms of coordination. This ability might arise from opportunities to expand captive production for a downstream affiliate.

2.2 Lessening of Competition Through Unilateral Effects

A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

2.21 Firms Distinguished Primarily by Differentiated Products

In some markets the products are differentiated, so that products sold by different participants in the market are not perfect substitutes for one another. Moreover, different products in the market may vary in the degree of their substitutability for one another. In this setting, competition may be non-uniform (*i.e.*, localized), so that individual sellers compete more directly with those rivals selling closer substitutes.[21]

A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger. Substantial unilateral price elevation in a market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices, and that repositioning of the non-parties' product lines to replace the localized competition lost through the merger be unlikely. The price rise will be greater the closer substitutes are the products of the merging firms, *i.e.*, the more the buyers of one product consider the other product to be their next choice.

2.211 Closeness of the Products of the Merging Firms

The market concentration measures articulated in Section 1 may help assess the extent of the likely competitive effect from a unilateral price elevation by the merged firm notwithstanding the fact that the affected products are differentiated. The market concentration measures provide a measure of this effect if each product's market share is reflective of not only its relative appeal as a first choice to consumers of the merging firms' products but also its relative appeal as a second choice, and hence as a competitive constraint to the first choice.[22] Where this circumstance holds, market concentration data fall outside the safeharbor regions of section 1.5, and the merging firms have a combined market share of at least thirty-five percent, the Agency will presume that a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices.

Purchasers of one of the merging firms' products may be more or less likely to make the other their second choice than market shares alone would indicate. The market shares of the merging firms' products may understate the competitive effect of concern, when, for example, the products of the merging firms are relatively more similar in their various attributes to one another than to other products in the relevant market. On the other hand, the market shares alone may overstate the competitive effects of concern when, for example, the relevant products are less similar in their attributes to one another than to other products in the relevant market.

Where market concentration data fall outside the safeharbor regions of section 1.5, the merging firms have a combined market share of at least thirty-five percent, and where data on product attributes and relative product appeal show that a significant share of purchasers of one merging firm's product regard the other as their second choice, then market share data may be relied upon to demonstrate that there is a significant share of sales in the market accounted for by consumers who would be adversely affected by the merger.

2.212 Ability of Rival Sellers to Replace Lost Competition

A merger is not likely to lead to unilateral elevation of prices of differentiated products if, in response to such an effect, rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines.[23]

[19] But excess capacity in the hands of non-maverick firms may be a potent weapon with which to punish deviations from the terms of coordination.

[20] Similarly, in a market where product design or quality is significant, a firm is more likely to be an effective maverick the greater is the sales potential of its products among customers of its rivals, in relation to the sales it would obtain if it adhered to the terms of coordination. The likelihood of expansion responses by a maverick will be analyzed in the same fashion as uncommitted entry or committed entry (see sections 1.3 and 3) depending on the significance of the sunk costs entailed in expansion.

[21] Similarly, in some markets sellers are primarily distinguished by their relative advantages in serving different buyers or groups of buyers, and buyers negotiate individually with sellers. Here, for example, sellers may formally bid against one another for the business of a buyer, or each buyer may elicit individual price quotes from multiple sellers. A seller may find it relatively inexpensive to meet the demands of particular buyers or types of buyers, and relatively expensive to meet others' demands. Competition, again, may be localized: sellers compete more directly with those rivals having similar relative advantages in serving particular buyers or groups of buyers. For example, in open outcry auctions, price is determined by the cost of the second lowest-cost seller. A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.

[22] Information about consumers' actual first and second product choices may be provided by marketing surveys, information from bidding structures, or normal course of business documents from industry participants.

[23] The timeliness and likelihood of repositioning responses will be analyzed using the same methodology as used in analyzing uncommitted entry or committed entry (see sections 1.3 and 3), depending on the significance of the sunk costs entailed in repositioning.

In markets where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider. If either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices.

2.22 Firms Distinguished Primarily by Their Capacities

Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.

This unilateral effect is unlikely unless a sufficiently large number of the merged firm's customers would not be able to find economical alternative sources of supply, *i.e.*, competitors of the merged firm likely would not respond to the price increase and output reduction by the merged firm with increases in their own outputs sufficient in the aggregate to make the unilateral action of the merged firm unprofitable. Such non-party expansion is unlikely if those firms face binding capacity constraints that could not be economically relaxed within two years or if existing excess capacity is significantly more costly to operate than capacity currently in use.[24]

3. Entry Analysis

3.0 Overview

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.

Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (*i.e.*, where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.

The committed entry treated in this section is defined as new competition that requires expenditure of significant sunk costs of entry and exit.[25] The Agency employs a three step methodology to assess whether committed entry would deter or counteract a competitive effect of concern.

The first step assesses whether entry can achieve significant market impact within a timely period. If significant market impact would require a longer period, entry will not deter or counteract the competitive effect of concern.

The second step assesses whether committed entry would be a profitable and, hence, a likely response to a merger having competitive effects of concern. Firms considering entry that requires significant sunk costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated. Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their premerger levels or lower. Thus, the profitability of such committed entry must be determined on the basis of premerger market prices over the long-term.

A merger having anticompetitive effects can attract committed entry, profitable at premerger prices, that would not have occurred premerger at these same prices. But following the merger, the reduction in industry output and increase in prices associated with the competitive effect of concern may allow the same entry to occur without driving market prices below premerger levels. After a merger that results in decreased output and increased prices, the likely sales opportunities available to entrants at premerger prices will be larger than they were premerger, larger by the output reduction caused by the merger. If entry could be profitable at premerger prices without exceeding the likely sales opportunities—opportunities that include pre-existing pertinent factors as well as the merger-induced output reduction—then such entry is likely in response to the merger.

The third step assesses whether timely and likely entry would be sufficient to return market prices to their premerger levels. This end may be accomplished either through multiple entry or individual entry at a sufficient scale. Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, makes it impossible for entry profitably to achieve the necessary level of sales. Also, the character and scope of entrants' products might not be fully responsive to the localized sales opportunities created by the removal of direct competition among sellers of differentiated products. In assessing whether entry will be timely, likely, and sufficient, the Agency recognizes that precise and detailed information may be difficult or impossible to obtain. In such instances, the Agency will rely on all available evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

3.1 Entry Alternatives

The Agency will examine the timeliness, likelihood, and sufficiency of the means of entry (entry alternatives) a potential entrant might practically employ, without attempting to identify who might be potential entrants. An entry alternative is defined by the actions the firm must take in order to produce and sell in the market. All phases of the entry effort will be considered, including, where relevant, planning, design, and management; permitting, licensing, and other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements.[26] Recent examples of entry, whether successful or unsuccessful, may provide a useful starting point for identifying the necessary actions, time requirements, and characteristics of possible entry alternatives.

3.2 Timeliness of Entry

In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider

[24] The timeliness and likelihood of non-party expansion will be analyzed using the same methodology as used in analyzing uncommitted or committed entry (*see* Sections 1.3 and 3) depending on the significance of the sunk costs entailed in expansion.

[25] Supply responses that require less than one year and insignificant sunk costs to effectuate are analyzed as uncommitted entry in section 1.3.

[26] Many of these phases may be undertaken simultaneously.

timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.[27] Where the relevant product is a durable good, consumers, in response to a significant commitment to entry, may defer purchases by making additional investments to extend the useful life of previously purchased goods and in this way deter or counteract for a time the competitive effects of concern. In these circumstances, if entry only can occur outside of the two year period, the Agency will consider entry to be timely so long as it would deter or counteract the competitive effects of concern within the two year period and subsequently.

3.3 Likelihood of Entry

An entry alternative is likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant.[28] The committed entrant will be unable to secure prices at premerger levels if its output is too large for the market to absorb without depressing prices further. Thus, entry is unlikely if the minimum viable scale is larger than the likely sales opportunity available to entrants.

Minimum viable scale is the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at premerger prices.[29] Minimum viable scale is a function of expected revenues, based upon premerger prices,[30] and all categories of costs associated with the entry alternative, including an appropriate rate of return on invested capital given that entry could fail and sunk costs, if any, will be lost.[31]

Sources of sales opportunities available to entrants include: (a) The output reduction associated with the competitive effect of concern,[32] (b) entrants' ability to capture a share of reasonably expected growth in market demand,[33] (c) entrants' ability securely to divert sales from incumbents, for example, through vertical integration or through forward contracting, and (d) any additional anticipated contraction in incumbents' output in response to entry.[34] Factors that reduce the sales opportunities available to entrants include: (a) The prospect that an entrant will share in a reasonably expected decline in market demand, (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached by the entrant, that utilizes prior irreversible investments in excess production capacity. Demand growth or decline will be viewed as relevant only if total market demand is projected to experience long-lasting change during at least the two year period following the competitive effect of concern.

3.4 Sufficiency of Entry

Inasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern whenever entry is likely under the analysis of section 3.3. However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities. In addition, where the competitive effect of concern is not uniform across the relevant market, in order for entry to be sufficient, the character and scope of entrants' products must be responsive to the localized sales opportunities that include the output reduction associated with the competitive effect of concern. For example, where the concern is unilateral price elevation as a result of a merger between producers of differentiated products, entry, in order to be sufficient, must involve a product so close to the products of the merging firms that the merged firm will be unable to internalize enough of the sales loss due to the price rise, rendering the price increase unprofitable.

4. Efficiencies

The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Agency.

Some mergers that the Agency otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Agency may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to specific manufacturing, servicing, or distribution operations of the merging firms, although, as a practical matter, these types of efficiencies may be difficult to demonstrate. In addition, the Agency will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means. The expected net efficiencies must be greater the more significant are the competitive risks identified in sections 1–3.

5. Failure and Exiting Assets

5.0 Overview

Notwithstanding the analysis of sections 1–4 of the Guidelines, a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances,

[27] Firms which have committed to entering the market prior to the merger generally will be included in the measurement of the market. Only committed entry or adjustments to pre-existing entry plans that are induced by the merger will be considered as possibly deterring or counteracting the competitive effects of concern.

[28] Where conditions indicate that entry may be profitable at prices below premerger levels, the Agency will assess the likelihood of entry at the lowest price at which such entry would be profitable.

[29] The concept of minimum viable scale ("MVS") differs from the concept of minimum efficient scale ("MES"). While MES is the smallest scale at which average costs are minimized, MVS is the smallest scale at which average costs equal the premerger price.

[30] The expected path of future prices, absent the merger, may be used if future price changes can be predicted with reasonable reliability.

[31] The minimum viable scale of an entry alternative will be relatively large when the fixed costs of entry are large, when the fixed costs of entry are largely sunk, when the marginal costs of production are high at low levels of output, and when a plant is underutilized for a long time because of delays in achieving market acceptance.

[32] Five percent of total market sales typically is used because where a monopolist profitably would raise price by five percent or more across the entire relevant market, it is likely that the accompanying reduction in sales would be no less than five percent.

[33] Entrants' anticipated share of growth in demand depends on incumbents' capacity constraints and irreversible investments in capacity expansion, as well as on the relative appeal, acceptability and reputation of incumbents' and entrants' products to the new demand.

[34] For example, in a bidding market where all bidders are on equal footing, the market share of incumbents will contract as a result of entry.

post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.

5.1 Failing Firm

A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: (1) The allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; [35] (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm [36] that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and (4) absent the acquisition, the assets of the failing firm would exit the relevant market.

5.2 Failing Division

A similar argument can be made for "failing" divisions as for failing firms. First, upon applying appropriate cost allocation rules, the division must have a negative cash flow on an operating basis. Second, absent the acquisition, it must be that the assets of the division would exit the relevant market in the near future if not sold. Due to the ability of the parent firm to allocate costs, revenues, and intracompany transactions among itself and its subsidiaries and divisions, the Agency will require evidence, not based solely on management plans that could be prepared solely for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market. Third, the owner of the failing division also must have complied with the competitively-preferable purchaser requirement of section 5.1.

[35] 11 U.S.C. 1101–1174 (1988).

[36] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets—the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm—will be regarded as a reasonable alternative offer.

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Thursday
September 10, 1992

Part III

Environmental Protection Agency

40 CFR Part 260, et al.

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 266, 271 and 279

[FRL-4153-6]

RIN: 2050-AC17

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Agency is promulgating a final listing decision for used oils that are recycled and is simultaneously promulgating standards for the management of used oil under RCRA section 3014. EPA has made a final listing decision for used oils that are recycled based upon the technical criteria provided in sections 1004 and 3001 of RCRA. EPA determined that recycled used oil does not have to be listed as a hazardous waste since the used oil management standards issued in this rulemaking are adequately protective of human health and the environment. These standards cover used oil generators, transporters, processors and re-refiners, burners, and marketers. These standards are promulgated under the authority of section 3014 of RCRA and will be codified in a new part 279 of chapter 40 of the Code of Federal Regulations. When these management standards go into effect, service station dealers who collect used oil from do-it-yourself (DIY) generators and who are in compliance with the standards promulgated, may be eligible for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 114(c) liability exemption. EPA is continuing to evaluate the potential hazards associated with management of used oil. When this analysis is completed, the Agency will publish Notice(s) of Data Availability in the Federal Register over the next several months, as necessary. EPA will also, at that time, solicit opinion from the public on what, if any, additional steps may be necessary regarding used oil management.

EFFECTIVE DATE: March 8, 1993.

ADDRESSES: The regulatory docket for this rulemaking is available for public inspection at room 2427, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 from 9 a.m. to 4 p.m., Monday through Friday, except for Federal holidays. The docket number is F-92-UO2F-FFFFF. The public must make an appointment to review docket materials by calling (202) 260-9327. The public may copy a maximum of 100 pages from any regulatory document at no cost. Additional copies cost $.20 per page.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline, Office of Solid Waste, U.S. Environmental Protection Agency 401 M Street, SW., Washington, DC 20460; Telephone (800) 424-9346 (toll free) or, in the Washington, DC, metropolitan area at (703) 920-9810.

For information on specific aspects of this rule, contact Ms. Rajani D. Joglekar, telephone (202) 260-3516, or Ms. Eydie Pines, telephone (202) 260-3509, U.S. EPA, 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Authority

This regulatory decision and the regulations promulgated today are issued under the authority of sections 1004, 1006, 2002, 3001, 3014, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and as amended by the Used Oil Recycling Act, as amended, 42 U.S.C. 6901, 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937 through 6939 and 6974.

II. Background

A. Authorities and Regulations Covering Used Oil Management

1. Statutory Authority

Section 3014 of RCRA requires EPA to establish standards applicable to recycled used oil that will protect public health and the environment and, to the extent possible within that context, not discourage used oil recycling. Section 3014 was added to the RCRA statute by the Used Oil Recycling Act (UORA) of 1980. The UORA required the Agency to establish performance standards and other requirements "as may be

necessary to protect the public health and the environment from hazards associated with recycled oil" as long as such regulations "do not discourage the recovery or recycling of used oil."

The Hazardous and Solid Waste Amendments of 1984 (HSWA) reemphasized that the protection of human health and the environment was to be of primary concern in the regulation of hazardous waste. Specific to used oil, HSWA slightly altered the language of RCRA section 3014 to direct the Administrator to promulgate regulations as may be necessary to protect human health and the environment from hazards associated with recycled oil. In developing such regulations, the Administrator shall conduct an analysis of the economic impact of the regulations on the oil recycling industry. The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil *consistent with the protection of human health and the environment.* (Emphasis added to highlight HSWA language amending RCRA section 3014(a).)

EPA is therefore directed to promulgate standards for the handling and management of recycled oil. Section 1004 of RCRA, in defining the term "recycled oil," includes used oil being reused for any purpose, including used oil being re-refined or being processed into fuel. EPA believes that section 3014 also provides authority for establishing management standards that specifically include used oil being stored, collected or otherwise managed prior to recycling.

2. Regulatory Actions Related to Used Oil

On December 18, 1978, EPA initially proposed guidelines and regulations for the management of hazardous wastes as well as specific rules for the identification and listing of hazardous wastes under section 3001 of the Resource Conservation and Recovery Act (RCRA) (43 FR 58946). At that time, EPA proposed to list waste lubricating oil and waste hydraulic and cutting oil [1] as hazardous wastes on the basis of their toxicity. In addition, the Agency proposed recycling regulations to regulate (1) the incineration or burning of used lubricating, hydraulic, transformer, transmission, or cutting oil that was hazardous and (2) the use of waste oils in a manner that constituted disposal.[2]

In the May 19, 1980 regulations (45 FR 33084), EPA decided to defer promulgation of the recycling regulations for waste oils to consider fully whether waste- and use-specific standards may be implemented in lieu of imposing the full set of Subtitle C regulations on potentially recoverable and valuable materials. At the same time, EPA deferred the listing of waste oil for disposal so that the entire waste oil issue could be addressed at one time. Under the May 19, 1980 regulations, however, any waste oil exhibiting one of the characteristics of hazardous waste (ignitability, corrosivity, reactivity, and toxicity) that was disposed, or accumulated, stored, or treated prior to disposal, became regulated as a hazardous waste subject to all applicable Subtitle C regulations.

As explained above, HSWA made protection of human health and the environment the prominent concern in the Agency's regulatory decisions for used oil and required EPA to propose whether to identify or list used automobile and truck crankcase oil by November 8, 1985. HSWA also required EPA to make a final determination as to whether to identify or list any or all used oils by November 8, 1986. On November 29, 1985 (50 FR 49258), EPA proposed to list all used oils as hazardous waste, including petroleum-derived and synthetic oils, based on the presence of toxic constituents at levels of concern from contamination during use and adulteration after use. Also on November 29, 1985, the Agency proposed management standards for recycled used oil (50 FR 49212) and issued final regulations, incorporated at 40 CFR part 266, subpart E, prohibiting the burning of off-specification used oil fuels [3] in non-industrial boilers and furnaces (50 FR 49164). Marketers of used oil fuel and industrial burners of off-specification fuel are required to notify EPA of their activities and to comply with certain notice and recordkeeping requirements. Used oils that meet the fuel oil specification are exempt from most of the 40 CFR part 266, subpart E regulations.

On March 10, 1986 (51 FR 8206), the Agency published a Supplemental Notice requesting comments on additional aspects of the proposed listing of used oil as hazardous waste. In particular, commenters to the November 29, 1985, proposal suggested that EPA consider a regulatory option of only listing used oil as a hazardous waste when disposed, while promulgating special management standards for used oil that is recycled.

On November 19, 1986, EPA issued a decision not to list as a hazardous waste used oil that is recycled (51 FR 41900). The Agency determined that used oil being recycled should not be listed as a hazardous waste under RCRA. The EPA stated in the November 1986 decision that the Agency intended to issue recycled used oil management standards and was conducting studies necessary to determine what standards are appropriate under § 3014 of RCRA and to determine whether used oil being disposed of should be listed as a RCRA hazardous waste, or regulated under other statutes. At that time, it was the Agency's belief that the stigmatic effects associated with a hazardous waste listing might discourage the recycling of used oil, thereby resulting in increased disposal of used oil in uncontrolled manners. EPA stated that several residues, wastewaters, and sludges associated with the recycling of used oil may be evaluated to determine if a hazardous waste listing was necessary, even if used oil was not listed as a hazardous waste. EPA also outlined a plan that included making the determination whether to list used oil being disposed as hazardous waste and promulgation of special management standards for recycled oil.

EPA's decision not to list used oil as a hazardous waste based on the potential stigmatic effects was challenged by the Hazardous Waste Treatment Council, the Association of Petroleum Re-refiners, and the Natural Resources Defense Council. The petitioners claimed that (1) the language of RCRA indicated that in determining whether to list used oil as a hazardous waste, EPA may consider technical characteristics of hazardous waste, but not the "stigma" that a hazardous listing might involve, and (2) that Congress intended EPA to consider the effects of listing on the recycled oil industry only after the initial listing decision.

On October 7, 1988, the Court of Appeals for the District of Columbia found that EPA acted contrary to law in its determination not to list used oil under RCRA section 3001 based on the stigmatic effects. (See *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 270 (D.C. Cir. 1988) [HWTC I].) The court ruled that EPA must determine whether

[1] The term "waste oil" included both used and unused oils that may no longer be used for their original purpose.

[2] "Use in a manner constituting disposal" means the placement of hazardous waste directly onto the land in a manner constituting disposal or the use of the solid waste to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land [40 CFR 261.2(c)(1)].

[3] Used Oil that exceeds any of the following specification levels is considered to be "off-specification" used oil under 40 CFR 266.40(e): Arsenic—5 ppm, Cadmium—2 ppm, Chromium—10 ppm, Lead—100 ppm, Flash Point-100 °F minimum, Total Halogens—4,000 ppm.

to list any used oils based on the technical criteria for waste listings specified in the statute.

After the 1988 court decision, EPA began to re-evaluate its basis for making a listing determination for used oil. EPA reviewed the statute, the proposed rule, and the many comments received on the proposed rule. Those comments indicated numerous concerns with the proposed listing approach. One of the most frequent concerns voiced by commenters was related to the quality and "representativeness" of the data used by EPA to characterize used oils in 1985. Numerous commenters indicated that "their oils" were not represented by the data and, if they were represented, those oils were characterized after being mixed with other more contaminated oils or with other hazardous wastes. Many commenters submitted data demonstrating that the used oils they generate, particularly industrial used oils, did not contain high levels of toxicants of concern.

In addition, the Agency recognized that much of the information in the 1985 used oil composition data was more than five years old, as most of the information was collected prior to 1985. Since the time of that data gathering effort, used automotive oil composition may have been affected by the phase-down of lead in gasoline. The Agency also recognized the need to collect analytical data addressing specific classes of used oils as collected and stored at the point of generation (*i.e.*, at the generator's facility).

Finally, the promulgation of the toxicity characteristic (TC) (55 FR 11798, March 29, 1990) is known to identify certain used oils as hazardous waste. Due to the possibility of changes in used oil composition since the Agency's 1985 proposed listing decision and the new TC, the Agency recognized that additional data on used oil characterization may be needed prior to making a final hazardous waste listing determination.

On September 23, 1991, EPA published a Supplemental Notice of Proposed Rulemaking for the identification and listing of used oil and for management standards for recycled used oil (56 FR 48000). The 1991 Supplemental Notice presented supplemental information gathered by EPA and provided to EPA by individuals commenting on previous notices on the listing of used oil and used oil management standards. As discussed above, numerous commenters on the 1985 proposal to list used oil as hazardous contended that the broad listing of all used oils unfairly subjects them to stringent Subtitle C regulations because their used oils are not hazardous. Based on those comments, the Agency collected a variety of additional information regarding various types of used oil, their management, and their potential health and environmental effects when mismanaged. The 1991 Supplemental Notice presented this new information to the public and requested comment on the information, particularly if and how the information suggests new concerns that EPA should consider in deciding whether to finalize all or part of its 1985 proposal to list used oil as a hazardous waste.

In addition, the 1991 Supplemental Notice expanded upon the November 29, 1985 (50 FR 49258) proposal to list used oils as hazardous and the March 10, 1986 (51 FR 8206) Supplemental Notice by discussing regulatory alternatives not previously presented in the **Federal Register**. Based on the public comments received relative to these two notices, the Agency investigated several important aspects of used oil regulation. The Supplemental Notice also contained a request for comments on additional issues related to the "mixture rule" (40 CFR 261.3(a)(2)(iii)), on test methods for determining halogen levels in used oils, and on new data on the composition of used oil and used oil processing residuals. For these aspects, the Agency identified alternative approaches that were not presented explicitly in the earlier notices. Those new alternatives were presented in the 1991 Supplemental Notice.

The 1991 Supplemental Notice also discussed the Agency's proposal to amend 40 CFR 261.32 by adding four waste streams from the reprocessing and re-refining of used oil to the list of hazardous wastes from specific sources. The wastes from the reprocessing and re-refining of used oil include process residuals from the gravitational or mechanical separation of solids, water, and oil (K152); spent polishing media used to finish used oil (K153); distillation bottoms from used oil processing and re-refining (K154); and treatment residues from primary wastewater treatment (K155).

The 1991 Supplemental Notice also included a description of some of the management standards (in addition to or in place of those proposed in 1985) that EPA considered in promulgating today's final rule.

On May 20, 1992, EPA proposed a Hazardous Waste Identification Rule describing two alternative approaches for hazardous waste identification under RCRA. The first proposed approach would establish concentration based exclusion criteria (CBEC) for listed hazardous wastes, waste mixtures, derivatives, and contaminated media. The second approach an expanded characteristic option (ECHO) would establish "characteristic" levels for listed hazardous wastes, waste mixtures, derivatives, and contaminated media. (57 FR 21450). Depending upon which approach the Agency finalizes, the manner in which EPA regulates mixtures of used oil and hazardous waste may change.

B. Summary of May 20, 1992 Federal Register Notice (Final Listing Decision for Used Oils Destined for Disposal)

On May 20, 1992, EPA published a final rule that addressed the listing of used oils that are disposed, excluded non-terne plated used oil filters that have been drained to remove used oil from the definition of hazardous waste, and deferred a final listing determination on residuals from the processing and re-refining of used oil (57 FR 21524). Four separate actions were taken and are discussed below.

First, the Agency promulgated a final decision not to list used oils destined for disposal. This decision was based primarily upon the finding that all used oils do not typically and frequently meet the technical criteria for listing a waste as hazardous. In making the final listing determination for used oil destined for disposal, EPA also gave considerable attention to the current federal regulations governing the management of used oils that are disposed. EPA evaluated the technical criteria for listing in light of the current regulatory structure that controls the management of used oils and concluded that any plausible mismanagement of used oil that is destined for disposal is addressed by current requirements. Existing regulations that cover used oil destined for disposal are discussed briefly at the end of this section. In addition, if a used oil that is destined for disposal exhibits a characteristic, it is regulated as a hazardous waste under subtitle C.

Second, the Agency decided to defer a decision on listing and management standards for used oil that is recycled (this decision is included in today's rule).

Third, the Agency promulgated a final exemption from the definition of hazardous waste in § 261.4 for certain used oil filters. The filters that received the exemption are non-terne-plated used oil filters that have been hot-drained to remove used oil. (Terne is an alloy of tin and lead.) Hot-drained means draining used oil from a filter while the engine is at operating temperature, when oil flows easily. Based on data submitted to EPA, non-terne-plated, hot-drained used oil

filters do not typically and frequently exhibit the Toxicity Characteristic.

Fourth, the Agency announced its deferral of a final decision on whether or not to list residuals from the processing and re-refining of used oil. The Agency stated that it will continue to evaluate the composition of used oil recycling residues and the management of these residues. The reason for continued evaluation of residuals is that recycling techniques and waste management practices that evolved during the past six years have resulted in residual composition changes.

C. Current Federal Regulations Governing Disposal of Used Oil

Currently, there are several regulatory programs in place to control the storage and transportation of used oil, to protect against releases to the ground, ground water, and surface waters, to protect against improper disposal of used oils, to prevent the burning of used oils with high levels of toxic constituents in certain units, and to control the management of used oils containing PCB's. Several of these programs have been proposed and/or promulgated since 1985, and some have been in place since before 1985. The Agency has decided that these current regulations are protective, but are not complete or sufficient to protect human health and the environment from potential mismanagement of used oils that are recycled. Therefore, in addition to the existing regulations, used oil handlers will have to comply with additional management standards that EPA is promulgating today, such as recordkeeping and analysis requirements, and a requirement for containment consisting of impervious floor and dikes/berms. The current regulatory programs are described below.

The storage of used oil in underground tanks is controlled under subtitle I of RCRA (40 CFR part 280). These regulations require that underground tanks be properly maintained, operated, protected from corrosion, and that any spills are properly cleaned up. Other existing storage tank standards are found under the Clean Water Act Spill Prevention Control and Countermeasures (SPCC) requirements. SPCC requirements regulate the storage of materials, including used oil, in aboveground *and* in underground tanks under certain circumstances. The Clean Water Act also requires reporting of releases of oil into navigable waters if a sheen appears on the water, if any water quality standards are violated, or if a sludge is deposited beneath the surface of the water. The recently enacted Oil Pollution Act revised the SPCC requirements of the Clean Water Act.

Regulations promulgated pursuant to MARPOL 73/78, Annex I, act to control shipboard management of used oil and releases of used oil to navigable waters. Bilge slops are a commonly generated waste on-board ships that contain used oil; MARPOL prevents this waste from being discharged into the sea in an unrestricted manner.

The transport of used oil is regulated under the Department of Transportation's Hazardous Materials Transportation Act (HMTA). Used oil that meets the criteria for being "combustible" or "flammable" is regulated under DOT requirements for classification, packaging, marking, labeling, shipping papers, placarding, recordkeeping and reporting.

The burning of used oil for energy recovery is subject to existing standards under RCRA (40 CFR part 266, subpart E). These standards include requirements for marketers of used oil, such as notification, analysis, recordkeeping, and invoices for each shipment. Off-specification used oil must be burned in industrial boilers or furnaces only. The "specification" levels for used oil that will be burned for energy recovery include levels for metals, halogens, and flash point. These existing standards promulgated in 1985 are recodified in part 279 today.

The manufacture, use, import, and disposal of polychlorinated biphenyls (PCBs) in used oils are controlled under the Toxic Substances Control Act (TSCA). TSCA controls the manufacture, import, use, and disposal of oils containing over 50 ppm PCBs. In addition, TSCA requires reporting of any spill of material containing 50 ppm or greater PCBs, into sewers, drinking water, surface water, grazing lands, or vegetable gardens. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires reporting of any 1-pound spill of PCBs into the environment. Note that used oils containing less than 50 ppm of PCBs are covered under RCRA.

Used oils that are contaminated with CERCLA hazardous substances (*e.g.*, due to the presence of elevated levels of lead) are subject to CERCLA release reporting requirements. Therefore, releases of used oil containing such contaminants (*e.g.*, lead) into the environment in quantities greater than the reportable quantity for the contaminant must be reported to the National Response Center. The current RQs for CERCLA hazardous substances are listed in 40 CFR 302.4. In addition, under 40 CFR part 110, any discharge of oil that violates applicable water quality standards or causes a film or sheen on a water surface must be reported to the National Response Center.

As mentioned previously, used oil handlers will have to comply with all existing regulations (including any applicable State and local regulations), and in addition, the new management standards for recycled oil promulgated today. For the reasons discussed in more detail below, EPA believes that this network of regulations will be sufficient to ensure protection of human health and the environment.

III. Summary of Major Comments to 1985 Proposal and 1991 Supplemental Notice

A. Comments Received in Response to the 1985 Proposed Rulemaking

1. Comments on 1985 Proposed Listing Decision

On November 29, 1985 (50 FR 49239), EPA proposed to list all used oils as hazardous waste, including petroleum-derived and synthetic oils, based on the presence of toxic constituents at levels of concern as a result of contamination during and adulteration after use. In 1985, the Agency also proposed special management standards for used oils that are recycled. Essentially, used oils that are disposed would have been subject to full subtitle C regulation, while recycled used oils could be managed in accordance with the proposed management standards developed and proposed under the authority of RCRA § 3014.

Many comments were received on the various aspects of the proposed listing of used oil, which are summarized as follows. Most commenters opposed the listing of used oil as a hazardous waste. The reasons given included that EPA's sampling was unrepresentative and flawed (*i.e.*, used oil samples were taken from storage tanks at used oil facilities rather than from the point of generation), used oil is no more hazardous than virgin oil, and the belief that the levels of constituents EPA found in used oils that were sampled and analyzed do not present a threat to human health. Some commenters asserted that EPA's concern is not with used oil itself but the mixing of used oil with other constituents that may render the used oil hazardous only because of post-use adulteration. Therefore, instead of listing all used oils, commenters recommended that EPA should list used oils as hazardous only if other

substances have been added after the oil's initial use.

A large number of commenters challenged the scope of the listing (*i.e.*, definition) and provided a number of examples where certain used oils should not be included in the listing because they do not contain constituents of concern at concentrations exceeding health-based levels that would cause the used oil to be listed. Some commenters proposed that only those used oils that contain toxic constituents, such as lead, arsenic, cadmium, chromium, 1,1,1-trichloroethane, trichloroethylene, tetrachloroethylene, toluene, and naphthalene, should be included in the listing. A number of commenters requested that in the proposed definition of used oil, the phrase "but is not limited to" should be stricken because it creates tremendous uncertainty as to what constitutes a used oil. Commenters also challenged EPA and indicated that the Agency exceeded its statutory authority by including synthetic and other non-petroleum derived used oils in the definition of used oil. Commenters also requested that used oil destined for recycling be excluded from the definition of used oil. A few commenters also requested that food grade oils be excluded because the Food and Drug Administration regulates these oils and requires that they meet health standards based on human consumption because they may contact food products. A number of commenters requested that EPA exclude dielectric waste oil from the listing because electrical equipment is not a source of the contaminants of concern and that dielectric oils are already controlled by the Toxic Substances Control Act.

A number of commenters expressed concern regarding EPA's proposed regulatory scope of mixtures of used oil and other materials. The commenters were mixed on their support of EPA's proposed exclusion for wipers contaminated with used oil. Those that supported the exemption stated that as long as a wiper contains no free liquid, as determined by the paint filter test, it presents a minimal threat to human health or the environment. These commenters also expressed the belief that there should be no set concentration limit for used oil in wipers, but the exclusion should be based on whether the wiper contains free liquids. Those that opposed the exclusion indicated that contaminated wipers can contain significant quantities of PCBs and other toxic constituents and therefore present a risk to health.

Many commenters supported EPA's proposal to exempt wastewaters containing *de minimis* amounts of used oil from the definition of hazardous waste. However, commenters stated that no set concentration limit should be established as a *de minimis* level. A few commenters opposed this exclusion on the grounds that it could present a threat to human health and the environment. Some commenters requested that the halogen level promulgated as part of the rebuttable presumption for used oil fuels be increased because *de minimis* amounts of solvents may inadvertently become mixed with used oil.

There was overwhelming support to exempt mixtures of sorptive minerals and used oil. However, some commenters requested that the word minerals be replaced with materials. The commenters' rationale was that minerals are actually adsorbents, meaning attracted to the surface, whereas other materials, such as treated wood and paper fiber, are absorbents, meaning becoming part of the material and more difficult to remove. Thus, these commenters asserted, non-mineral sorbent materials also would pose no risk to the environment.

2. Major Comments on 1985 Proposed Management Standards for Recycled Used Oil

On November 29, 1985 (50 FR 49212), EPA proposed a comprehensive set of management standards for various entities handling used oils. These proposed standards were tailored after the hazardous waste management standards of subtitle C, and included requirements for notification, tracking, recordkeeping, preparedness and prevention, testing, storage, and closure. The handlers included generators, transporters, recyclers, marketers, burners, and road oilers.

a. Generator Standards. Concerning management standards for generators, commenters were generally supportive of EPA's proposed regulations except for the following comments relating to specific provisions. Commenters expressed concern that the quantity limit for small quantity generators was too low. Commenters also advocated a change from determining a generator's regulatory status on a monthly basis to a 12-month average limit to account for periodic and/or seasonal variations in generation patterns. Commenters thought that the proposed 90-day time limit on accumulation did not provide enough time for generators to accumulate a full tank of used oil. Because some facilities generate small amounts of used oil, some commenters felt that a 180- or 270-day time limit would be more appropriate.

One commenter stated that the requirement to empty a leaking or otherwise unfit for service tank within 24 hours is unreasonable and more strict than the hazardous waste requirements. One commenter stated that it is unreasonable to require that whenever a leak in a tank system occurs, the whole tank system must then be subject to the standards for new tank systems. An example of this inequity, provided by the commenters, could occur if the tank system develops a leak because of a faulty gasket and then the whole system has to be replaced rather than merely replacing the gasket. A few commenters expressed the opinion that the proposed standards for used oil storage tanks far exceed the necessary standards for protection of human health and the environment. Some commenters stated that requiring secondary containment for newly installed tanks beyond the SPCC requirements amounted to regulatory overkill. One commenter requested EPA to provide clarification on the definition of tank because many tank-like structures may be pulled into the system although they may not warrant regulation. Many commenters expressed concern that the regulation of storage in underground tanks under RCRA § 3014 would be duplicative of the standards promulgated under Subtitle I of RCRA. Many commenters disagreed with EPA that ground-water monitoring provides a superior approach to leak detection.

b. Transporter Standards. Some commenters thought that the 10-day time limit for storing used oil at transfer facilities was an inadequate period of time for transporters to accumulate and consolidate sufficient quantities of used oil. One commenter requested that an exemption be provided for generators that transport used oil from isolated locations to a central storage site, which would reduce the regulatory burden on oil and gas production operations, contract drillers, gas processors, and pipeline operators.

Commenters expressed concern with the requirement proposed in 1985 that collectors provide recycling facilities with lists of their customers. This could lead to solicitation of the collector's customers by used oil recyclers, which could adversely impact the collectors.

c. Recycling Facility Standards. A few commenters requested that EPA allow for the co-management of used oil with hazardous waste under a permit-by-rule rather than requiring such facilities to apply for and obtain a modification to their existing Subtitle C operating permit. Commenters also challenged the fact that while EPA required analysis of

halogens, there is no EPA-approved test method for halogens. Some commenters also objected to the proposed requirement that facilities that manage both used oil and other hazardous wastes test their used oil for indicator parameters for each hazardous waste stream. Although many comments were received concerning testing frequencies, commenters generally did not agree on any particular frequency or on whether or not the Agency should impose a set testing frequency.

EPA received many comments both for and against the proposed requirements that used oil recycling facilities that are not in compliance with the permit-by-rule provisions on the effective date of the rule comply with the interim status provisions of 40 CFR part 265. A few commenters pointed out that corrective action for releases of used oil to the environment was not adequately addressed in the 1985 proposed rulemaking.

d. Dust Suppression. The commenters were generally in favor of banning used oil for dust suppression. One commenter requested that EPA consider a case-by-case approval of used oil as a dust suppressant provided the activity is permitted and waste analysis is conducted. A state agency recommended that the dust suppression ban be extended to refined oil and oil/water mixtures.

B. Comments Received in Response to 1991 Supplemental Notice

1. Listing Used Oil

The Supplemental Notice of September 23, 1991 (56 FR 48041), presented three options for identifying used oil as a hazardous waste. Option One was to list all used oils as proposed on November 29, 1985 (50 FR 49239), based on the potential for adulteration during use and environmental damage when mismanaged. Option Two was to list categories of used oil that were found to be "typically and frequently" hazardous because of the presence of lead, PAHs, arsenic, cadmium, chromium, and benzene. "Typically and frequently" was defined to mean that 50 percent or more of the samples in a used oil category exceeded the levels of concern. Under Option Three, the Agency proposed not to list used oils as hazardous, but rely on management standards developed under section 3014 of RCRA to control mismanagement of oil.

Commenters overwhelmingly supported Option Three, not to list used oil as a hazardous waste, but rely on management standards. Many of these commenters suggested that EPA should encourage recycling through education, collection, and management standards instead of a hazardous waste listing. Many commenters expressed concern that listing used oil would have a negative effect on the used oil recycling system. These commenters stated that due to excessive liability and disposal costs associated with handling hazardous wastes, they would be forced out of business or out of the used oil management system. They stated that this would result in having fewer collection centers resulting in decreased acceptance of DIY-generated used oil, and may lead to further mismanagement. A few commenters pointed out that their lease prohibits the handling of hazardous materials or wastes and the listing of used oil as a hazardous waste would thus force them out of business or require them to negotiate a costly new lease. Additionally, some commenters, primarily service stations and oil changers, are currently voluntarily accepting DIY-generated used oil. They stated that listing used oil as a hazardous waste would lead to the discontinuation of this service because of the potential liability and the increased cost of handling used oil.

Some commenters noted that DIY-generated used oil presents the biggest threat to human health and the environment because it is often disposed of improperly. Another view point shared by many commenters was that used oil is a resource that is recyclable as lube oil feedstock or as a fuel substitute, and EPA should not designate a valuable commodity as hazardous waste.

A few commenters stated that used oil should not be listed because it is no longer hazardous due to EPA's lead phase-down program. In addition, EPA's analyses of used oil were based on too few samples and these were unrepresentative of actual conditions. Some commenters expressed a reluctance to have EPA list used oil as a hazardous waste, but urged EPA, if used oil is to be listed, to list only those used oils that are disposed and not list used oils that are recycled.

A few commenters supported the proposal to list all used oils as hazardous waste. They stated that used oil has been historically mismanaged and presents a threat to human health and the environment. In addition, they referenced the "California experience" in support of listing. These commenters said that when California listed used oil as a hazardous waste, the resulting recycling program within the state increased the amount of used oil entering the used oil management system.

2. De Minimis Mixtures

EPA proposed exempting wipers, sorptive minerals, and oil filters that have been drained of free-flowing used oil from the definition of hazardous waste, if used oil were listed as a hazardous waste. EPA expressed its belief that many of these materials may not pose a threat to human health and the environment because of the very small quantities of used oil involved. The Agency also proposed the "one-drop" standard for determining whether or not free-flowing used oil is present in the mixtures.

The commenters were nearly unanimous in support of EPA's proposal to exclude wipers and sorptive minerals contaminated with small amounts of used oil from the proposed listing. A number of commenters requested EPA to expand the definition of sorptive minerals beyond the current definition of clay and diatomaceous earth to include synthetic adsorbents and other natural filter/absorbent media. A few commenters requested clarification as to the status of laundered clean wipers that do not contain free flowing used oil. A few commenters requested a clarification concerning recycling of used oil mixtures with high Btu value and instances where used oil cannot be separated from the mixture for burning a mixture as a used oil fuel.

3. Controlling Disposal of Used Oil

EPA believes that certain used oils may require disposal because they can not be recycled. In cases where the used oil is not recyclable and the disposal of the used oil is not controlled under the current subtitle C regulations (*e.g.*, because the used oil does not exhibit a hazardous waste characteristic), EPA wants to ensure that used oils are disposed of in an environmentally safe manner. EPA therefore requested comment on the appropriateness of developing guidelines for the disposal of used oil and the appropriateness of a total ban on the disposal of used oil.

Commenters supported EPA's proposal to develop specific guidelines for the disposal of nonhazardous oil under § 1008 of RCRA. Some commenters urged EPA not to impose a total ban on the disposal of nonhazardous oil. This is because some materials (*e.g.*, contaminated soil) can not be disposed elsewhere in an economically acceptable fashion. Some commenters supported a total ban on disposal of used oil mainly to ensure protection of the ground water and as a

method to promote recycling of all used oils.

4. DIY-Generated Used Oil

RCRA does not provide the authority to regulate household-generated waste prior to collection (*e.g.*, DIY-generated oil and filters), nor does it give EPA the authority to mandate collection programs for DIY-generated used oil. Over the past five years, EPA has developed public informational brochures to encourage DIY generators to recycle their used oil. EPA may develop more educational materials for the public and the regulated community on used oil recycling alternatives. EPA therefore requested comments on how to improve the recycling of DIY-generated used oil.

Many suggestions were received on ways EPA could encourage the acceptance and recycling of DIY-generated used oil. A majority of commenters, however, said that listing used oil as a hazardous waste would discourage recycling of DIY-generated used oil, primarily because many facilities indicated that they would no longer accept DIY-generated used oil because of the liability associated with collecting and handling hazardous waste. A state government agency stated that a primary reason service stations are not accepting DIY-generated used oil is the uncertainty over the past few years of whether EPA will list used oil as a hazardous waste and thus, require generators that have used oil on hand to pay for its disposal. Commenters indicated that the primary reason for the poor recycling rate of DIY-generated used oil is because of the lack of collection centers. Some major suggestions included the implementation of a curbside pickup program for DIY-generated used oil, requiring any entity selling motor oil to collect DIY-generated used oil, ensuring that used oil collection facilities be exempted from CERCLA liability requiring retailers to list nearby used oil collection centers, and establishment of a deposit-refund system.

5. Criteria for Recycling Presumption

EPA proposed to establish a presumption that all used oils, once collected, would be recycled and, therefore, would be subject to the proposed used oil recycling standards. However, EPA is aware of certain categories of used oils (*e.g.*, watery metalworking oils, oily bilge water) that may not be recyclable. Most used oils can be processed and treated to manufacture either burner fuel, lube oil base stock, to feedstock for refining. However, EPA gave consideration to providing an opportunity for used oil handlers to rebut the used oil recycling presumption and avoid compliance with the used oil recycling standards by documenting that their used oil is not recyclable in any manner. EPA requested comments on the suggested procedures for rebutting the recycling presumption and appropriate documentation.

The commenters were nearly unanimous in their support of the recycling presumption. However, the comments were mixed concerning the criteria for "recyclability" and the appropriate documentation. One commenter suggested that a one-time certification on the recyclability of a waste stream is adequate, assuming the facility's waste management plan does not change. Many of the commenters were supportive of the criteria EPA listed for determining recyclability, which included BTU content, water content, degree of emulsification, degree of viscosity, and the availability of economically and geographically acceptable recyclers. However, two commenters (refiners) stated that since none of the five criteria were examples of nonrecyclability and that all used oil can be recycled, whether used oil is actually recycled is strictly a matter of cost. One commenter questioned whether EPA had the authority to assume that all used oil was recyclable and, if not, to require certification and documentation.

Commenters were generally in agreement concerning the documentation requirements for the recycling presumption. There were only a few specific comments on the issue. One commenter suggested that a generator should not be allowed to determine recyclability but this should be the responsibility of a recycling facility. Another commenter suggested that documentation should be kept on-site and should not have to be sent to EPA.

6. Ban on Use as a Dust Suppressant

On November 29, 1985 (50 FR 49239), EPA proposed to ban the use of used oil as a dust suppressant (road oiling). The September 23, 1991, Supplemental Notice (56 FR 48041) stated that regardless of whether EPA lists used oils as a hazardous waste, EPA was still considering the ban of all used oils used for dust suppression. Specific comment was requested on how used oils could be used for dust suppression in an environmentally safe manner.

Most of the commenters supported the ban on using any used oil for dust suppression. Many of these commenters stated that used oil should not be used for road oiling given the potential adverse impact to water resources due to run-off. One commenter pointed out that surfactant additives in motor oil are generally anionic which prevents oil from bonding strongly to most negatively charged aggregate articles resulting in massive run-off. All of the state agencies commenting on this issue supported a ban.

Some commenters suggested that EPA should allow used oil to be used for dust suppression if it meets certain criteria such as not failing a characteristic test or the specification criteria for used oil fuel. Other commenters requested that nonhazardous used oil be allowed for road oiling. A few commenters urged the allowance of water contaminated with *de minimus amounts* of used oil to be used for dust suppression. On a related matter, some commenters wanted to know whether use of used oil for insect control or as a weed killer is allowed.

7. CERCLA Liability Issues

Section 114(c) of CERCLA contains the service station dealer's exemption from liability under the statute for used oil. To be eligible for the exemption, service stations are required to comply with the section 3014 of RCRA used oil management standards and accept DIY-generated used oil. EPA requested comment on how to ensure that small quantity generators could be eligible for this exclusion if they were conditionally excluded from most of the regulatory requirements similar to subtitle C.

The commenters were in agreement that the service station exclusion contained in section 114(c) of CERCLA should be implemented. Many commenters encouraged EPA to include facilities that collect DIY-generated used oil (*e.g.*, public facilities), regardless of whether they are service stations, to promote recycling of the DIY used oil segment. A commenter requested that EPA clarify that "quick oil change and lubrication facilities" are in the definition of "service station dealers" and that "used oil destined for recycling" should be included instead of just "recycled" used oil. One commenter requested that refiners and downstream users be included in the definition of service station to obtain the CERCLA liability exemption.

Many commenters expressed support for the elimination of generator category distinction (*i.e.*, small quantity generators versus large quantity generators). In addition to the reduction in confusion and handling requirements for used oil, these commenters noted that all generators could then benefit from the CERCLA liability exemption.

8. Storage

EPA proposed different requirements for storage for different segments of the used oil industry to respond to the potential risks associated with used oil handling. EPA requested comment on storage standards to address the potential hazards associated with used oil. EPA did not propose requirements for underground tanks used to store used oil, because the Agency believes that the current requirements for USTs in 40 CFR part 280 appear to be adequate.

Most commenters supported EPA's basic intent to establish minimum technical standards for the storage of used oil. A number of commenters supported the requirement that all generators should comply with minimal technical standards and that there should be no exclusion for small quantity generators; however, some opposed this approach and supported a distinction between generators based on the amount of used oil generated. The majority of commenters requested that the proposed requirement for daily inspections should be reduced to weekly, biweekly, or monthly. A number of commenters were against the proposed 50-foot buffer zone requirement primarily because it would be impossible for quick lube facilities to implement this requirement due to the limited size of their facility and it would be inappropriate because of the low flash point of motor oil. An alternative that was suggested was for facilities to comply with the NFPA's "Flammable and Combustible Liquids Code" for buffer zones. One commenter suggested that satellite accumulation areas that are exempt from the storage standards be allowed. One commenter pointed out that a definition and requirement for a continuously fed tank is necessary.

9. Secondary Containment for Tanks

EPA requested comment on its proposal to require Spill Prevention, Control and Countermeasure (SPCC)-recommended secondary containment or to require RCRA subtitle C secondary containment requirements for controlling releases and spills of used oil from aboveground storage tanks at used oil processing and re-refining facilities. The SPCC options include berms, dikes, or retaining walls along with an oil-impervious floor designed to contain used oil and avoid significant contamination of soil and nearby surface and ground water resources.

Most of the commenters agreed with EPA's proposal to require SPCC-recommended secondary containment but were not supportive of also requiring subtitle C secondary containment requirements for aboveground storage tanks. A few commenters noted that requiring compliance with subtitle C would not add a significant margin of safety compared to the cost of upgrading the tanks. Commenters argued that most of the aboveground storage tanks are already in compliance with SPCC and, with few exceptions, these requirements have been an acceptable vehicle for protecting human health and the environment. One commenter supported the measure to require owners/operators storing used oil in aboveground storage tanks to comply with both SPCC and subtitle C requirements. Their rationale was that such requirements address different management issues and are not unreasonably burdensome.

10. Financial Responsibility

In the 1985 proposed rule, used oil recycling facilities were to be subject to the subtitle C financial responsibility requirements (50 FR 49256). Many comments that were received on this proposal suggested that such requirements would have detrimental effects on the used oil recycling market. In the September 1991 Supplemental Notice, EPA requested comment on deferring the requirements.

The commenters were nearly evenly divided on EPA's proposal to defer the financial responsibility requirements for used oil recycling facilities. Those commenters that supported the deferral indicated that because recyclable used oil has economic value, there is an incentive to move as much oil as possible. These commenters also agreed with EPA's contention that requiring financial responsibility would impact the economic viability of used oil recyclers.

Those commenters that did not support EPA's proposal to defer the financial responsibility requirements questioned the practicality of requiring recyclers to comply with the closure and post-closure requirements while not requiring the financial mechanisms to ensure that these activities are done. A few commenters noted that there are 63 used oil recycling sites listed on the National Priorities List, which indicates that financial responsibility requirements are necessary. A state agency urged EPA to require some level of financial responsibility because used oil, when mismanaged, presents as much risk to human health and the environment as any other hazardous waste.

11. Permit-By-Rule

In the 1985 proposed rule, EPA used the authority under section 3014 of RCRA to propose permitting requirements for used oil recycling facilities (50 FR 49225, 49257). RCRA section 3014(d) provides that owners and operators of used oil recycling facilities are deemed to have a permit for their recycling activities and associated tank and container storage, provided they comply with the used oil management standards promulgated by EPA. Thus EPA proposed that owners/operators of used oil recycling facilities would be eligible for a permit-by-rule eligibility, including those undertaken by facilities that recycle or store used oil in surface impoundments and facilities that manage other hazardous waste in addition to used oil (co-management facilities).

Most of the comments pertaining to the permit-by-rule proposal were not supportive of EPA's proposal based on many concerns. A number of commenters opposed EPA's proposal that only those facilities that did not manage other hazardous wastes should be eligible. Their contention was that section 3014 of RCRA did not expressly state that co-management facilities were ineligible. A few commenters were against the permit-by-rule concept altogether and favored a site-by-site permitting approach. A few commenters requested EPA to allow permit-by-rules only for facilities that handled nonhazardous oil and require those facilities that handled hazardous oil to comply with subtitle C. Some commenters were in support of EPA's proposed permit-by-rule requirements.

IV. Definition of Used Oil

EPA's 1985 proposal to list used oil as a hazardous waste included the following proposed definition of used oil:

> "Used oil" means petroleum-derived or synthetic oil including, but not limited to, oil which is used as a: (i) lubricant (engine, turbine, or gear); (ii) hydraulic fluid (including transmission fluid); (iii) metalworking fluid (including cutting, grinding, machining, rolling, stamping, quenching, and coating oils); (iv) insulating fluid or coolant, and which is contaminated through use or subsequent management.

During the 1985 comment period, many commenters criticized the vagueness of the proposed definition. One issue commenters raised was that it was unclear from the definition what constitutes "contamination." The use of the phrase "but not limited to" also was challenged. Commenters contended that such a phrase could be interpreted to

include varieties of oil such as food grade oils within the definition of used oil. Commenters suggested that EPA specifically list in the definition the types of oils they intended to regulate.

Another point that commenters disputed about the definition of used oil was use of the term "or subsequent management." They pointed out that the statutory definition of used oil specifies contamination only "as a result of use," not via subsequent management. Used oils that become adulterated after use should be subject to management standards that discourage this practice. Commenters agreed that used oils contaminated with hazardous wastes should be subject to full subtitle C requirements.

Many commenters questioned the basis for including synthetic oils in the definition of used oil. The statutory definition of used oil does not explicitly include synthetic oils; therefore, commenters asserted that used synthetic oils should not be considered "used oils." Several comments were received regarding metalworking oils as well. Commenters requested that copper and aluminum wire drawing solutions be excluded from the definition of used oil. Copper drawing solution is an emulsion of 1 to 2 percent oil in water. Aluminum drawing solution is considered a neat oil (*i.e.*, 100 percent oil). However, one commenter stated that aluminum drawing solution is nonhazardous and meets the EPA used oil fuel specification test.

EPA carefully evaluated the comments referring to synthetic oils, including those comments where the commenter submitted data. EPA has concluded that synthetic oils that are not petroleum-based (*i.e.*, those produced from coal or oil shale), those that are petroleum-based but are water soluble (*e.g.*, concentrates of metalworking oils/fluids), or those that are polymer-type, are all used as lubricants similar to petroleum-based lubricants, oils, and laminating surface agents. Upon use, synthetic oils become contaminated with physical or chemical impurities in a manner similar to petroleum-based lubricants. This contamination during (or as a result of) use is what makes used oil toxic or hazardous. Upon collection, these used oils are not distinguishable from non-synthetic used oils, except in the case of segregated, water-based metalworking oils/fluids. All used oils, in general, are managed in similar manners (*e.g.*, burned for energy recovery, re-refined to produce lube oil feedstock, or reconstituted as recycled products). Therefore, EPA believes that all used oils, including used synthetic oils, should be regulated in a similar fashion and, hence, EPA has decided to include synthetic oils in the definition of used oil as discussed below. For the large part, the definition of used oil includes used lubricants of all kinds that are used for a purpose of lubrication and become contaminated as a result of such use.

Today, EPA is promulgating a regulatory definition for "used oil" at 40 CFR 260.10 as follows:

> Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

This regulatory definition of used oil is drawn from the statutory definition of used oil found at section 1004(36) of RCRA and is similar to the current definition of used oil found at 40 CFR 266.40(b). EPA believes that this definition covers the majority of oils used as lubricants, coolants (non-contact heat transfer fluids), emulsions, or for similar uses and are likely to get contaminated through use. Therefore, specific types of used oils are not identified in the definition.

The definition includes all used oils derived from crude oil, as well as used synthetic oils that are contaminated by physical (*e.g.*, high water content) or chemical (*e.g.*, lead, halogens, or other toxic or hazardous constituents) impurities as a result of such use. However, with today's rule, EPA is interpreting the definition of used oil contained in the statute to include used synthetic oils, including those derived from coal or shale or from a polymer based starting materials. The Agency explained its rationale for including synthetic oils in the definition of used oils in the preamble for the November 1985 proposed used oil listing (50 FR 49262). The Agency's position continues to be that synthetic oils should be included in the definition of used oil due to the fact that these oils are generally used for the same purposes as petroleum-derived oils, are usually mixed and managed in the same manner after use, and present the same level of hazard as petroleum-based oils. In addition, the Agency believes that Congress could not envision how prevalent synthetic oils would become when it passed the UORA in 1980. Congress surely would not have intended a result where large amounts of vehicle engine oils are not covered by RCRA section 3014.

The commenter-submitted data concerning synthetic oils suggest that properties of synthetic oils that are polymer based are akin to oils produced from crude base stock and can be used effectively as crude oil substitutes. When used, they become contaminated with physical or chemical impurities and are not readily distinguishable from used oils that are crude oil based.[4] Today's definition does not include oil-based products used as solvents refined from crude oil or manufactured from synthetic materials. The Agency has always viewed petroleum-based solvents as wastes separate and distinct from used oil. In the 1989 proposal for Land Disposal Restriction Standards, ignitable liquids encompass materials like solvents, paint thinners, contaminated oils, and various organic hydrocarbon. Some of these have been thought to contain organic constituents from the listed wastes F001–F005. (See 54 FR 48420, November 22, 1989.)

The definition of used oil promulgated today does not include used oil residues or sludges resulting from the storage, processing, or re-refining of used oils. EPA believes that the types and concentrations of hazardous constituents in used oil residues and sludges are different from those typically found in used oils, and therefore these residues and sludges warrant separate regulatory consideration. EPA is going to continue to study used oil residues and sludges, as well as all of the residuals from used oil re-refining activities. EPA may finalize the residual listings proposed in the 1991 Supplemental Notice or propose a listing determination for the specific used oil sludges and residuals in a future rulemaking. Residuals are covered under the existing RCRA regulations. Currently, these wastes are subject to the hazardous waste characteristics. If a residue, sludge, or residual resulting from used oil storage, processing, or re-refining exhibits one or more of the characteristics of hazardous waste, then it must be managed as a hazardous waste in accordance with all applicable Subtitle C requirements. However, as discussed later in this preamble, distillation bottoms derived from used oil re-refining are conditionally exempt from the used oil management standards promulgated today, as well as the Subtitle C hazardous waste regulations, when the distillation bottoms are used as ingredients in asphalt products. In the September 1991 Supplemental Notice, EPA proposed to list as a hazardous waste several residuals from used oil

[4] A letter from Mobil Corporation to EPA dated July 8, 1992. A report by Independent Lubricants Manufacturers Association, "Waste Minimization and Wastewater Treatment of Metalworking Fluids," 1990.

processing and re-refining operations. Distillation bottoms were among the residuals that EPA proposed to list. Following the 1991 Notice, EPA received data from several commenters indicating that distillation bottoms from the processing and re-refining of used oil do not fail the toxicity characteristic. EPA has no other recent data on the composition or toxicity of these residuals. In addition, commenters have indicated that the use of distillation bottoms as ingredients in asphalt materials is a very common practice. Furthermore, distillation bottoms, when used as asphalt extender materials, also may be regulated under the Toxic Substances Control Act, as applicable. EPA believes, based on the Toxicity Characteristic (TC) data provided by commenters, that the distillation bottoms from re-refining of used oil do not exhibit the characteristic of toxicity. Therefore, the Agency has deferred a listing decision for these residuals and has provided a conditional exemption from the hazardous waste regulations of parts 262 through 266, 268, 270, and 124 and the part 279 standards for certain residuals that are incorporated into asphalt (40 CFR 279.10(e)(4)).

V. Listing Determination for Recycled Used Oil

A. General

Section 3001 of RCRA provides the Agency with the general statutory authority under RCRA for identification and listing of hazardous wastes. In 1984, HSWA amended section 3014 of RCRA by specifically requiring EPA to exercise its hazardous waste identification and listing authorities and propose a listing determination for used automobile and truck crankcase oils and other used oils.

EPA's technical criteria for determining whether or not a solid waste should be listed as a hazardous waste are codified at 40 CFR 261.11. Section 261.11(a)(1) allows EPA to list a solid waste as a hazardous waste if the solid waste exhibits any of the characteristics of hazardous waste. Section 261.11(a)(3) directs that a waste shall be listed as hazardous if it contains any of the toxic constituents listed in appendix VIII and, after considering the following factors, the Administrator concludes that the waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. The factors to be considered in making this determination include toxicity, fate and transport, mobility and persistence, and the bioaccumulation potential of the constituents in the waste, as well as plausible mismanagement scenarios (40 CFR 261.11(a)(3)(vii)) and other Federal and state regulatory actions with respect to the waste (40 CFR 261.11(a)(3)(x)).

In making a listing determination for used oils destined for disposal, EPA paid considerable attention to the current Federal regulations governing the disposal of non-hazardous and hazardous wastes. EPA published a final listing determination for used oils destined for disposal on May 20, 1992 (57 FR 21524). EPA concluded that the existing EPA regulations, especially the toxicity characteristic, adequately regulate the disposal of used oils that exhibit a characteristic of hazardous waste. Other EPA programs (*e.g.*, the recently promulgated municipal solid waste landfill criteria, the stormwater requirements, and TSCA regulations), as well as other Federal and state regulations, adequately control the disposal of non-hazardous used oils that do not exhibit a characteristic of hazardous waste.

EPA has decided to use a similar regulatory approach for recycled used oils as the Agency used for used oils that are disposed. The Agency proposed in September 1991 that the listing of used oil as a hazardous waste may not be necessary if the Agency promulgates used oil management standards that are protective of human health and the environment. Commenters who responded to the September 1991 notice overwhelmingly supported this approach. EPA has decided to adopt this approach and consider the technical criteria for making a listing determination, given a universe of used oils that are managed in accordance with a protective set of management standards.

In making a listing determination for recycled used oils, EPA evaluated the technical criteria for listing a waste as hazardous, the fate and plausible mismanagement of used oils that are recycled, and the impacts of the management standards proposed in 1985 and 1991 and finalized today. EPA has determined that used oils that are recycled do not pose a substantial present or potential hazard to human health or the environment when the used oils are managed properly from the time they are generated until they are recycled. As discussed in the next section of this preamble, EPA believes that used oil that is recycled and handled in compliance with the used oil management standards promulgated today will not pose serious adverse risks to human health and the environment. Therefore, EPA is finalizing its decision not to list used oils that are recycled as hazardous waste. Integrally related to this "no listing" decision for recycled used oil, the Agency also is promulgating management standards for recycled used oils to assure protection of human health and the environment from potential damages due to the mismanagement of recycled used oils.

B. Summary of EPA's Listing Determination and Rationale for Recycled Used Oils

As discussed below, the Agency has determined that the major potential risks associated with the mismanagement of used oils during recycling can be adequately controlled through management standards promulgated under the authorities of RCRA section 3014. The used oil management standards promulgated today are designed to control the accumulation, storage, transportation, and general management of recycled used oils. The management standards promulgated today protect human health and the environment from potential mismanagement of recycled used oils without imposing undue regulatory and financial burdens upon the used oil recycling system. The goal of today's regulations is to ensure the recycling of all used oils in a safe and protective manner. These new Federal management standards address the major risks (discussed later) identified by the Agency, associated with management of used oil eliminating the need for the Agency to list used oils as hazardous waste per the listing criteria provided in § 261.11(a)(3).

Today's decision not to list recycled used oils is based on the adequacy of both existing Federal regulations and today's newly promulgated management standards to address the potential mismanagement of used oil, similar to the basis for the May 20, 1992 decision concerning used oil destined for disposal. Briefly, used oil mismanagement and related risks are controlled under other regulations and statutes; in particular, the 40 CFR part 280 underground storage tank (UST) regulations, the 40 CFR part 112 spill prevention, control and countermeasure (SPCC) program, the stormwater regulations, and the lead phase-down program. These regulations will be supplemented by the used oil management standards promulgated today for recycled used oils. As discussed in the preamble to the May 20, 1992 used oil regulation, the SPCC program requires facilities to have a contingency plan in place to ensure that

oil spills are prevented, controlled via containment measures, and responded to when oil spills occur and reach navigable waterways. The UST program similarly focuses on control and prevention of oil leaks from underground petroleum storage tanks including waste oil tanks. These two programs are clearly related to the management standards promulgated today and cover the used oil universe.

The management standards promulgated today specifically address the following major risks that EPA has identified with past practices in managing recycled used oil. These are:

1. *Improper storage.* EPA notes that in the past, used oil was both overaccumulated and handled carelessly, resulting in a number of release incidences, from used oil storage units. These releases have been documented at off-site processors and re-refiners.[5] Today's management standards have stringent secondary containment and spill cleanup provisions for used oil processors and re-refiners. Also, storage of used oil in unlined surface impoundments (unless only *de minimis* amounts of used oil are present) is banned outright.

2. *Road Oiling.* EPA has documented several cases of environmental degradation that were caused by oiling roads with adulterated used oil. Today's management standards ban the use of used oil for road oiling and dust suppression purposes. However, States that currently allow used oil to be used for road oiling, and/or those States that want to set standards to control the use of used oil as a road oiling agency, may petition EPA to allow road oiling in the individual States.

3. *Adulteration with hazardous waste.* In a number of documented instances used oil has been used either deliberately or inadvertently as a carrier for the illegal disposal of hazardous waste. The addition of hazardous waste, or "adulteration," results in a more toxic mixture that may be spilled, burned, or even dumped. Today's management standards address adulteration in four main ways:

- The "rebuttable presumption" provision of 40 CFR part 266, subpart E, which currently applies to used oil burned for energy recovery, has been expanded to cover all used oils, regardless of intended disposition;
- Used oil processing and re-refining facilities have to develop specific sampling and analytical plans to document that they do not accept hazardous waste/used oil mixtures;
- All used oil handlers must label their tanks and containers used to store used oil with the term "used oil," to assist employees in identifying which units are used exclusively for used oil storage and to avoid inadvertent mixing with other wastes; and
- The existing invoice system in 40 CFR part 266, subpart E for used oil fuels has been supplemented with a tracking system consisting of acceptance and delivery records. Tracking of used oil shipments applies to all used oil transporters and processing and re-refining facilities. The tracking system will assist in identifying accountability, should mixing be suspected.

Finally, EPA notes that two other areas of potential risk are not addressed by today's management standards, but these risks already have been reduced by in past agency actions. As noted above, the Agency is postponing listing determinations on used oil processing residuals. Although cases of environmental damages due to improper management of residuals have been documented, these cases involved residuals from old, out-of-date processes (*i.e.*, acid clay re-refining). Data received in response to the September 1991 Supplemental Notice indicate that residuals from newer processes do not exhibit the toxicity characteristic. Residuals that are destined for disposal are still subject to the hazardous waste characteristics, and in 1990, EPA promulgated the toxicity characteristic rule, which replaced the extraction procedure (EP) toxicity test. If used oil residuals, including distillation bottoms derived from used oil processing and re-refining, are recycled as used oil fuels, then the management of the residuals is subject to the management standards promulgated today. Distillation bottoms that are recycled as feedstocks in the production of asphalt materials are not subject to the management standards promulgated today. EPA will gather and assess information on newer technologies before reaching any further decisions on the regulatory status of residuals that are currently generated by used oil re-refiners.

EPA is aware of concerns raised over burning used oil as a fuel. The 1985 used oil fuel specification, however, was established to control the risks from burning used oil, thus it represents the Agency's best current judgment as to the level of control necessary to protect human health and the environment. Thus, the burning of used oil in compliance with the existing standards is not a "plausible mismanagement scenario" requiring the listing of recycled used oil as a hazardous waste. The concerns focus on the current lead specification of 100 ppm and whether this threshold provides adequate protection. RCRA restricts the burning of off-specification used oil for energy recovery to certain industrial facilities (e.g., industrial furnaces and utility burners) and space heaters. While facilities that burn off-specification used oil fuel are not required to control air emissions under RCRA, some of these facilities may be subject to Clean Air Act controls. The Agency plans to study these issues and, should regulatory controls be deemed necessary, EPA may take appropriate actions under RCRA or other statutory authority.

As discussed above, these rules address the major risks associated with used oil recycling including improper storage, road oiling, and adulteration with hazardous waste. These standards should prevent the kinds of mismanagement that has occurred in the past resulting in environmental damage. EPA has concluded that the management standards promulgated today in combination with other existing regulations provide adequate protection of human health and the environment and thus make it unnecessary to list used oil as a hazardous waste. EPA traditionally has based listing determinations on the risks posed by land-based management scenarios (*e.g.*, plausible land disposal mismanagement). Today's used oil management standards do address the technical criteria for listing of waste as hazardous under 40 CFR 261.11(a)(3).

EPA wishes to reemphasize that its decision not to list recycled used oil as a hazardous waste is based solely upon its evaluation of the technical listing criteria contained in 40 CFR 261.11(a)(3). In particular, EPA has not taken into account the potential stigma associated with classifying used oil as hazardous waste raised by commenters on the 1985 and 1991 proposals. Some consideration was given to the impacts of used oil management standards on used oil recycling in developing the standards, as required by section 3014(a) of RCRA. Once the standards were developed, however, EPA made today's listing determination by evaluating the resulting standards solely in terms of whether they would address the risks caused by plausible mismanagement of recycled used oil. EPA notes that the used oil standards address the same types of mismanagement, particularly spilling and improper land disposal, typically addressed by Subtitle C controls. In addition, the used oil management standards will be enforced under the same authorities (*i.e.*, section 3008 of RCRA) as are the hazardous waste regulations. For all of the above reasons, EPA determined that listing of recycled used oil as a hazardous waste is unnecessary.

[5] *Summary Descriptions of Sixty-Three "Used Oil" Superfund Sites*, Final Draft, U.S. EPA, May 1992.

VI. Final Management Standards for Recycled Used Oils

A. General Approach for Used Oil Management

On November 29, 1985 (50 FR 49212), EPA proposed a comprehensive set of management standards for generators, transporters and processing and re-refining facilities that handle and recycle used oil. The management standards proposed in 1985 were very similar to the management standards promulgated for handlers of RCRA hazardous wastes since the Agency also proposed to list used oils as hazardous wastes. EPA received substantial public comment on the 1985 proposed requirements. On September 23, 1991 (56 FR 48000), EPA published a Supplemental Notice of Proposed Rulemaking that discussed the Agency's recent data collection activities for the identification and listing of used oil and discussed several options for used oil management standards. The intent of the management standards alternatives identified and discussed in the 1991 Supplemental Notice was not to replace or withdraw the 1985 proposed standards but to set forth options to (a) clarify or modify certain 1985 proposed standards, (b) defer selected standards (*e.g.*, financial responsibility), and (c) add new requirements (*e.g.*, recordkeeping and reporting requirements for certain generators and transporters). The Agency requested and received a substantial number of comments on the specific approaches that the Agency was considering and that were discussed in the 1991 Supplemental Notice.[6]

After reviewing and analyzing comments in response to both the 1985 proposed rulemaking and the 1991 Supplemental Notice of Proposed Rulemaking, the Agency is adopting an approach for the management of used oils, described below, under which one set of management standards (with certain exemptions for used oil mixtures that contain de minimis quantities of used oil) will control the management of used oils that are recycled. The Agency's basis for setting these standards includes documented release and damage information, quantities of used oil managed by each segment of the used oil management system, the adequacy of current management practices, and the potential economic impacts that could be imposed on the regulated universe.

Based upon evidence provided by documented damages at sites on the National Priorities List (NPL) and by updating the site-specific information previously used to support alternative management standards discussed in the 1991 Supplemental Notice, EPA has concluded that storage practices at facilities that handled used oil have resulted in the vast majority of known instances of used oil mismanagement. EPA also confirmed this finding through a review of enforcement cases prepared by Regional enforcement officials to identify environmental damages that occurred at RCRA facilities managing used oil in solid waste management units. EPA has documented damage and release information from both NPL sites and RCRA-permitted facilities. Detailed descriptions of the damages at 63 NPL sites where used oil was managed are presented in "Summary Descriptions of Sixty-Three 'Used Oil' Superfund Sites." A summary of used oil-related damages at RCRA-permitted facilities where used oil was managed is presented in "Summary Descriptions of Used Oil-Related Damages at RCRA-Permitted Facilities." A copy of each of these documents is in the docket for today's rule.

The Agency has determined that it is necessary to develop management standards to address the major risks discussed earlier associated with management (and plausible mismanagement scenarios) of used oils within the used oil recycling system. Primarily, the management standards promulgated today focus heavily on used oil processors and re-refiners and include storage and release response requirements, tracking and recordkeeping requirements, and bans on certain practices that have caused problems (*i.e.*, road oiling and the storage of used oil in surface impoundments not regulated under subtitle C of RCRA). The management standards cover all sectors of the used oil universe and are codified in a new part, part 279, of title 40 of the CFR.

Generally, EPA is establishing (1) controls on the storage of used oil in aboveground tanks and containers to minimize potential releases from these units; (2) tracking and recordkeeping requirements for used oil transporters, processors and re-refiners to provide a level of confidence within the system that used oils destined for recycling are in fact recycled by authorized facilities; and (3) standards for the cleanup of releases to the environment during storage and transit and for the safe closure of storage units at processing and re-refining facilities to mitigate future releases and damages. The Agency believes this approach will address potential hazards to human health and the environment from the management (including plausible mismanagement scenarios), of all used oils by used oil handlers.

EPA believes that, irrespective of whether used oils exhibit a characteristic of hazardous waste, used oils can pose some threat to human health and the environment (*e.g.*, used oils can form a sheen on water and make it non-potable). Therefore, it is important that used oils are handled in a safe manner from the point of generation until recycling, reuse, or disposal.

As stated in the 1991 Supplemental Notice of Proposed Rulemaking and as supported by most of the public comments received by the Agency, the Agency has decided to implement used oil management standards using a two-phased approach. The proposed phased approach is designed first to develop basic management standards to address the potential risks associated with management (including plausible mismanagement) practices of used oil recycling industry. Used oil mismanagement scenarios include storage, collection/shipping, and processing or re-refining. At a later date, as the Agency monitors the effectiveness of regulatory approach and receives more information, the Agency may adopt additional measures as necessary to address other potential problems.

The management standards adopted today are designed to address the potential hazards associated with improper storage and handling of used oil by establishing minimal requirements applicable to used oil generators, transporters, used oil processors, and re-refiners, and off-specification used oil burners. These requirements are selected from both the 1985 proposed standards and the 1991 proposed alternative management standards, taking into account public comments, an assessment of economic impacts on the regulated community, an assessment of how the management standards will impact the market for recycled used oil, and an assessment of the effectiveness of today's regulations, combined with other requirements, in controlling the risks posed by the improper management of used oil.

Today's management standards cover all used oil handlers and requirements including detection and clean up of used oil releases associated with storage and transportation, controls on storage,

[6] EPA received more than 800 comments during the comment period for the September 1991 Supplemental Notice. EPA also received over 100 comments on the notice after the close of the comment period.

analytical requirements to assure that used oils are not mixed with hazardous wastes, recordkeeping requirements, and the existing 40 CFR part 266, subpart E standards for the rebuttable presumption of mixing. Today's requirements also include closure standards for used oil processing and re-refining facilities. These requirements also address hazards associated with road oiling and disposal practices. The Agency has previously evaluated disposal requirements for hazardous and non-hazardous used oils under RCRA to protect against potential hazards from land disposal of used oil in the context of the Agency's decision not to list used oil destined for disposal (57 FR 21524, May 20, 1992).

After today's rule is implemented, EPA intends to evaluate the protective nature of this initial set of requirements and the effects these standards have had on the used oil recycling market, prior to developing additional standards or developing non-regulatory incentive programs to promote and increase used oil recycling. After such an evaluation, EPA may impose additional management standards at a later date. EPA will weigh the increase in potential environmental benefits against economic impacts prior to developing and imposing additional RCRA requirements, as required by RCRA section 3014.

As part of a comprehensive approach to addressing the management of used oil, EPA encourages the recycling of DIY-generated used oils (*e.g.*, household-generated used oils). Currently, DIY-generated used oils (approximately 193 million gallons annually) are not widely recycled. In fact, DIY-generated used oils are often improperly disposed. The Agency does believe, however, that since 1985, the recycling rate for DIY-generated used oils has been increasing as a result of public and private sector efforts.[7] EPA discussed several non-regulatory approaches (*i.e.*, economic incentives) to encourage DIY used oil recycling in the 1991 Supplemental Notice. EPA received a significant number of comments on these approaches (summarized in Section II of this preamble). The comments generally indicated that EPA should not go forward with the development of economic incentive programs at this time, but allow private sector programs and state-initiated programs to address the issue of DIY used oil collection. Since the 1991 Supplemental Notice was published, EPA has initiated a study of non-regulatory approaches for promoting DIY used oil collection. If the results indicate that incentives can promote recycling, then the Agency may address the establishment or use of incentives for encouraging the recycling of DIY-generated used oils later.

The management standards promulgated today contain basic, good housekeeping standards for the management of used oil. EPA considered an alternative approach in which no management standards would be issued until the Agency had developed a comprehensive, risk-based management scheme for used oil, which would address DIY-generated oil, used oil fuels burned by industrial burners, used oil transportation, and other used oil recycling and re-refining activities. Although this type of approach may have the advantage of providing time for EPA to collect more information on used oil management practices and avoiding piecemeal regulation of the industry, factors in favor of the phased approach include providing immediate protection to human health and the environment by addressing the primary sources of hazards identified by EPA including, improper storage, road oiling, and adulteration with hazardous waste. As stated above, the 1991 proposed two-phased approach provides the opportunity for changing regulatory provisions (if necessary) in Phase II, based on feedback from the implementation of Phase I. EPA believes that the approach adopted today will allow for adjustments as problems of over- or under-regulation are identified in the future.

B. Recycling Presumption

Various authorities are available to the Agency to control the management of used oils. RCRA section 3014 provides EPA with the authority to regulate generators, transporters, processing and re-refining facilities, and burners that handle recycled used oil or used oils that are to be recycled, regardless of whether or not the used oils are identified as hazardous waste. Section 3014 of RCRA does not, however, provide the Agency with regulatory authority over used oils that are not recycled. As stated in the May 20, 1992 rulemaking, the Agency believes that other RCRA authorities and other EPA and non-EPA regulations adequately control the management of used oils that are not recycled.

In the 1991 Supplemental Notice, EPA proposed a presumption of recyclability for all used oils. The presumption was based on industry data which suggested that once used oil enters the recycling system the majority of the used oil is recycled by burning for energy recovery or some other manner, such as refining. Under the proposed presumption, the Agency would have presumed that all used oils would be recycled, unless a used oil handler documented that the used oil cannot be recycled. In the 1991 notice, EPA also proposed several criteria used oil handlers could use to rebut the recycling presumption. The comments that EPA received in response to the recycling presumption were very supportive. Commenters indicated that the recycling presumption would ensure that used oils remained in the used oil recycling system. However, many commenters also indicated that the criteria that the Agency proposed for rebutting the presumption are not necessary, since they argued that all used oils can be recycled and the selection of a recycling method depends on the physical characteristics of the used oil (*e.g.*, water content, level of contamination) and the corresponding cost of recycling the used oil.

After considering the public comments supporting the recycling presumption, and the difficulties associated with promulgating and enforcing the proposed "recyclability criteria," the Agency has decided that specific criteria to rebut the presumption are not necessary. The Agency agrees with the commenters that the physical characteristic of the used oil and the used oil recycling market will dictate the conditions for recycling of used oil. However, the Agency has retained the recycling presumption because the presumption simplifies the used oil management system by ensuring that generators and others may comply with one set of standards, the part 279 standards promulgated today, regardless of whether the used oil exhibits a hazardous characteristic and regardless of whether the used oil will ultimately be recycled or disposed. In other words, the generator (or any other person who handles the oil prior to the person who decides to dispose of the oil) need not decide whether the used oil eventually will be recycled or disposed and thus need not tailor its management of the oil based upon that decision (and, if destined for disposal, whether the used oil is hazardous). Rather, the part 279 standards apply to all used oils until a person disposes of the used oil, or sends it for disposal.

The recycling presumption will not apply once the generator or other person disposes or sends the used oil for

[7] A survey conducted by the Convenient Automotive Services Institute, which was undertaken earlier this year, indicates that half the states have private sector-operated DIY used oil collection programs. Also, more than 30% of the states have public sector-operated DIY used oil collection programs.

disposal. Today's rule does not impose any recordkeeping requirements on such persons to demonstrate that the oil is destined for disposal. Rather, they must continue to comply with existing requirements for used oil disposal as listed in part 279, subpart I. The used oil disposal must be done in compliance with all applicable regulations (*i.e.*, the generator must determine whether the used oil exhibits any characteristic and, if so, must manage it as a hazardous waste). If used oil is recycled, however, no characteristic determination is required, but all parties handling the used oil must comply with the part 279 management standards.

For used oil processing and re-refining residuals, a hazardous waste determination will be necessary when the residuals are managed in a manner other than recycling for energy recovery or when re-refining distillation bottoms are used as a feed material for asphalt products (see discussion in Section IV of this preamble).

C. Rebuttable Presumption of Mixing for Used Oil

The rebuttable presumption currently codified at 40 CFR 266.40(c) provides that used oil containing more than 1,000 ppm of total halogens is presumed to be mixed with chlorinated hazardous waste listed in 40 CFR part 261, subpart D. Persons may rebut the presumption by demonstrating that the used oil has not been mixed with hazardous waste. EPA does not presume mixing has occurred if the used oil does not contain significant concentrations of chlorinated hazardous constituents listed in appendix VIII of part 261.

In 1985, EPA promulgated the used oil fuel specification. EPA set the specification limit for total halogens at 4,000 ppm. EPA set this specification limit for total halogens based upon emission standards modelling results. EPA also promulgated the rebuttable presumption of mixing in 1985. The rebuttable presumption limit for halogen content was set at 1,000 ppm, based upon probable mixing scenarios. The Agency believes (due to enforcement experience) that used oils exhibiting a total halogen level greater than 1,000 ppm have most likely been mixed with chlorinated hazardous wastes.

The Agency wants to discourage all mixing of used oils and hazardous wastes. However, EPA understands that some used oils (e.g., metalworking oils with chlorinated additives) may exceed the 1,000 ppm total halogen limit without having been mixed with hazardous waste. In these cases, the generator can rebut the presumption of mixing by documenting the source of the halogens and the used oil is subject to the part 279 management standards and is not subject to the subtitle C management system. However, even if the presumption of mixing is rebutted, if the total halogen level in the used oil exceeds 4,000 ppm, the used oil will not meet the used oil specification limit for total halogens. Therefore, if the used oil is to be burned for energy recovery, and the used oil will have to undergo further processing to meet the used oil fuel specification (to lower the total halogen level) or the used oil must be burned as off-specification used oil fuel (in which case the used oil fuel handlers must be in compliance with the requirements of part 279, subpart G). In cases where the used oil generator cannot rebut the presumption of mixing, the used oil generator must manage the mixture of used oil and hazardous waste as a hazardous waste (in compliance with all applicable Subtitle C management requirements).

In the 1991 Supplemental Notice, EPA proposed to apply the rebuttable presumption for used oil fuels to all used oils. Commenters favored extending the applicability of the rebuttable presumption for used oil fuels to all used oils that are recycled in any manner. EPA has decided to expand the presumption to cover all used oils (with two exceptions, discussed below) and has amended 40 CFR 261.3 to make the provision applicable to all used oils. Under this presumption, used oils containing more than 1000 ppm total halogens are presumed to have been mixed with a halogenated hazardous waste and therefore must be managed as hazardous waste. Used oil handlers may rebut this presumption by demonstrating that the used oil does not contain hazardous waste. EPA is recommending the use of SW–846 method 8010 in rebutting the presumption of mixing.

In today's rule, EPA is removing the current requirements of 40 CFR part 266, subpart E and recodifying these requirements in the new part 279, as explained later in this preamble. In the case of the rebuttable presumption, EPA is reinstating the rebuttable presumption as part of the definition of hazardous waste at 40 CFR 261.3. The Agency is amending the definition of hazardous waste in this manner to clarify that the rebuttable presumption will now apply to all used oils and that all used oils that contain greater than 1,000 ppm halogens must be managed as a hazardous waste, unless the presumption can be rebutted.

EPA solicited comments on the possible elimination of a distinction between a 1,000 ppm halogen limit for rebuttable presumption of mixing and the 4,000 ppm level for total halogens in specification fuel. EPA received favorable comments from the public. EPA, however, has decided not to address this issue in today's rulemaking. The management standards established today cover basic management practices and establish 1,000 ppm level for the rebuttable presumption of mixing for all used oils. The 4,000 ppm total halogen limit for specification fuel remains unchanged for now.

Today, EPA is amending the rebuttable presumption of mixing to conditionally exempt two types of used oils from the requirement to document the rebuttal. EPA is providing a conditional exemption for both used metalworking oils containing chlorinated paraffins and used compressor oils containing CFCs.

1. Metalworking oils

EPA is providing a conditional exemption from the rebuttable presumption of mixing for used metalworking oils/fluids containing chlorinated paraffins, on the condition that these oils/fluids are processed through a tolling agreement to reclaim the metalworking oils/fluids. Many metalworking oils/fluids contain greater than 1,000 ppm total halogens, not because they are mixed with chlorinated hazardous wastes, but due to the presence of chlorinated paraffins in the oils/fluids. Today's amendment to the rebuttable presumption is partially a clarification, because used metalworking oils that are not mixed with hazardous waste (but do contain greater than 1,000 ppm halogens) could have been the subject of a successful rebuttal. This exemption will relieve generators of such oils/fluids of the burden and responsibility of documenting the source of the halogens when the generator has entered into a tolling agreement to have metalworking oils/fluids recycled. Generators, as well as other handlers, of metalworking fluids/oils who have not entered into a tolling agreement to provide for the recycling of the oils/fluids remain subject to the rebuttable presumption and will have to continue to document that the oils/fluids are not mixed with chlorinated hazardous wastes. The Agency is providing and codifying this amendment for generators and processors/re-refiners with tolling agreements because the Agency believes that such private arrangements restrict the handling of the oils/fluids and provide for a mutual interest in preventing any potential contamination of the oils/fluids to assure that the oils/fluids can be recycled (*i.e.*, adding

solvents to metalworking oils would reduce the value of the used oil as a metalworking oil—adding solvents may not reduce the value of the used oil if it is used as a fuel, but it is possible that it may be deemed as a mixture of used oil and hazardous waste if significant quantities of F001 and F002-halogenated constituents are detected).

2. Compressor Oils From Refrigeration Units Containing CFCs

EPA also is amending the rebuttable presumption to exempt CFC-contaminated used oils generated and removed from refrigeration units and air conditioning equipment, on the condition that these used oils are not mixed with other wastes, that the used oils containing CFCs are subjected to CFC recycling and/or reclamation for further use, and that these used oils are not mixed with used oils from other sources. The remaining used oil must be recycled appropriately in compliance with today's standards. The presence of CFCs in compressor oils removed from refrigerant units will cause the use oils to exhibit a halogen level greater than 1,000 ppm, even after the majority of the CFCs are removed and/or recycled. This exemption, like the exemption provided for metalworking oils, will relieve generators of used compressor oils of the burden and responsibility of documenting the source of the halogens. Generators and other handlers of CFC-contaminated compressor oils must keep the used oils that are contaminated with CFCs separate from other used oils that are not exempt from the rebuttable presumption, since other used oils may be mixed with chlorinated hazardous wastes. It is important to note that although the rebuttable presumption does not apply to used compressor oils containing CFCs or used metalworking oils, these used oils remain subject to appropriate part 279 standards. For example, used oils must contain less than 4,000 ppm total halogens to be considered specification used oil fuels.

Used compressor oils containing residual levels of CFCs after the CFC recycling/reclamation and used metalworking oils are subject to the specification limits for used oil fuels if these oils are destined for burning. EPA wants to discourage the burning of used oils with significantly elevated levels of halogens in space heaters or non-industrial furnaces or boilers. Pending further study, the Agency may restrict the on-site burning of metalworking and CFC-contaminated used oils sometime in the future. All burning of used oil containing high levels of halogens must occur in compliance with the RCRA regulations established for the burning of hazardous waste or used oil as applicable.

D. Summary of New Part 279

As mentioned above, today's action promulgates management standards for recycled used oil to meet the legislative mandate of the Used Oil Recycling Act of 1980. These standards are a combination of the 1985-proposed management standards and the alternative management standards proposed in the 1991 Supplemental Notice. The detailed discussion concerning applicable requirements is provided under individual categories of used oil handlers; Tables VI.1 to VI.7 give specific regulatory citations for the individual management standards contained in today's rule.

1. Applicability

a. *General.* As indicated in the 1991 Supplemental Notice, the used oil management standards promulgated in today's rule will be codified in a new part 279 of Title 40 of the Code of Federal Regulations. The regulations in part 279 apply to all used oils, regardless of whether or not they exhibit a hazardous waste characteristic. The management standards promulgated today apply to household-generated and do-it-yourself (DIY)-generated used oils only when these used oils are collected and aggregated. Such used oils may be collected and aggregated at individual privately-owned or company-owned service stations with DIY oil collection programs, auto centers or other state or local government-approved, community-based used oil collection centers.

Today's requirements cover all used oil handlers and all types of used oils. Table VI.1 summarizes the general standards. EPA believes that all used oils, once generated, must be stored properly and must enter the used oil recycling system. In addition, as discussed below, EPA presumes that all used oils are recyclable either as a fuel or a feedstock.

TABLE VI.1.—USED OIL

[General standards]

Requirement	New or existing	Regulatory citation
Recycling presumption	New	§ 279.10(a).
Mixtures of used oil with hazardous waste	Existing	§ 279.10(b).
Rebuttable presumption for used oil	Existing	§ 279.10(b)(1)(ii) and § 261.3(a)(2)(v).
Exceptions from rebuttable presumption for CFC and metalworking oils.	New	§ 279.10(b)(1)(ii) (A) and (B) and § 261.3(a)(2)(v) (A) and (B).
Mixtures of used oil with non-hazardous waste	Existing	§ 279.10(c).
Mixtures of used oil with products	New	§ 279.10(d).
Materials derived from used oil	New	§ 279.10(e).
Conditional exemption—wastewater	New	§ 279.10(f).
Used oil introduced into crude oil or natural gas pipelines	New	§ 279.10(g).
Used oil on vessels	New	§ 279.10(e)(3), § 279.10(h), and § 279.20(a)(2).
PCB contaminated used oils	New	§ 279.10(i).
Used oil specification	Existing	§ 279.11.
Surface impoundment/waste pile prohibition except for units operated under Part 264/265 requirements.	New	§ 279.12(a).
Prohibition on use as a dust suppressant	New	§ 279.12(b).
Prohibition on burning in other than certain units	Existing	279.12(c).

b. *Recycling presumption.* The management standards in part 279 apply to all used oils that can be recycled. EPA presumes that all used oils are recyclable and, therefore, all used oils must be managed in accordance with the management standards promulgated today. In the event a used oil handler disposes used oil on site or sends for disposal, the handler must comply with the applicable regulations (*e.g.*, determine whether the used oil exhibits any characteristic of hazardous waste and if it does, must manage the used oil as a hazardous waste). This provision is

codified today as subpart I of part 279. See section VI. B. for additional discussion.

The commenters to the 1991 Supplemental Proposal overwhelmingly favored implementation of the recycling presumption. However, many commenters stated that the criteria provided for rebutting the recycling presumption (*e.g.*, water content, BTU value) would be difficult to comply with, and therefore EPA should not develop such criteria. In addition, commenters stated that all used oils are recyclable and the extent of recycling depends on the cost to generators. For example, if the used oil is actually a mixture of oil and water, then the cost of recycling the mixture would be higher than recycling used oil that is straight out of engines or from metalworking operations. Upon further evaluation of comments, the feasibility of applying these criteria for a rebuttal, and the analytical requirements accompanying the proposed criteria, the Agency decided against finalizing the specific criteria for rebutting the presumption of recycling. The Agency believes that recycling is a more viable alternative than disposing of used oil as a characteristic waste. Therefore, used oil handlers will react to market conditions, thus selecting recycling over disposal. The Agency therefore has decided to rely on the decision to dispose used oil as a *de facto* criterion for rebuttal of the recycling presumption promulgated today.

c. *Mixtures.* The following section discusses management of mixtures of used oil and used oil-contaminated wastes. Used oils mixed with other solid wastes or with other materials (*e.g.*, virgin fuel oil) are regulated as used oil under the part 279 standards.

i. Mixtures of used oil and hazardous waste. Used oils that are mixed with listed hazardous wastes are subject to regulation as hazardous waste under 40 CFR parts 262 through 266, 268, 270, and 124. Used oils that are mixed with characteristic hazardous wastes may be managed as used oils under part 279 if the resultant mixture does not exhibit a characteristic. In addition, used oils that exhibit a hazardous waste characteristic (*e.g.*, ignitability or toxicity) by their own nature and are not mixed with a hazardous waste may be handled in accordance with today's part 279 used oil management standards and are exempt from (i.e., not subject to) additional Subtitle C requirements, if they are recycled.[8]

Mixtures of used oil and hazardous wastes generated by conditionally exempt small quantity generators regulated under 40 CFR 261.5 are subject to regulation as used oil. The hazardous waste from a conditionally exempt generator when mixed with used oil generated by this entity, may cause the used oil to exceed the halogen limit under the rebuttable presumption of mixing. This mixing has been permissible since 1985 under 40 CFR 260.40(d)(2) when used oil mixed with hazardous waste generated by a small quantity hazardous waste generator is burned for energy recovery. The existing requirement is recodified at 40 CFR 279.10(b)(3) today.

ii. Mixtures of used oil and other solid wastes. EPA encourages the separation of used oils from used oil/solid waste mixtures and from used oil-contaminated materials prior to management of the mixture. Used oils separated from mixtures containing other solid wastes should be recycled in accordance with the standards promulgated today. Used oils that have been separated from mixtures with other materials or solid wastes are subject to the management standards of part 279. For example, used oils recovered from oil filters, industrial wipers and other absorbent materials, and used oils recovered from scrap metals are all subject to the part 279 used oil management standards when they are recycled. Commenters were in favor of requiring proper management of wipers and sorptive materials contaminated with used oil, as long as the used oil has been removed and no free-flowing oil remains associated with the solid waste mixture.

In the September 1991 Supplemental Notice, EPA proposed a one drop test for determining when there is no free-flowing used oil remaining in a mixture. The Agency has decided against using the one drop test, because EPA is unable to address the question of how to determine when one drop is formulated. Instead, the Agency decided to apply a free-flowing concept to mixtures of used oil and other solid wastes. The used oil from such mixtures, when subjected to mechanical pressure devices such as cloth wringers/squeezers or gravity draining, can easily be removed so that no free-flowing oil remains associated with the other solid waste(s). Therefore, EPA has decided to apply the concept of no free-flowing oil, rather than a one drop test. EPA encourages the handlers of used oil and other solid wastes to remove used oil to the extent possible such that there is no visible sign of free-flowing oil in the remaining solid waste. The storage and handling of the mixtures prior to the separation of the used oil must be in compliance with the management standards for recycled used oil promulgated today. If any used oil that is removed from a mixture cannot be recycled, the generator of the used oil must manage the used oil in accordance with the disposal requirements of part 279, subpart I. Materials from which used oils have been removed must be managed safely and in accordance with all applicable RCRA regulations upon removal of used oil.

iii. Mixture of ignitable solvents and used oil. In the 1991 Supplemental Notice, EPA requested comments on whether the Agency should allow burning of mixtures of used oil and characteristic waste (i.e., waste exhibiting characteristics of ignitability) such as mineral spirits as a used oil fuel. The commenters stated that the burning of such mixtures can be performed in compliance with the used oil fuel specification requirements. The commenters also pointed out that mineral spirits, petroleum distillates are used in place of halogenated solvents as cleaning agents, degreasing fluids or part-cleaning solvents in automotive and vehicle maintenance industry and metalworking operations. The mineral spirits, petroleum distillates are then mixed with used oil to eliminate the characteristic of ignitability and then sent off-site for recycling as a used oil fuel. Based on the available data, the Agency has concluded that the mixing to manage ignitable solvents appears to be acceptable, provided the characteristic of ignitability of the ignitable solvents is removed.

EPA believes that if the solvents are hazardous only because of ignitability, and are not listed in part 261, subpart D, and do not exhibit the toxicity characteristic, then mixing the solvents in with used oil should not affect the chemical constituents or other properties of used oil. The solvents in question (i.e., mineral spirits) are petroleum fractions, are typically used by the same businesses that generate used oil, and are managed in a manner similar to used oil, i.e., burning for energy recovery or distillation to recover the solvent. As such, efficient and sound management can include mixing with used oil by used oil generators, and management by used oil processors and re-refiners. If the mixture exhibits the characteristic of ignitability, however,

[8] The Agency is currently evaluating several options to change the hazardous waste identification program (see 57 FR 21450; May 20, 1992). Depending upon which option(s) the Agency promulgates for hazardous waste identification, the mixture rule at § 261.3 may be altered or abolished. Hence, the regulation of used oils that are mixed with hazardous wastes may change.

this can mean that the mixing has changed the nature of hazards involved in managing the used oil, and this mixture should remain subject to hazardous waste controls.

d. *Used oil fuels.* Since the final used oil burning and blending rule was published on November 29, 1985, used oils burned for energy recovery have been regulated under 40 CFR part 266, subpart E. Today's rule removes subpart E from part 266 and incorporates (with minor modifications) the existing management standards for used oil marketers and burners (including the used oil fuel specification) into part 279. Used oil burned for energy recovery is subject to regulation under subpart G of part 279, unless the used oil is mixed with hazardous waste. Mixtures of used oil and hazardous waste that are burned as fuel for energy recovery in an industrial boiler or furnace will continue to be subject to 40 CFR part 266, subpart H, the standards for hazardous waste burned in boilers and industrial furnaces.[9]

(Note: Used oils that are identified as hazardous wastes may be burned for energy recovery in compliance with part 279 instead of 40 CFR part 266, subpart H, provided the used oil fuel is hazardous solely because it exhibits a characteristic of hazardous waste by its own nature or was mixed with hazardous waste generated by a conditionally exempt small quantity generator regulated under 40 CFR 261.5.)

e. *SPCC Program.* Today's rule regulates the storage of used oils in aboveground tanks and containers. Used oils stored in underground storage tanks remain subject to the standards of 40 CFR part 280. Under section 311 of the Clean Water Act, EPA has promulgated regulations for the prevention of oil spills into navigable waterways. These rules are known as the Spill Prevention Control and Countermeasure (SPCC) regulations and are codified at 40 CFR part 112. The SPCC requirements apply to non-transportation-related facilities located in the proximity of navigable waters; they cover facilities with underground storage capacity over 42,000 gallons, aboveground storage capacity greater than 1,320 gallons, or single tank capacity of 660 gallons. The SPCC definition of oil is very broad and covers all petroleum and oil product-storing facilities handling waste oil, fuel oil and "oil refuse;" therefore, persons and facilities storing used oil may already be subject to the SPCC regulations. The used oil facilities covered under the SPCC regulations will continue to be subject to those requirements independent of the used oil storage requirements promulgated today for the used oil industry participants.

The SPCC regulations are designed to address prevention of oil spills and the associated contamination or threat of contamination of surface water. However, the regulations do not specifically address the mitigation of discharges that contaminate soil and/or ground water without posing a threat of contamination of surface waters. In addition, the National Oil and Hazardous Substances Contingency Plan (NCP) at 40 CFR part 300 requires removal of oil forming a sheen on surface water but does not require cleanup of oil-contaminated areas that do not pose a threat of contamination of surface waters. EPA believes that approximately 50 percent of the used oil generator universe, most of the used oil transporters and processors and re-refiners, and more than half of the off-specification used oil burners are likely to be covered under the SPCC program. EPA also believes that less than 10 percent of the used oil industry participants are excluded from the SPCC program because they are not located in the vicinity of navigable waterways.[10] When today's used oil management standards become effective, the aboveground used oil storage and processing tanks and containers located at used oil transfer facilities owned or operated by used oil collectors/transporters, used oil processing and re-refining facilities, and off-specification used oil burner sites will be subjected to the RCRA section 3014 requirements. These used oil handlers also will be subject to the applicable SPCC regulations in 40 CFR part 112.

f. *Storage in Underground Tanks.* Used oil handlers who store used oil in underground storage tanks (USTs)[11] must comply with the standards in 40 CFR part 280. The technical standards for USTs, including USTs that are used to store used oils, were promulgated after the 1985 proposed used oil management standards. The Agency stated in the preamble to the UST final rule (53 FR 37112) that used oil, when stored in underground tanks, presents risks similar to other petroleum products stored in USTs. As a result, EPA determined that owners and operators of used oil USTs must comply with the standards promulgated for petroleum USTs.

g. Conditional Exemptions

i. Distillation Bottoms from Re-refining of Used Oil. As proposed in 1985, EPA is promulgating an exemption from the part 279 standards for distillation bottoms derived from used oil re-refining processes on the condition that the distillation bottoms are used as ingredients in asphalt paving and roofing materials. Commenters have indicated that the use of distillation bottoms to make asphalt paving materials is a common practice. Commenter-submitted data also indicate that distillation bottoms from re-refining processes do not exhibit the toxicity characteristic, and the Agency has no data to refute this claim. Therefore, EPA sees no reason to prohibit or restrict the use of re-refining distillation bottoms in the production of asphalt materials and is therefore excluding used oil residuals used in this manner from the definition of hazardous waste.

ii. Inserting of used-oil in crude oil or natural gas pipelines. Several commenters, in response to the 1985 proposed management standards, requested that EPA exempt upstream crude oil operations from the used oil management standards. These commenters believed that the practice of returning used oil to the refinery through the crude oil pipeline affords a high level of protection to human health and the environment, and additional requirements are unnecessary. Some commenters suggested that natural gas processing plants who may introduce used oil in the natural gas process stream should be exempted as well.

In response to these comments, EPA agrees that once introduced to a pipeline at crude oil or natural gas processing facilities, the possibility of releases to the environment is not greater for used oil than for crude oil and, therefore, is providing an exemption from the management standards for used oils that are placed directly into a crude oil pipeline. Similar exemption is provided to the owners/operators of natural gas

[9] Used oil that is mixed with hazardous wastes and is incinerated (*i.e.*), burning does *not* include energy recovery) must be incinerated in units that are in compliance with subpart O of 49 CFR parts 264/265. Any used oil that is incinerated in units regulated under parts 264/265, subpart O, must be managed in accordance with all applicable part 279 requirements prior to its incineration.

[10] See the background document pertaining to how the costs and benefits of today's rule were derived for a further explanation of how many facilities are not subject to the SPCC requirements. The background document is available in the docket for today's rule.

[11] In 40 CFR 280.12, underground storage tank is defined as any one or combination of tanks that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is ten percent of more beneath the surface of the ground.

processing plants may choose to introduce used oil generated on site into a natural gas pipeline. The exemption applies to such used oils after the used oils are placed into the pipeline. Prior to being placed into a crude oil pipeline, the used oils are subject to all applicable used oil management standards promulgated today as part of part 279, including all used oil storage requirements, because at that point, the used oil could be released through leaks or spills, as could any other used oil.

iii. Used oil/diesel fuel mixtures. Some used oil generators blend the used oils they generate from the diesel-powered vehicles they own or operate with diesel fuel for use in these vehicles. As EPA explained in the 1985 proposed rule (50 FR 49220), this blending should result in fuel that is very low in toxic contaminants. EPA also explained in 1985 that mixing of used oils with diesel fuel is often recommended by diesel engine manufacturers. In addition, data available to EPA suggest that used diesel engine crankcase oils are quite low in contaminants as generated. Since diesel fuel is itself typically low in toxic metals, a dilution ratio that assures a high concentration of diesel fuel to used diesel crankcase oils would seem to ensure the resultant blended fuel will meet the used oil fuel specification. EPA also believes that such blending is not done on a very frequent basis and the resultant blended fuel is kept on site for use in the generator's own vehicles. Therefore, EPA is exempting this activity from the processing and re-refining facility standards of part 279 for generators who engage in this practice on-site and use the resultant fuel only in their own vehicles. Such generators are, however, still subject to the generator standards of subpart C of part 279, prior to mixing the used oils with diesel fuel, and the resulting fuel must be managed in accordance with the used oil fuel specification regulations.

iv. de minimis wastewater mixtures. As proposed in 1985, the Agency has decided to exempt wastewaters contaminated with *de minimis* quantities of used oil from the part 279 requirements. These wastewaters are covered under the Clean Water Act regulations. The majority of commenters supported such an exemption. EPA is today finalizing the definition for *de minimis* quantities of used oil that was proposed in 1985: "small spills, leaks, or drippings from pumps, machinery, pipes, and other similar equipment during normal operations or when small amounts of oil are lost to the wastewater treatment system during washing or draining operations." As discussed above, used oils recovered from wastewaters, however, will be subjected to the part 279 used oil management standards and must be managed accordingly. In addition, if such wastewaters are discharged to a surface water, the wastewater must meet all applicable NPDES limits promulgated under section 402 of the Clean Water Act. Wastewaters discharged to POTWs must meet the applicable pretreatment standards established pursuant to section 307(b) of the Clean Water Act.

v. PCB-contaminated used oils. Used oils that are contaminated with PCBs and regulated under 40 CFR part 761 are not subject to the used oil management standards promulgated today as 40 CFR part 279. The Agency believes that the current requirements in part 761 for PCB-contaminated wastes adequately control the management and disposal of used oils containing PCBs.

vi. Used Oils sprayed onto coal. When used oils are sprayed onto coal to suppress dust during the transport of coal, the used oil/coal mixture destined for energy recovery is considered a used oil fuel and is regulated under part 279 subpart G. However, used oils that remain in containers (including railroad tank cars and trucks) after the removal of the coal must be managed in accordance with all applicable part 279 standards.

h. *CERCLA Liability Exemption and Its Applicability to Service Station Dealers.* Service Station Dealers (SSDs), as defined by section 101(37) of CERCLA, will become eligible for the exemption from CERCLA liability for recycled oil as a result of today's rule, provided that they meet the requirements of section 114(c) of CERCLA. The exemption is limited to generator liability under section 107(a)(3) of CERCLA and transporter liability under section 107(a)(4); it does not cover owner and operator liability under section 107(a)(1) and (2). The exemption applies to liability for injunctive relief under section 106(a) and for cost recovery under section 107. In order to qualify for the exemption, an SSD must meet the following requirement of sections 114(c) and 101(37): (1) The SSD must be in compliance with the used oil management standards that EPA is promulgating today, discussed in sections VI.D.2 and VI.D.3, respectively, of the preamble; (2) the used oil must not be mixed with any other hazardous substance; and (3) the SSD must accept "do-it-yourself" generated used oil for recycling. Further, the exemption applies only to "recycled oil" as defined in section 1004(37) of RCRA.

The used oil management standards, in particular, include corrective action requirements for used oil releases after the effective date of the rule (i.e., response to used oil releases). The SSD must comply with these and with other applicable requirements, i.e., the part 280 standards for underground storage tanks, and part 112 standards for aboveground containers and tanks, as appropriate. In addition, the SSD complying with the corrective action requirements for underground storage tanks used for used oil storage will become eligible for the exemption. The exemption is not available for the SSD's own facility.

SSDs becomes eligible to assert the exemption on the effective date of the used oil regulations under section 3014 of RCRA that include, among other provisions, a requirement to conduct corrective action to respond to any releases of recycled oil under subtitle C or subtitle I of such Act. (See CERCLA section 114(c)(4).)[12] Today's rules provide for corrective action by cross-referencing subtitle I for releases from underground tanks and the part 112 regulations for aboveground SPCC tanks. For containers and other aboveground tanks, today's rule establishes new requirements for responding to releases under RCRA, section 3014, a subtitle C authority. In non-authorized States, the rules become effective (insert date 6 months from publication). In authorized States, the rules will not become effective until the State adopts rules under its own authorities. Prior to State adoption, an SSD may be eligible for the exemption if it can demonstrate compliance with EPA's regulations. In both authorized and non-authorized states, after the rules take effect, EPA would generally not pursue an enforcement action against SSD for which the exemption potentially applies unless it has reason to believe that the SSD is not complying with the section 3014 regulations, or fails to meet any other conditions of CERCLA section 114(c) and 101(37). EPA will determine whether a CERCLA enforcement action is appropriate on a case-by-case basis. EPA's determination, of course, is not binding on other persons, including states, that might bring an action under CERCLA. In such cases, the SSD may have to show

[12] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) (Pub. L. 96-510), as amended by The Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499), December 1986, p. 71.

that it has complied with the used oil management standards and met the other conditions of section 114(c) and 101(37) through record or other means.

As mentioned above, EPA has determined today that SSDs must follow existing regulations promulgated under Subtitle I of RCRA to respond to releases of recycled oil from underground storage tanks (USTs). SSDs and other owners of underground tanks had to begin complying with these regulations in 1988. The exemption for SSDs, however, could not take effect until EPA determined that compliance with these regulations would satisfy section 114(c) of CERCLA. In authorized states, the states themselves must adopt regulations governing underground tanks. While EPA encourages the states to rely on the subtitle I rules, the states may adopt more stringent requirements. Hence, EPA believes that the standards for underground tanks do not "take effect" for the purpose of the section 114(c) exemption in an authorized state until that state adopts used oil management standards under its own authorities.

Finally, section 101(37)(C) of CERCLA provides that the President shall promulgate regulations further defining "service station dealer" pertaining to the "significant" percentage of gross revenues from motor vehicle fueling, servicing including lube and tune up, or repairing activities provided to the public on a commercial basis. The legislative history states, "To prevent the creation and use of 'service station dealerships' as a front for hazardous waste management firms or commercial generators of hazardous substances that want the benefit of this exemption from liability, a significant percentage of the business' gross revenue must be derived from the fueling, repairing, or servicing of motor vehicles. Business operations, such as large retail establishments or car and truck dealerships that have a legitimate, commercial automotive service component, are intended to be covered by this definition. However, a retail establishment that does not derive revenue from fueling, repairing, or servicing motor vehicles does not qualify under this definition. To the extent establishments that do not qualify under this definition produce large quantities of used oil, they are industrial generators and are to be treated like other generators."[13]

2. Standards for Used Oil Generators

a. *Applicability.* The standards for used oil generators have been promulgated as subpart C of part 279. Table VI.2 lists applicable requirements and provides regulatory citations. These standards apply to used oil generators as defined in subpart B of part 279. A used oil generator is any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulations. For example, generators include all persons and businesses who produce used oil through commercial or industrial operations and vehicle services, including government agencies, and/or persons and businesses who collect used oil from households and "do-it-yourself" oil changers. Household "do-it-yourselfer" used oil generators or private individuals who generate used oil through the maintenance of their personal vehicles are not subject to the used oil generators standards.

[13] H. Rep. No. 99-662, 99th Cong., 2nd Sess. (1986), at 226.

TABLE VI.2.—USED OIL

[Generator standards]

Requirement	New or existing	Regulatory citation
Used oil on vessels	New	§ 279.20(a)(2).
Mixtures of used oil and diesel fuel	New	§ 279.20(a)(3).
Farmers	New	§ 279.20(a)(4).
Generators who perform other management activities	New	§ 279.20(b).
Hazardous waste mixing	New	§ 279.21.
Type of storage units	New	§ 279.22(a).
Good condition above ground tanks and containers	New	§ 279.22(b).
Labelling of tanks and containers	New	§ 279.22(c).
Response to used oil releases from above ground storage units	New	§ 279.22(d).
On-site burning in space heaters	Existing	§ 279.23.
Off-site shipment	New	§ 279.24.
SPCC requirements, including spill prevention and control	Existing (applicable independently)	40 CFR part 112.
UST requirements, including corrective action and financial responsibility.	Existing (applicable independently)	40 CFR part 280.
Accumulation limit	NA	None.
Inspection requirements	NA	None.
Closure	NA	None.
Collection Centers:		
Do-it-yourselfer collection centers	New	§ 279.30.
Used oil collection centers	New	§ 279.31.
Used oil aggregation points	New	§ 279.32.

The Agency has decided to regulate all used oil generators under one set of minimum management standards. Today's rule does not exempt any class of generators based upon a generation rate. In the September 1991 Supplemental Notice, FPA proposed to eliminate the regulatory distinction between small quantity and large quantity used oil generators (the Agency had proposed such a distinction in the November 1985 proposed rulemaking). The majority of commenters who responded to the September 1991 Supplemental Notice on this issue supported the proposed elimination of the regulatory distinction for generators.

In the 1991 Supplemental Notice, while proposing to cover all used oil generators under the RCRA section 3014 management standards, EPA discussed the advantages of such an approach to the regulated community, regulating agencies, and do-it-yourself used oil generators. The major advantages that EPA envisions are as follows. Such an

approach minimizes complexity by placing all used oil generators under uniform regulatory requirements; it eliminates the need for measuring quantities of used oils collected and stored each month; it eliminates the concerns that generators could be bumped into a more stringent regulatory category if the collect DIY-generated used oils; and above all, it allows for a system whereby all used oil is collected, recycled, and managed in an environmentally sound manner, thus reducing hazards to human health and the environment. Another major advantage, as discussed earlier in section V.D.1.h., is that approximately 30,000 used oil generators who meet the CERCLA section 114(c) "service station" definition qualify for the liability exemption if they accept DIY-generated used oil and comply with the used oil management standards, including corrective action (*i.e.*, used oil spill response and clean up requirements).

EPA decided against providing a small quantity generator exemption for the following reasons:

- The generator standards established today are basic and minimal good housekeeping practices that include maintaining all tanks and containers in good condition, labeling tanks and containers, and cleaning up spills and releases of used oil. They are substantially less than those proposed in 1985 and 1991.
- Large generators who use tanks that exceed the capacity limits and other prerequisites established under the SPCC and UST programs are subject to the containment and corrective action requirements in those programs. These programs provide additional protection necessary at used oil generator sites appropriately beyond the basic standards contained in today's rule.
- The collection of DIY-generated used oil would be discouraged due to the inherent concern for generators of being bumped into a higher category (*e.g.*, if an exemption was set at 100 kg/mo, generators would be unwilling to accept DIY-generated used oils because of the concern that the additional quantities of used oil would require them to comply with the management standards).
- Generators may have to keep records of used oil generation activities to demonstrate that they qualify from an exemption. It is probable that some generators may dump used oil to show that they only generate a quantity of used oil that is less than the quantity limit for defining a small quantity used oil generator.
- An extensive education and outreach program would be necessary to explain the interface between the used oil generator exemption and the CERCLA liability exemption.
- Existing mismanagement practices at certain generator sites would continue, resulting in ongoing risks to human health and the environment.
- As discussed in Section X of this preamble, the costs of compliance are relatively small on a per facility basis, even though total costs to generators may be 39 to 66 percent of the total costs to the regulated community.

b. *Used oil generated on ships.* In the case of used oils generated by ships or vessels (as defined in 40 CFR 260.10), these used oils are not subject to the used oil management standards until the used oils are transported ashore. When used oils are removed from a ship or vessel and taken ashore, the owner or operator of the ship or vessel and the person or persons removing or accepting the used oil from the vessel are co-generators of the used oil and both parties are responsible for managing the used oil in accordance with the used oil generator standards in subpart C of part 279. The co-generators may decide which party will fulfill the requirements of subpart C. Bilge water that contains used oil but does not contain listed hazardous waste when brought ashore must be managed in compliance with the generator standards in today's rule prior to subjecting it to separation steps that use oil/water separators. Bilge water containing listed hazardous waste is subject to RCRA subtitle C regulations once brought ashore. EPA believes that large quantities of bilge water are not generally stored for an extended period but are processed soon after their arrival on the shore. After separation the used oil portion of the bilge water must be maintained in compliance with the used oil generator standards. The remaining wastewater separated from bilge water must be managed in accordance with the applicable RCRA regulations and any discharged is subject to applicable Clean Water Act regulations. (See §§ 279.10(e)(3) and 279.20(a)(2).)

c. *Management of Materials Contaminated with Used Oil.* As discussed above, used oil that is mixed with a hazardous waste must be managed as a hazardous waste in accordance with all applicable RCRA requirements. Persons who generate mixtures of used oil and other materials or solid wastes (*e.g.*, used oil filters, rags, sorptive minerals, sorbent materials, scrap metals) are subject to part 279. Used oil removed from mixtures must be managed in accordance with the requirements of part 279 and either sent off-site for recycling or reused on-site. If the used oil removed from the mixture cannot be recycled, the generator must comply with the requirements of subpart I of part 279 for disposal of the used oil. Mixture of used oil and solid waste (e.g., natural or synthetic sorbent materials) from which used oil can not be separated when burned for energy recovery is subject to used oil specification fuel requirements.

After separating used oils from other materials or solid wastes, the remaining material or solid waste must be managed in accordance with any and all applicable RCRA requirements. The generator must determine whether or not the materials that previously contained used oil exhibit a characteristic of hazardous waste (with the exception of non-terne-plated used oil filters; see 57 FR 21534), and if so, manage them in accordance with existing RCRA controls. If the material does not exhibit a hazardous characteristic (and is not mixed with a listed hazardous waste) then the material can be managed as a solid waste.

d. *On-Site Management of Used Oil.* As discussed above, generators who blend used oil with diesel fuel for use in their own vehicles need not manage the used oil/diesel fuel mixture in accordance with the generator requirements of part 279. EPA believes that used oil/diesel fuel mixtures should be stored properly to ensure against possible spills, fire, and explosion hazards. Prior to mixing with diesel fuel, these used oils are subject to the part 279 generator standards. Generators may use such a mixture in their own vehicles.

Used oil generators who dispose of used oil on-site must test the used oil or apply their knowledge to determine whether or not the used oil exhibits a hazardous waste characteristic. If the used oil exhibits a characteristic of hazardous waste, the used oil must be disposed in accordance with all applicable RCRA requirements. When disposing used oil that cannot be recycled, the generator must comply with subpart I of part 279, relating to proper management and disposal of used oils. Used oil generators processing used oil on site are subject to standards for used oil processors/re-refiners promulgated today.

e. *On-Site Storage.* Used oil generators are required to store used oil in tanks or containers and must maintain all tanks and containers in good operating condition. In maintaining all tanks and containers in good condition, generators must ensure that all tanks and containers are free of any visible spills or leaks, as well as structural damage or deterioration.

Generators storing used oil in aboveground tanks and containers must clearly label all tanks and containers with the term "used oil." Generators who store used oil in underground tanks must label all fill pipes with the words

"used oil." The labeling requirements are meant to assist generator employees in identifying all tanks and containers used to store used oil and to avoid unintentional mixing. In the 1985 proposed rule, EPA solicited comment on a requirement to label all used oil tanks and containers with the words "recycled oil." Commenters overwhelmingly responded that such a term would be confusing because tanks and containers are used to store used oil before it is recycled. Therefore, the majority of commenters favored labeling used oil storage units with the words "used oil."

Used oil generators who are covered under the Spill Prevention, Control, and Countermeasure (SPCC) program will continue to be subject to the requirements of 40 CFR part 112. Similarly, generators storing used oil in underground storage tanks (whether or not the used oil exhibits any characteristics of hazardous waste) must comply with the standards in 40 CFR part 280, which are independently applicable and enforceable. As discussed in the Supplemental Proposal, technical standards for underground storage tanks (USTs) have been promulgated since publication of the 1985 proposed rule. The Agency stated in the preamble to the UST final rule (53 FR 37112; September 23, 1988) that EPA believes that used oil, when stored in underground tanks, presents risks similar to other petroleum products stored in USTs. As a result, EPA determined that owners or operators of used oil USTs (including used oil generators) must comply with the tank upgrading, operation and maintenance, corrosion protection, corrective action, closure, and financial responsibility requirements promulgated under part 280 for other petroleum product USTs. The Agency believes that the Subtitle I standards are sufficient to protect human health and the environment from potential releases of used oil from USTs. In addition, commenters to the 1991 Supplemental Notice felt that subjecting underground storage of used oil to standards beyond those in part 280 was unnecessarily burdensome and duplicative.

Storage of used oil in lagoons, pits, or surface impoundments is prohibited, unless the generator is storing only wastewaters containing *de minimis* quantities of used oil, or unless the unit is in full compliance with 40 CFR part 264/265, subpart K. The Agency believes that such units do not provide adequate protection of human health and the environment against potential releases and damages. In fact, the Agency has documented numerous cases of environmental damage from the storage of used oil in these units (see Environmental Damage from Used Oil Mismanagement, Final Draft Report, U.S. EPA, August 30, 1991, which is available in the docket for today's rule).

f. *Response to Releases.* Whenever a release occurs to the environment from the aboveground storage tanks and containers, a used oil generator must respond in a timely manner by taking the following steps: (1) Stop the release, (2) contain the released used oil, (3) clean up and properly manage released used oil and materials used for cleaning up/containing the release, and (4) remove the tank or container from service, repair, or replace the tank or container before returning it to service.

This above requirement applies only when there is a release to the environment. Under this rule, this would not include releases within contained areas such as concrete floors or impervious containment areas, unless the releases go beyond the contained areas. EPA believes that used oil spills or leaks occurring at generator facilities in an area with a concrete floor inside a building (*e.g.*, in service bays, maintenance garages, metalworking and fabricating locations) are cleaned up upon discovery as a general operating practice using appropriate sorbent materials before the used oil reaches the environment. Such clean up operations prevent the potential contamination of unprotected soils in the vicinity of the storage and work areas. The facility owners or operators must make sure that adequate quantities of sorbent materials are available on site all the time and is used to contain spills or leaks occurring during the normal activities.

The response to release provision does not require clean up of past releases to the environment which occurred prior to the effective date of the used oil program within an authorized state in which a used oil facility is located. Releases of used oil from underground storage tanks are subject to the requirements of 40 CFR part 280, subpart F independently as applicable.

In addition to the provisions listed above for releases of used oil from aboveground tanks and containers, and in addition to the corrective action requirements for releases from USTs provided in 40 CFR part 280, subpart F, used oil generators are required, under CERCLA section 103, to report a release of hazardous substances to the environment when the release is equal to or in excess of the reportable quantity (RQ) for the particular substance. Used oils that are contaminated with CERCLA hazardous substances (*e.g.*, due to the presence of elevated levels of lead) contain CERCLA hazardous substances. Therefore, releases of such contaminants (*e.g.*, lead) into the environment in quantities greater than the reportable quantity must be reported to the National Response Center. The current RQs for contaminants are listed in 40 CFR 302.4. In addition, under 40 CFR part 110, any discharge of oil that violates applicable water quality standards or causes a film or sheen on a water surface must be reported to the National Response Center.

g. *Off-site transport.* Used oil generators are required to ensure that all shipments of used oil in quantities greater than 55 gallons are transported off-site only by transporters who have an EPA identification number. Used oil generators may transport, in their own vehicles, up to 55 gallons of used oil, that is either generated on-site or collected from DIY used oil generators, to a DIY used oil collection center, used oil collection center, or aggregation point (*e.g.*, one that is licensed or recognized by a state or municipal government to manage used oil or solid waste). A used oil generator is not required to obtain an EPA identification number for this off-site transportation activity. A generator may also self-transport up to 55 gallons of used oil, in the generators's own vehicle, to an aggregation point owned by the used oil generator without obtaining an EPA identification number. EPA selected 55 gallons as a cut off quantity because that is the size of one drum. Also, the Agency feels that any quantity of used oil less than 55 gallons cannot be economically collected and transported by a used oil transporter.

The DIY used oil collection centers, used oil collection centers, and aggregation points referred to above are recognized by EPA as separate and legitimate entities in the used oil management system. Definitions of these terms are provided in § 279.1 and all three types of facilities fall within the definition of used oil generator. A used oil collection center is any site or facility registered/licensed/permitted/recognized by a state/county/municipal government to collect used oil from regulated generators prior to its pickup by a used oil transporter with an identification number for offsite recycling. EPA believes that these facilities handle small quantities of used oil on an occasional basis and local government would monitor their operations and make sure that these

sites are operating per the local-government specified guidelines. Such used oil collection centers must use used oil transporters with EPA identification number when sending used oil for offsite recycling.

Used oil collection centers may accept used oils from DIY generators as well as regulated used oil generators (in quantities less than or equal to 55 gallons per shipment). EPA believes that used oil quantities of less than 55 gallons (*i.e.*, content less than a 55-gallon drum/container) are unlikely to be accepted by the used oil collectors/transporters for offsite shipment.

A used oil collection center accepting only do-it-yourself generated used oil for recycling also must comply with the generator standards of part 279, subpart C. These DIY collection centers may or may not be recognized by the State or county/local authorities to accept DIY oil. DIY collection centers are centers that are not authorized to accept used oil from regulated generators. They are generally operated by voluntary organizations or local authorities as convenient "drop off" places for consumers to bring in their crankcase oil for recycling or proper disposal, similar to other household generated hazardous waste (e.g., paint thinners, degreasing fluids, over cleaners, insect killers). These establishments may be temporary by nature (*e.g.*, parking lots, schools, government office buildings). DIY collection centers that are operated to encourage DIY recycling are not equipped to handle or collect large quantities of used oil brought in for a drop-off by non-DIY generators. These centers have few drums/containers to collect small quantities of used oil stored in a milk jug or oil can/bottle, that are brought in for recycling by individual households. An example of a DIY used oil collection center is a site run by a state or municipal program established to collect used oil from commercial and household generators, such as Project ROSE in Alabama. Unlike used oil transfer facilities, DIY collection centers handle small quantities of used oil generated by DIYers on an occasional basis and after collection send the DIY used oil for off-site management.

A used oil aggregation point is any site or facility where an individual generator aggregates and/or stores shipments of used oil generated at any of several generation sites owned by the same generator. Aggregation points also may accept DIY-generated used oil. The major distinction between collection centers and aggregation points is that aggregation points and the generation sites from which they collect used oil are under common ownership. EPA views aggregation points of used oil generators, DIY collection centers, and used oil collection centers as similar to on-site facilities of used oil generators and, therefore, is subjecting them to the generator standards in subpart C of part 279.

EPA believes that it is necessary to allow used oil generators to self-transport small quantities of used oil to off-site collection centers or aggregation points to encourage generators of small quantities of used oil, and generators who have several generation points, but generate very small quantities of used oil at one or a few of the generator's sites, to recycle their used oils. EPA believes that used oil aggregation points are convenient drop-off point for satellite generator sites operated under the common ownerships. Used oil management at these aggregation points must be in compliance with the used oil generators standards and used oil must be send for offsite recycling using a used oil transporter with an EPA identification number.

If generators of small quantities of used oil were required to offer these small quantities of used oil to a used oil transporter with an EPA ID number, the cost of employing the transporter may discourage the generator from recycling the used oil. In addition, some used oil transporters may only accept shipments of used oil above a certain quantity. Therefore, by providing this self-transporting provision, EPA believes that generators who generate small quantities of used oil in any one calendar month will be discouraged from storing used oil on-site for long periods of time, or from disposing of the used oil. In addition, EPA believes that the risk of spills from transporting such small amounts of used oil is relatively low, thus, specific tracking of such shipments is unnecessary to protect human health and the environment.

h. *Accumulation limit.* Although EPA proposed, both in 1985 and in 1991, to restrict the accumulation of used oils stored by used oil generators, today's rule does not contain an accumulation limit for such used oil storage. EPA has decided not to impose an accumulation limit on generator storage since some amount of used oil is almost always stored at generator sites. Also, since used oil is a marketable commodity, there is an incentive for generators to send used oil off-site for recycling rather than storing it on-site for prolonged periods. EPA believes that used oil is not stored at the generator sites for a prolonged period since long-term storage requires purchasing of additional storage units for increasing storage capacity. This may result in additional costs to businesses or it may require that they comply with other federal or state regulations or local ordinance requirements.

i. *Tracking requirements.* In the 1991 Supplemental Notice, EPA proposed three options for the tracking of used oil from generators to used oil recycling facilities (*e.g.*, processors, re-refiners, burners) to ensure that all shipments of used oil reached recyclers of used oil. Commenters favored the concept of tracking shipments of used oil. Since the 1991 Notice, EPA has re-evaluated the proposed tracking requirements and the public comments. EPA also considered the costs associated with the tracking options for generators and the associated paperwork burden. In addition, EPA re-evaluated the recordkeeping requirements for used oil generators and assessed the information maintained by generators in normal operating records. Based on these analyses, EPA has determined that information maintained by used oil transporters will provide sufficient records of used oil transport activities without burdening used oil generators with additional tracking requirements. Information collected when accepting used oil shipments, such as quantities and type of used oil collected, the name and location of used oil generators, and analytical data for the rebuttable presumption, would be maintained by the used oil collectors/transporters as part of the recordkeeping requirements finalized today. Using this information maintained by used oil transporters, the Agency can track a used oil generator, if needed. Therefore, the Agency has eliminated the proposed tracking requirements for used oil generators. EPA believes that used oil generators maintain used oil collection and shipment records as standard business information.

j. *Inspection requirements.* In the 1985 and 1991 proposals, EPA proposed daily inspection requirements for used oil generators to assure the discovery of used oil spills and releases at used oil generator facilities. Commenters opposed the proposed daily inspection requirements. Most of these commenters claimed that when generators are loading/transferring used oils, they check for leaks and spills and take appropriate action at that time to clean up the released oil and contaminated materials. Transferring operations do not occur daily at generator sites. SPCC inspection and clean up requirements will be applicable independently.

k. *Closure Requirements.* In the 1985 and 1991 proposals, EPA considered deferring closure requirements for used oil generators, based on the lack of risk data supporting the need for closure requirements at generator sites. Since 1991, while reviewing the available Superfund site information and RCRA enforcement case data, the Agency has not located any damage information specific to generator sites. This leads the Agency to believe that damages at used oil generator sites are not a substantial concern (*i.e.*, have not resulted in environmental damage of a significant magnitude that it has resulted in the site being identified as the NPL site). Therefore, the Agency believes that closure requirements for used oil generator sites are unnecessary at this time, hence EPA is deferring such requirements.

l. *Exemption for Small Farmers.* In response to comments expressing concern over the expansion of RCRA requirements to small farmers generating used oils from heavy farming equipment, machinery, and vehicles, EPA is providing an exemption from the generator standards for small farming operations that generate on an average 25 gallons or less of used oil per month in a calendar year. EPA is providing this exemption to these generators because EPA believes that most of these generators, especially family farms, are similar to households, whose solid waste management is unregulated under RCRA. Family-run and other small farms are similar to households in a number of ways: They tend to have about the same number of vehicles owned for personal use; they tend to service and maintain their family-owned vehicles and heavy farming equipment on-site; and, indeed, small farms typically have residences on-site which generate used oil and other exempt household wastes. Also, unlike small industrial generators who usually are located within close proximity to used oil collection centers or who can easily arrange for used oils to enter the used oil recycling system via a used oil transporter, many family farms and other small farming operations are not readily accessible to collection centers. They may be using used oil on site in space heaters for heating purposes during the winter months and hence, do not accumulate more than 25 gallons of oil per month on average which can be provided to used oil transporters for recycling. Therefore, EPA believes that small farms who generate on an average 25 gallons or less per month of used oil in a calendar year should be exempted from regulation, as are households.

EPA has set the generation limit for the small farmer exemption at, on an average, 25 gallons or less of used oil per month in a calendar year to exempt only small farms that may have special difficulties in locating a used oil recycling center or in otherwise recycling the used oils they generate. The 25 gallon cutoff is roughly equivalent to the more general SQG exemption for used oil generators the Agency had considered in the 1985 and 1991 proposals and the 100 kg/month exemption for the conditionally exempt small quantity generators of hazardous waste. EPA believes that small farms will have few pieces of equipment and thus generate only small amounts of used oil. Of the approximately two million farms in the U.S., over 99 percent would be exempt under this provision. Finally, since small farms pose similar problems for the used oil management system as DIY from households, EPA believes it may be more appropriate to consider non-regulatory alternatives to encourage the collection of used oils from small farms, rather than the management standards promulgated today.

EPA's intention in providing this exemption is not to exempt large farming operations or businesses from today's standards. EPA believes that large farming operations do not face the same difficulties in recycling the used oil they generate and these operations are better able to provide the used oils they generate to the used oil recycling system. The Agency is aware of current activities undertaken by brokers who are involved in collecting used oil generated by large farming operations and business.

EPA encourages small farmers, as well as household used oil generators, to recycle their used oil, and when available, to participate in community collection programs or used oil collection facilities by cooperatives, brokers, etc. As is the case with used oils collected from households, used oil that is collected from these farms at used oil collection centers and DIY-collection centers is subject to the part 279 standards when collected and accumulated at these collection centers.

Any use of used oil that can be construed as application to land (e.g. weed killing, spraying on plants) that is performed by exempt farming operations (or others) is discouraged since EPA is concerned with long term impacts of land application of used oil on the environment. Also, exempted farmers may be subject to state regulations that may limit such practices.

3. Standards for Used Oil Transporters

a. *Applicability.* A used oil collector/transporter is any person or business who collects used oil from more than one generator or transporter or a generator who transports shipments of more than 55 gallons of used oil and transports the used oil off-site to another party or establishment for recycling, disposal, or continued transport. Used oil generators who transport shipments of used oil in their own vehicles, in quantities of 55 gallons or less (*i.e.*, a drum/container holding this quantity) to used oil collection centers or aggregation points[14] are not within the definition of a used oil transporter. Household do-it-yourselfers who transport used oil to generators, collection centers, or aggregation points also are not included in the definition of a used oil transporter. Table VI.3 lists requirements for used oil transporters and provides the regulatory citations.

[14] Used oil collection centers and aggregation points are defined in Subpart A of Part 279.

TABLE VI.3.—USED OIL

[Transporter and transfer facility standards]

Requirement	New or existing	Regulatory citation
General requirements	New	§ 279.40(a) through (c).
Transporters who perform other management activities	New	§ 279.40(d).
Restriction on processing used oil	New	§ 279.41.
Notification and EPA identification number	Existing for transporters who are marketers; new for others	§ 279.42.
Used oil deliveries	New	§ 279.43(a).
DOT requirements	Existing (applicable independently)	§ 279.43(b).

TABLE VI.3.—USED OIL—Continued

[Transporter and transfer facility standards]

Requirement	New or existing	Regulatory citation
Used oil discharges	New	§ 279.43(c).
Rebuttable presumption for used oil	Existing for transporters managing used oil fuel; new for others	§ 279.44(a), (b), and (c).
Exceptions from rebuttable presumption for CFC and metal-working oils.	New	§ 279.44(c)(1) and (2).
Record retention for rebuttable presumption	New	§ 279.44(d).
Recordkeeping	New	§ 279.44(d).
Storage limit	New	§ 279.45(a).
Type of storage units	New	§ 279.45(b).
Good condition above ground tanks and containers	New	§ 279.45(c).
Secondary containment for containers and existing and new above ground tanks.	New	§ 279.45(d), (e) and (f).
Labelling of containers and tanks	New	§ 279.45(g).
Response to releases	New	§ 279.45(h).
Tracking—acceptance, deliveries, export, and recordkeeping	Existing for transporters who are marketers (invoices); new for others.	§ 279.46(a), (b), and (c).
Tracking—exports	New	§ 279.46(d).
Management of residues	New	§ 279.47.
SPCC requirements, including spill prevention and control	Existing (applicable independently)	40 CFR part 112.
UST requirements, including corrective action and financial responsibility.	Existing (applicable independently)	40 CFR part 280.
Inspections	None	None.
Closure	None	None.

Owners and operators of used oil transfer facilities are also defined as used oil transporters. A used oil transfer facility is any transportation-related facility where used oil shipments are held for more than 24 hours during the course of normal transport prior to final transport to another transfer facility(ies), a used oil processor/re-refiner, or a used oil burner. Transfer facilities include such areas as loading docks, parking areas, and tank and container storage facilities. All used oil transporters are required to comply with the standards promulgated in subpart E of part 279. In addition, used oil transporters who also handle other hazardous waste must be in compliance with all applicable RCRA subtitle C regulations for hazardous waste transporters.

Used oil transporters who process used oils (including blending used oils with virgin oils) are subject to the standards for used oil processing and re-refining facilities in subpart F of today's rule.

Any person who transports used oil in a vehicle previously used to transport hazardous waste must ensure that the vehicle meets the definition of an empty container per 40 CFR 261.7 prior to transporting used oil. If the transporter does not comply with § 261.7, the used oil shipment is considered to be a hazardous waste and must be managed accordingly. The definition of "empty" requires that all non-acutely hazardous wastes be removed using common industry practices and that no more than 0.3 percent of the waste by weight remain in containers greater than 110 gallons and no more than 3 percent by weight remain in containers with a capacity of less than or equal to 110 gallons.

Transporters who import used oil into the United States and transporters who export used oil to points outside of the United States are subject to the used oil transporter requirements of subpart E of part 279 from the time the used oil enters the United States until the time the used oil exits the borders of the United States.

b. *Restrictions.* Used oil transporters are prohibited from blending used oils with virgin oil to meet the specification levels for used oil fuels in § 279.11. If an owner or operator of a transfer facility conducts any used oil processing, including blending to market the used oil as a fuel, the owner/operator must comply with the requirements provided for used oil processors and re-refiners in part 279, subpart F. EPA clarifies here that blending different used oils together to consolidate shipments is allowed by used oil transporters. The only blending activity that transporters are prohibited from undertaking is the blending of used oils with virgin oils to meet the fuel specifications. EPA has determined that "incidental processing" (*e.g.*, settling) that may occur at transporter sites when used oil is in storage does not pose any risks similar to those associated with processing of used oil. EPA considers "incidental processing" at transporter facilities during shipment consolidation or transfer not to be equivalent to blending or processing of used oil to meet the specification requirements for used oil fuels. Consolidation for a purpose of collecting a shipment full of used oil to transfer to a used oil processor/re-refiner does not necessarily require any treatment. When a used oil transporter markets a consolidation of different loads of used oil as an on-specification used oil fuel to non-industrial boilers and furnaces, the transporter must comply with the 1985 marketer requirements (*e.g.*, claiming that it meets the specification levels for used oil burned for energy recovery) recodified in part 279 today. A transporter may market used oil as off-specification fuel upon consolidation of different loads of used oil without making any specification claims and must comply with the 1985-established requirements for marketers of off-specification used oil that are recodified in part 279 today.

c. *Notification Requirements.* Any used oil transporter who has not previously complied with the notification requirements of RCRA section 3010 must do so and obtain an EPA identification number. An EPA identification number can be obtained by submitting EPA Form 8700–12 to the appropriate EPA Regional Administrator or State Director. An EPA identification number also can be obtained by submitting a letter to the EPA Regional Administrator requesting an EPA identification number and containing the following information: Company name, name of the owner of the transporter company, mailing address, telephone number and address of the point of contact, type of transport activity (*e.g.*, transporter only, transfer facility, or transporter and transfer facility), location of transfer facilities, and the name and phone number of the contact

at each transfer facility. Upon receipt of a completed notification form, EPA will provide the transporter with a unique 12-digit identification number, which is required to transport used oil. Transporters who have previously notified the Agency of their hazardous waste activities (or notified EPA under the 40 CFR part 266, subpart E used oil fuel regulations) and received an EPA identification number need not renotify.

d. *Delivery of Used Oil Shipments.* A used oil transporter is required to ensure that a shipment of used oil reaches an "authorized" used oil processing or re-refining facility, a used oil burning facility, or another used oil transporter. Entities deemed to be authorized are used oil processing and re-refining facilities subject to part 279, subpart F; used oil burning facilities in compliance with part 279, subpart G; hazardous waste management facilities with a permit or interim status; part 258 disposal facilities; or another used oil transporter who has an EPA identification number.

A transporter who markets used oil fuels must comply with the used oil marketer requirements of 40 CFR part 279, subpart H. In the event a transporter undertakes this activity, the transporter must comply with the recordkeeping (invoicing) requirements of § 279.74.

e. *Shipping requirements.* Transporters and collectors are required by existing U.S. Department of Transportation regulations to meet certain standards if the used oil is a hazardous material, including all applicable packaging, labeling, and placarding requirements in 49 CFR parts 173, 178, and 179. In addition, under today's rule, used oil transporters and collectors must clean up any used oil discharge that occurs during transportation or take such action as may be required or approved by Federal, state, or local officials so that the used oil discharge no longer presents a hazard to human health or the environment. The Agency believes that these provisions are necessary to reduce the potential impacts of used oil that could be released into the environment.

f. *Used oil storage at transfer facilities.* A used oil transfer facility is defined in 40 CFR 279.1 as "any transportation related facility [15] including loading docks, parking areas, storage areas, and other similar areas where shipments of used oil are held during the normal course of transportation for a period longer than 24 hours but not exceeding 35 days." A transfer facility is regarded as a site for the temporary storage of used oil that is picked up from one or more original generators and is on its way (1) to a processing or re-refining facility for further processing to produce used oil fuel, non-fuel recycled oil products, or lube oil feedstock; (2) to be reintroduced into refinery operations; or (3) to be burned as a used oil fuel. Storage of used oil at a transfer facility for a period exceeding 35 days will cause the transfer facility to become subject to the standards for used oil processors and re-refiners in subpart F of part 279.

The requirements established today cover all used oil transfer facilities owned/operated by used oil transporters regardless of their location and regardless of the size of any single tank at the facility or the total storage capacity of the facility. The SPCC (40 CFR part 112) and UST (40 CFR part 280) requirements are independently applicable to such facilities.

EPA believes that some regulatory controls are necessary to ensure proper management of used oils at used oil transfer facilities. Improper management at these facilities could allow for the release of used oil to the environment, cause spills during transfer and loading/unloading operations, or result in the inadvertent adulteration of used oil with hazardous waste while in storage or in transit. To prevent such mishaps, EPA is adopting "good housekeeping" standards for transfer facilities to ensure that units (containers and tanks) used to accumulate and/or store used oil are kept in good condition and to minimize potential releases of used oil to the environment.

Storage of used oil at a transfer facility must occur only in containers and aboveground or underground tanks. EPA believes that storage of used oil in units other than containers or tanks (*e.g.*, surface impoundments or lagoons) at transfer facilities does not occur since transfer facilities are typically temporary storage areas where used oil is stored for periods of very short duration. Furthermore, as discussed elsewhere in today's notice, EPA believes that storage of used oil in surface impoundment is generally a poor practice. Thus, EPA believes it is appropriate not to allow it at transfer facilities. EPA believes that transfer facilities are not likely to hold used oil in surface impoundments but in case, such use occurs only surface impoundments that are in compliance with parts 264/265 requirements can be used for used oil storage. Today's rule prohibits the use of an unlined surface impoundment for used oil storage.

All aboveground tanks [16] and containers at transfer facilities must be kept in good condition (*i.e.*, no visible signs of deterioration or leaks) and containers must be in compliance with all applicable DOT regulations. Aboveground tanks and containers and all fill pipes for underground used oil storage tanks must be clearly labeled with the words "used oil" to minimize accidental mixing. In addition, the storage areas around aboveground tanks and under the storage containers must be equipped with oil-impervious floors and secondary containment structures (dikes and berms or retaining walls) capable of containing all potential spills and releases of used oil until the discovery and cleanup of spills and releases.[17] The floor under existing storage tanks must cover the entire area within the dike, berm or retaining wall except areas where portions of existing tanks meet the ground. EPA has determined that it is not necessary to require retrofitting of the floors of the existing tanks that are in good condition; it is not necessary to remove tanks temporarily to install an impervious floor directly beneath an aboveground tank that is in good condition. Any releases from the walls of existing tanks will be captured within the containment area and will be removed, while releases to the area outside of the containment area must be cleaned as required by today's release response requirements. EPA believes that used oil releases from tank overfills, spills, and loading/unloading activities are more likely than from the bottom of a tank or due to the loss of structural integrity of a tank.

However, the floor surrounding the area where the tank meets the ground must be impervious to oil. When installing new aboveground tanks, replacing damaged or deteriorated tanks, or reinstalling unfit tanks after restoring the structural integrity, an impervious floor under the aboveground tanks must be installed. This requirement is applicable to the aboveground tanks that are existing when the states adopt the part 279 used oil management standards and when the state rule containing the Federal used oil management standards takes effect. The

[15] For facilities subject to the SPCC regulation, the term "transportation-related" is defined in Appendix I of 40 CFR part 112.

[16] Aboveground tank is defined in § 279.1 as a tank used to store or process used oil that is not an underground tank as defined in part 280.

[17] For further discussion of the basis for the secondary containment requirement and the materials suitable for constructing impervious floors and dikes, berms, or retaining walls, see section VI.E.5. of today's preamble.

impervious floor under new storage tanks must cover the entire area within the containment structure. The effective date is the same as that discussed for existing tanks.

In the 1985 proposed rule and in the 1991 Supplemental Notice, EPA proposed secondary containment requirements for used oil storage tanks that are similar to the secondary containment provisions of 40 CFR part 264, subpart J. The Agency received a substantial number of public comments that disagreed with EPA's proposed secondary containment requirements. Most commenters disagreed with the proposed secondary containment provisions on the basis that the cost of full secondary containment for tanks and containers would be prohibitive for most used oil generators and transporters. The secondary containment requirements promulgated today for aboveground tanks and containers are substantially less burdensome, both technically and financially. Although these requirements will still impose some costs upon used oil transporters, the Agency believes that some level of secondary containment is necessary at transfer facilities to protect human health and the environment from potential used oil spills and releases. In fact, as documented by the Agency in the background documents supporting this final rule, past storage practices at used oil management facilities, including transfer facilities, have resulted in releases of used oil to the environment and, in some cases, substantial damages to human health and the environment.[18] EPA believes that the secondary containment requirements established today adequately protect against used oil releases to ground water and the existing SPCC requirements provide protection against spills reaching navigable waters. EPA has determined that secondary containment requirements similar to those in 40 CFR parts 264/265, subpart J are not necessary since the requirements promulgated today will effectively contain any spilled or released used oil within the containment structures. Also, the requirement that the entire containment structure be made of a material impervious to used oil will prevent the migration of used oil to soils, surface waters, and ground water.

Although the secondary containment requirements promulgated today are somewhat less burdensome than those required under 40 CFR parts 264/265, subpart J, any used oil transfer facility that is currently in compliance with the subpart J requirements (*e.g.*, the facility has double-walled tanks with double-walled or otherwise contained pipes) will be deemed in compliance with the secondary containment requirements promulgated today. EPA does want to clarify that all aboveground tanks or containers must be within a secondary containment structure that is impervious to used oil and capable of preventing the migration of used oil spills or releases to the environment.

An April 29, 1992, memorandum from EPA's Assistant Administrator for Solid Waste and Emergency Response [19] addresses aboveground storage tank technologies that may be used to provide secondary containment at SPCC-regulated facilities. The memorandum states that alternative aboveground storage tank systems that have capacities generally less than 12,000 gallons may provide protection of navigable waters substantially equivalent to that provided by the secondary containment systems listed in 40 CFR 112.79(c) of the SPCC regulation. An example of an alternative aboveground storage tank system that generally would provide substantially equivalent protection of navigable waters is a shop-fabricated double walled tank installed and operated with overfill prevention measures that include an overfill alarm, an automatic flow restrictor or flow shut-off, and constant monitoring of all product transfers including used oil. Used oil tanks meeting with the secondary containment equivalency discussed in the memorandum of April 29, 1992, are considered to be in compliance with the secondary containment requirements for aboveground tanks established in today's rule.

g. *Storage Limit.* Commenters to the 1985 proposed rule felt that the proposed 10-day limit on storage at transfer facilities was too short a period of time to accumulate and consolidate sufficient amounts of used oil for cost effective transportation. The Agency agrees with the commenters. In 1991, EPA proposed an alternative time limit (*e.g.*, 35 days) as a limit specifying the length of time of which used oil must be delivered to the final destination (*e.g.*, processors, re-refiners, or burners). Based on the favorable comments, EPA believes that at transfer facilities, used oil storage in normal course of operation typically occurs for less than 35 days. The Agency, therefore, has decided to allow used oil storage for no more than 35 days at transfer facilities. A transfer facility at which used oil is stored for more than 35 days must comply with the requirements finalized today for processing/re-refining facilities established under the 40 CFR part 279, subpart F. Also, EPA notes that the 35-day storage limit applies to the in-use storage tanks at transfer facilities and does not apply to the abandoned aboveground storage tanks used to store used oil, or to such tanks taken out of service. The requirements for the abandoned storage tanks are those currently in effect. For example, the owners/operators of transfer facilities must evaluate residues left in aboveground tanks taken out of service to make a hazardous waste determination (*i.e.*, whether the residues exhibit characteristics of toxicity, ignitability, corrosivity, or reactivity). If an aboveground tank at a transfer facility contains a hazardous waste, the tank will be managed in accordance with existing RCRA controls, including subpart J standards for tank closure.

Finally, the Agency concluded that a storage limit of 35 days at transfer facilities is protective of human health and the environment when applied in conjunction with the secondary containment requirements for aboveground storage containers and tanks promulgated today. EPA believes that storage at transfer facilities will be for a short duration when used oil is in transit between generators to processors, re-refiners, fuel oil dealers, and transfer facilities before reaching the ultimate recycler or burners. Any spills and leaks occurring during storage must be contained within the containment area, discovered, and cleaned up in a timely manner. If EPA, in the future, determines a need for a closure standard for transfer facilities to ensure that used oil contamination at a facility prior to the facility closing must be addressed then the Agency may take such a step.

Underground storage tanks (*i.e.*, those with more than 10% of the surface area of the tank(s) and associated pipes underground) used to store used oil at used oil transfer facilities remain subject to the requirements of 40 CFR part 280, independently. Also, many facilities remain subject to the Spill Prevention Control and Countermeasure requirements of part 112 of 40 CFR, independently.

[18] See "Summary Descriptions of Sixty-Three 'Used Oil' Superfund Sites" and "Summary Descriptions of Used Oil-Related Damages at RCRA-Permitted Facilities."

[19] See memorandum from Don R. Clay, Assistant Administrator, to EPA Regional Directors regarding "Use of Alternative Secondary Containment Measures at Facilities Regulated under the Oil Pollution Prevention Regulation (40 CFR part 112)," April 29, 1992.

h. *Response to releases.* Any spill or release of used oil from aboveground storage units (tanks and containers) at a used oil transfer facility must be stopped, contained, and cleaned up upon detection. Spilled used oils must be cleaned up and properly managed. If necessary, the unit must be removed from service, the contents removed, and the unit repaired prior to returning it to service. These requirements do not apply to past releases that have occurred at transfer facilities prior to the effective date of the used oil program within an authorized state in which a used oil facility is located. This requirement applies only when there is a release to the environment. Under this rule, this would not include releases within contained areas such as concrete floors or impervious containment areas, unless the releases go beyond the contained areas.

In the case of a release of used oil from an underground storage tank, the owner or operator of the used oil transfer facility must comply with the requirements of 40 CFR part 280, subparts E and F.

In addition to the provisions listed above for releases of used oil, and in addition to the corrective action requirements for releases from USTs provided in 40 CFR part 280, subpart F, used oil transporters are required, under CERCLA section 103, to report a release of hazardous substances to the environment when the release is equal to or in excess of the reportable quantity (RQ) for the particular substance. Used oils that are contaminated with CERCLA hazardous substances (*e.g.*, due to the presence of elevated levels of lead) are subject to CERCLA release reporting requirements. Therefore, releases of such contaminants into the environment in quantities greater than the reportable quantity must be reported to the National Response Center. The current RQs for CERCLA hazardous substances are listed in 40 CFR 302.4. In addition, under 40 CFR part 110, any discharge of oil that violates applicable water quality standards or causes a film or sheen on a water surface must be reported to the National Response Center.

i. *Rebuttable Presumption.* Since the rebuttable presumption now will apply to all used oils, EPA is requiring used oil transporters to determine the total halogen content as used oil shipments prior to accepting the shipments for transport. EPA believes that the majority of used oil transporters are already complying with this requirement to ensure that used oil has not been mixed with halogenated solvents, since the majority of used oil that is currently recycled is used as fuel for energy recovery and is therefore subject to 40 CFR part 266, subpart E, recodified today as 40 CFR part 279, subpart G.

If the halogen level exceeds 1,000 ppm, the used oil is presumed to be mixed with a halogenated hazardous waste, and must be managed as a hazardous waste, unless the transporter rebuts the presumption as described above. The transporter may accept such shipments of used oil as a hazardous waste transporter, but if the original generator of the hazardous waste cannot be identified, the transporter may have to assume hazardous waste generator responsibilities and comply with both the generator standards of 40 CFR part 262 as well as the hazardous waste transporter requirements of 40 CFR part 263.

j. *Recordkeeping.* Transporters are required to maintain records (for at least three years) documenting the acceptance and delivery of each used oil shipment. For the purposes of complying with the recordkeeping requirements in today's rule, used oil transporters need only enter the required information or documentation for each used oil shipment into a collection or operating log.

Used oil transporters must keep records for each used oil shipment accepted for transport from an original used oil generator or another transporter and maintain copies of each record for a period of at least three years. Records for each shipment accepted by transporters must include: (1) The date; (2) the name, address, and EPA identification number (if applicable) of the party who provided the used oil for shipment; (3) the quantity and type of used oil accepted; and (4) the dated signature of the party offering the shipment.

Used oil collectors and transporters must also keep and maintain for at least three years records of each shipment of used oil that is delivered to another transporter, used oil burner, fuel marketer, or used oil processor/re-refiner. Records for each delivery must include: (1) The date; (2) the name, EPA identification number, and address of the receiving facility or transporter; (3) the quantity of used oil delivered; and (4) the dated signature of a representative of the receiving facility.

EPA believes that these recordkeeping requirements are necessary to monitor the flow of used oil within the used oil management system and to discourage any adulteration of used oil by any used oil handler, by providing a paper trail documenting all parties who handled the used oil. EPA believes that the rebuttable presumption, as well as the requirement that used oil collectors and transporters keep records, will provide sufficient incentive to discourage adulteration of used oils. Past practices of used oil collectors and transporters storing mixtures of used oil and hazardous waste have resulted in damages to the environment. Further discussion of such damages is provided in the background documents that accompany this rule.

It is EPA's understanding that most of the recordkeeping requirements established in today's rule are already being done as normal business and accounting practices by used oil transporters. As noted in the background information for the Regulatory Impact Analysis of today's rule, a used oil industry representative indicated that such records are maintained and the practice of keeping such records is not uncommon. The recordkeeping requirements promulgated today for used oil transporters are very similar to those proposed in the 1991 Supplemental Notice.

k. *Exports of used oil.* If a used oil transporter provides used oil for export or exports used oil from the United States, the transporter must maintain a record of the name and address of the receiving facility, the quantity of used oil exported to a foreign country, and the date the used oil is exported from the United States.

l. *Closure.* In 1985, EPA proposed closure requirements for used oil transfer facilities. Commenters opposed these requirements due to the fact that the requirements are overly burdensome. Since the secondary containment requirements promulgated today should mitigate the migration of almost all releases of used oil to the environment, and since today's requirements require used oil spills and releases to be cleaned up upon detection, EPA has decided that closure requirements for aboveground storage areas are not necessary and therefore, the Agency is not promulgating closure requirements for used oil transfer facilities with aboveground storage units. EPA also notes that the majority of damages from improper storage of used oil have occurred at recycling facilities, rather than transfer facilities, which suggests differential standards are appropriate. (Note: Used oil transporters that store used oils in underground storage tanks are required under the Subtitle I standards to close all units used to store used oil prior to closing or abandoning the facility.)

m. *Other applicable provisions.* In addition to the requirements provided in subpart E, used oil transporters who recycle used oil either by blending, processing or re-refining, must comply with the requirements of subpart F. Used oil transporters who burn used oil on-site must comply with the requirements of subpart G of part 279, as well as the provisions of subpart E. If a used oil transporter markets used oil fuels, the transporter must comply with the requirements for used oil fuel marketers in subpart H of part 279. Used oil transporters who either dispose of used oil or use used oil as a road oiling agent must comply with subpart I of part 279.

In the 1991 Supplemental Notice the Agency proposed inspection, facility preparedness, and corrective action provisions. EPA has decided against such requirements because (a) the SPCC program-based inspection, preparedness, and emergency response provisions, (b) response to releases provision for transfer facilities, and (c) limits on the storage period are adequately protective against potential environmental damages associated with used oil storage. A used oil transporter who stores used oil for greater than 35 days is considered to be a used oil processor and must comply with the standards for used oil processing and re-refiners.

4. Standards for Used Oil Processing and Re-refining Facilities

As discussed in section VI.A of this preamble, the past used oil management practices at used oil processing facilities has resulted in environmental damage. This is evident from the identification of approximately 25 sites on the National Priority List where used oil was identified as one of the major constituent of concern. Similarly, EPA has discovered environmental damage associated with used oil management at RCRA facilities managing used oil in solid waste management units. Of the used oil facilities that the Agency has studied, 16 facilities has used oil spills; 15 facilities had leaking tanks and/or containers; 32 facilities recycled and disposed of used oil and wastes in surface impoundments and pits; 5 facilities placed used oil recycling sludges in waste piles directly on the ground; and one facility land-farmed used oil recycling sludges. Virtually all the surface impoundments or pits at these facilities were unlined. These instances lead EPA to believe that used oil processing/re-refining facilities pose the biggest problems due to used oil mismanagement, justifying the toughest controls (e.g. preparedness, secondary containment, closure, analysis plan, and tracking) established today.

a. *Applicability.* A used oil processing or re-refining facility is defined in § 279.1 as "a facility that processes used oil." Used oil processing means chemical or physical operations designed to produce from used oil, or to make used oil more amenable for the production of, fuel oils, lubricants, or other used oil-derived product. Processing includes, but is not limited to: Blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining. Used oil re-refining may include settling, filtering, catalytic conversion, fractional/vacuum distillation, hydrotreating, or polishing. The products of used oil processing or re-refining are likely to include specification fuel, reconstituted lubricating oils/fluids, distillate fuel, lube feedstock, asphaltic bottoms, and other non-fuel oil-derived product.

In addition to the requirements of part 279 subparts C and E, used oil generators and collectors/transporters are subject to all applicable processor and re-refiner requirements, if they process/re-refine used oil on-site. Used oil processing and re-refining facilities that also burn used oil fuel on-site for energy recovery must comply with the provisions in subpart G of part 279, except burning that occurs incidental to processing at used oil processing and re-refining facilities in compliance with § 279.50(b)(3)(ii). Table VI.4 lists requirements and provides the regulatory citations.

TABLE VI.4.—STANDARDS FOR USED OIL PROCESSORS AND RE-REFINERS

Requirement	New or existing	Regulatory citation
Processors who perform other management activities	New	§ 279.50(a).
Notification and EPA identification number	Existing for processors/re-refiners who are marketers; new for others.	§ 279.51.
Preparedness and prevention	New	§ 279.52(a).
Contingency plan and emergency procedures	New	§ 279.52(b).
Rebuttable presumption for used oil	Existing for processors/re-refiners managing used oil fuel	§ 279.53 (a), (b), and (c).
Exceptions from rebuttable presumption for CFC and metal-working oils.	New	§ 279.53(c) (1) and (2).
Type of management units	New	§ 279.54(a).
Good condition above ground tanks and containers	New	§ 279.54(b).
Secondary containment for containers and existing and new above ground tanks.	New	§ 279.54 (c), (d), and (e).
Labelling of containers and tanks	New	§ 279.54(f).
Response to releases	New	§ 279.54(g).
Closure for containers and above ground tanks	New	§ 279.54(h).
Analysis plan	New	§ 279.55.
Indicator parameters	N.A.	None.
Tracking—acceptance, deliveries, and recordkeeping	Existing for processors/re-refiners who are marketers (invoices); new for others.	§ 279.56.
Operating record	New	§ 279.57(a).
Biennial reporting	New	§ 279.57(b).
Off-site shipment	New	§ 279.58.
Management of residues	New	§ 279.59.
SPCC requirements, including spill prevention and control	Existing (applicable independently)	40 CFR Part 112.
UST requirements, including corrective action and financial responsibility.	Existing (applicable independently)	40 CFR Part 280.
Inspections	N.A.	None.

b. *Notification Requirements.* An owner or operator of a used oil processing/re-refining facility must notify the appropriate EPA Regional Administrator using EPA Form 8700–12, stating the location and general description of used oil management activities. In lieu of using the EPA Form 8700–12, owners and operators may notify the EPA Regional Administrator of their location and general description of used oil management activities in a letter. Upon receipt of this form, EPA will issue an EPA identification number to the facility. Owner/operators who have previously notified the Agency of their hazardous waste management or used oil activities and received an ID number need not renotify.

In addition to notifying EPA of any recycling activities and receiving an EPA identification number, an owner or operator of a used oil processing or re-refining facility that receives used oil from foreign sources must comply with all applicable RCRA requirements for the importation of solid and hazardous wastes.

c. *Preparedness and Prevention.* Owners or operators of used oil processing and re-refining facilities must operate and maintain the facility in a manner that will minimize the possibility of any fire, explosion, or unplanned sudden or non-sudden release. The existing Federal (*e.g.*, SPCC), state, and local (*e.g.*, fire ordinances) preparedness and prevention requirements are specific to certain aspects of facility operation. The existing RCRA requirements for preparedness and prevention, by contrast, pertain to the toxic or hazardous nature of the material or waste. The Agency, therefore, believes that RCRA requirements are necessary to ensure that used oil processing and re-refining facilities are maintained and operated to prevent possible fires, explosions, or releases of used oil to the environment. EPA believes that the preparedness and prevention requirements promulgated today are merely incremental to those currently in place and the existing compliance procedures can easily be expanded to comply with these additional requirements. Section 279.52(a) requires owners and operators to comply with the requirements for preparedness and prevention similar to those established for hazardous waste management facilities in 40 CFR part 265, subpart C. These requirements include maintenance and operation of the facility, required equipment, testing and maintenance of the equipment, access to communication or alarm system, required aisle space, and arrangements with local authorities.

The 1985 proposal required preparedness and prevention measures as part of the Permit-by-rule requirements for recycling facilities. The proposed requirements were the same as those established for hazardous waste management facilities. EPA believes that the majority of processing and re-refining facilities have preparedness and prevention measures in place as a part of good business and operational practices, therefore the Agency does not think such requirements will be overly burdensome (see background document on cost analysis that is in the docket for today's rule). In addition, local fire regulations, state regulations, and the Occupational Safety and Health Act require some level of preparedness and prevention measures.

d. *Contingency Plan and Emergency Procedures.* Section 279.52(b) requires owners or operators of used oil processing and re-refining facilities to prepare a contingency plan designed to minimize hazards in case of a sudden or non-sudden release, fire, explosion, or similar emergency. The variable composition of used oil (*e.g.*, the possibility of very low flash point oil) makes this more of a concern than for other types of oil facilities. The requirements for contingency plans and emergency procedures were taken from 40 CFR part 265, subpart D, because of the similarity to hazardous waste facility operations. These requirements include purpose and implementation of the contingency plan, content of the contingency plan, copies of the contingency plan, amending the contingency plan, emergency coordinator, and emergency procedures.

EPA believes that the majority of processing and re-refining facilities have contingency plan and emergency procedures in place as a part of good business and operational procedures. Therefore, EPA believes that such requirements are not overly burdensome. In addition, local fire regulations, state regulations, and the Occupational Safety and Health Act require development of contingency plans and emergency procedures.

e. *Storage Requirements.* Owners and operators of used oil processing and re-refining facilities must store all used oils either in tanks or containers, and all tanks and containers must be maintained in good condition (*i.e.*, no visible signs of leaks or structural damage or deterioration). Based on the comments received in 1985 and 1991, EPA believes that the practice of storing used oil in lagoons, ponds, pits or surface impoundments is not common and, in addition, that such storage is inherently unsafe and poses an undue risk to human health and the environment. Both in 1985 and 1991, EPA proposed to ban the use of lagoons, ponds, pits, or surface impoundments for used oil treatment or storage due to the unreasonable risks posed to human health and the environment. Many commenters concurred with EPA on this point. Therefore, today's rule prohibits the storage of used oil in any surface impoundment, pond, pit, lagoon or similar land-based unit, unless the unit is kept in full compliance with the requirements in subpart K of part 264/265 or unless the unit contains only wastewaters with *de minimis* quantities of used oil as specified in 40 CFR 279.10(f).

In 1991 Supplemental Notice, EPA proposed inspection requirements for a discovery of used oil release or spill. Today, EPA is not finalizing the proposed inspection requirement because the preparedness requirement established today for used oil processing/re-refining facilities and the inspection provision of the SPCC program include inspection for used oil releases to the environment or oil spills, respectively.

The requirements established today cover all used oil processors/re-refiners, regardless of their location and regardless of the size of any single tank the facility or the total storage capacity of the facility. The SPCC and UST requirements are independently applicable to processing or re-refining facilities.

The owner or operator of a used oil processing or re-refining facility must label all aboveground tanks and containers used to store used oil and all fill pipes used to transfer used oil to underground storage tanks with the words "used oil." EPA is requiring owners and operators to clearly label storage units used to store oil to prevent accidental mixing by ensuring that only used oil is placed in tanks reserved for the storage of used oil.

Owners and operators of used oil processing and re-refining facilities who store used oil in containers or aboveground tanks as defined in § 279.1 must equip the storage area surrounding the tanks or containers with a floor made from material(s) that is impervious to used oil. Owners and operators must also equip the storage area with secondary containment structures (dikes, berms, and/or retaining walls) that are made of a material(s) that is impervious to used oil and capable of

containing all potential spills and releases of used oil from the tanks or containers until the facility owner or operator can take measures to clean up the released used oil. The floor under existing storage tanks must cover the entire area within the containment structure, except where existing tanks meet the ground. EPA believes that requiring owner/operators with existing tanks to retrofit the containment structure would be financially burdensome and that there is little opportunity for contamination to occur under the small area where the tank touches the ground. For new tanks, the floor must cover the entire area within the containment structure.

In 1985, EPA reserved several sections of the proposed rule for the soon-to-be promulgated secondary containment requirements for hazardous waste storage tanks. Many commenters disagreed with EPA's proposal to require used oil recycling facilities to comply with the hazardous waste tank secondary containment provisions. In the 1991 Supplemental Notice, EPA stated that secondary containment standards similar to those required by the SPCC program may be adequately protective of human health and the environment and may be less burdensome to used oil processing and re-refining facilities. In the 1991 Supplemental Notice, the Agency specifically discussed the provisions for maintaining berms, dikes, or retaining walls around existing aboveground storage tanks. The Supplemental Notice included a diagram depicting a secondary containment structure that the Agency was considering requiring. The Agency believes that a secondary containment structure constructed around the entire storage area will provide adequate protection to the environment against spills and releases of used oil that may occur during used oil storage. Many commenters agreed with the Agency's assessment that this type of secondary containment is adequate for used oil storage areas. Some commenters urged the Agency to include secondary containment requirements in Phase I management standards, suggesting that storage-related spills and releases should be controlled.

Upon evaluation of the comments, and a further consideration of past storage practices at used oil processing and re-refining facilities that have either become Superfund sites or have had RCRA enforcement actions taken against them, EPA has concluded that there is a need to control releases of used oil during storage at processing and re-refining facilities. In fact, as documented by the Agency in the background documents supporting this final rule, past storage practices at used oil management facilities have resulted in releases of used oil to the environment, and in some cases, substantial damages to human health and the environment.[20]

Of the used oil facilities that the Agency has studied, 16 facilities had used oil spills; 15 facilities had leaking tanks and/or containers; 32 facilities recycled and disposed of used oil and wastes in surface impoundments and pits; 5 facilities placed used oil recycling sludges in waste piles directly on the ground; and 1 facility land-farmed used oil recycling sludges. Virtually all the surface impoundments or pits at these facilities were unlined.

Of the facilities that had spills, two were disposing solely used oil/oil recycling wastes, one was a storage facility only, and the remaining 13 were used oil processing and re-refining facilities. Of the facilities that had leaking tanks, two facilities were used oil storage facilities, one was a used oil disposal facility, and the remaining 12 were used oil recyclers. Of the facilities that disposed of used oil and wastes after recycling used oil in surface impoundments, 3 were also generators, 4 were solely disposal facilities, 1 was a storage facility, and the remaining 24 were processing and re-refining facilities. All five facilities that stored used oil recycling sludges in waste piles were processing and re-refining facilities. The facility that land-farmed used oil recycling sludges was a used oil recycling facility.

EPA has concluded that the containment of used oil releases is necessary, since contamination of soil, ground water, or surface water resources with used oil could reduce water quality and make water non-potable or could cause significant ecological harm. EPA believes that used oil handling and storage-related releases at used oil processing and re-refining facilities can be effectively controlled by the use of floors and containment structures made from an oil-impervious material.

As discussed above, the storage areas around aboveground tanks and under storage containers must be equipped with oil-impervious floors and secondary containment structures (dikes and berms or retaining walls) capable of containing all potential spills and releases of used oil until the discovery and clean-up of released used oil.[21] The floor under existing storage tanks must cover the entire area within the dike, berm or retaining wall, except areas where portions of existing tanks meet the ground. This requirement is applicable to the aboveground tanks that are existing when the states adopt the part 279 used oil management standards and the state rule containing the Federal used oil management standards takes effect. The impervious floor under new storage tanks must cover the entire area within the containment structure. The effective date is the same as that discussed for existing tanks.

EPA believes that the secondary containment requirements established today adequately protect against used oil releases to ground water and the existing SPCC requirements provide protection against spills reaching navigable waters. EPA has determined that secondary containment requirements similar to those in 40 CFR parts 264/265, subpart J are not necessary since the requirements promulgated today will effectively contain any spilled or released used oil within the containment structures. Also, the requirement that the entire containment structure be made of a material impervious to used oil will prevent the migration of used oil to soils, surface waters, and ground water.

Although the secondary containment requirements promulgated today are somewhat less burdensome than those required under 40 CFR parts 264/265 subpart J, any used oil processing/re-refining facility that is currently in compliance with the subpart J requirements (*e.g.*, the facility has double-walled tanks with double-walled or otherwise contained pipes) will be deemed in compliance with the secondary containment requirements promulgated today, and therefore need not install a new secondary containment system at the facility. EPA does want to clarify that all aboveground tanks and containers must be within a secondary containment structure that is impervious to used oil, and capable of preventing the migration of used oil spills or releases to the environment.

An April 29, 1992, memorandum from EPA's Assistant Administrator for Solid Waste and Emergency Response (discussed above) addresses

[20] See "Summary Descriptions of Sixty-Three 'Used Oil' Superfund Sites." and "Summary Descriptions of Used Oil-Related Damages at RCRA-Permitted Facilities."

[21] For further discussion of the basis for the secondary containment requirement and the materials suitable for constructing impervious floor and dikes, berms, or retaining walls, see section VI.E.5. of today's preamble.

aboveground storage tank technologies that may be used to provide secondary containment at SPCC-regulated facilities. The memorandum states that alternative aboveground storage tank systems that have capacities generally less than 12,000 gallons may provide protection of navigable waters substantially equivalent to that provided by the secondary containment systems listed in 40 CFR 112.79(c) of the SPCC regulation. An example of an alternative aboveground storage tank system that generally would provide substantially equivalent protection of navigable waters is a shop-fabricated doubled walled tank installed and operated with overfill prevention measures that include an overfill alarm, an automatic flow restrictor or flow shut-off, and constant monitoring of all product transfers including used oil. Used oil tanks meeting with the secondary containment equivalency discussed in the memorandum of April 29, 1992, are considered to be in compliance with the secondary containment requirements for aboveground tanks established in today's rule.

In the 1991 Supplemental Notice, EPA requested comment on the types of material that could be used to construct oil-impervious structures including berms, dikes, retaining walls, and floors. EPA did not receive any comments specific to the request. Since publication of the 1991 Notice, the Agency has studied the permeability of some commonly used construction materials such as cement, clay, asphalt, plastic, and steel. EPA concluded that the selection of a suitable material for construction depends upon the size of the storage units and the site characteristics. As stated in the cost analysis section of this preamble, most of these materials are currently used for the purpose of containing releases under other regulatory programs. EPA believes that any of these materials can adequately prevent releases of used oil to the environment from storage units that are properly operated and maintained at used oil processing and re-refining facilities, therefore, the Agency feels there is no need to specify the type of oil-impervious construction material that must be used at all facilities. For the cost analysis that accompanies today's rule, EPA used a secondary containment scenario that includes a 3-inch asphalt floor with an annual application of sealant. EPA believes that a floor of this type is adequate to contain used oil releases since there should be minimal or no vehicular traffic around the storage tanks or within the bermed, diked, or walled area. When installing new tanks, however, facility owner/operator will have to take into considerations the size of the tank that the floor will be resting upon. Depending on the size of the floor's thickness, and the type of floor installed, the appropriate construction material may change.

f. *Applicable UST and SPCC requirements for used oil storage tanks.* If used oil is stored in underground tanks, the owner or operator of a used oil recycling facility must comply with the requirements of 40 CFR part 280, including the corrective action and closure requirements of part 280 subparts F and G. An underground storage tank used for storage of used oil that meets the underground storage tank definition under 40 CFR 280.12 must comply with part 280 requirements. As discussed in the 1991 Supplemental Notice, technical standards for underground storage tanks (USTs) have been promulgated since publication of the 1985 proposed rule. The Agency stated in the preamble to the UST final rule (53 FR 37112; September 23, 1988) that EPA believes tht used oil, when stored in underground tanks, presents risks similar to other petroleum products stored in USTs. As a result, EPA determined that used oil USTs must comply with the tank upgrading, operation and maintenance, corrosion protection, corrective action, closure, and financial responsibility requirements promulgated under part 280 for other petroleum product USTs. The Agency believes that the subtitle I standards are sufficient to protect human health and the environment from potential releases of used oil from USTs.

In addition to all of the storage requirements discussed above, used oil processing and re-refining facilities that meet the applicability criteria for the SPCC standards contained in 40 CFR part 112 also must comply with all applicable SPCC requirements, including maintaining containment and diversionary structures to control releases of oil from aboveground storage tanks.

g. *Response to releases.* Upon detection of any release or spill within the secondary containment area from transfer operations or from aboveground storage units (tanks and containers), owners or operators must take steps to stop and contain the release, to remove all released used oil from the containment area, and repair or replace the damaged tank or container. Release used oil must be removed from the area and must be managed (*i.e.*, treated, recycled, disposed) in accordance with the requirements of this part and any other applicable parts of this chapter. In addition, whenever there is a catastrophic release or spill of used oil and used oil migrates beyond the containment structure and reaches the environment, corrective measures must be taken to adequately protect human health and the environment from potential damages. This requirement does not apply to past releases of used oil that occurred prior to the effective date of the used oil program within an authorized state in which the facility is located. This above requirement applied only when there is a release to the environment. Under this rule, this would not include releases within contained areas such as concrete floors or impervious containment areas, unless the releases go beyond the contained areas.

In addition to the provisions listed above for releases of used oil and, in addition to the corrective action requirements for releases from USTs provided in 40 CFR part 280, subpart F, owners of used oil processing and re-refining facilities are required, under CERCLA section 103, to report a release of hazardous substances to the environment when the release is equal to or in excess of the reportable quantity (RQ) for the particular substance. Used oils that are contaminated with CERCLA hazardous substances (*e.g.*, due to the presence of elevated levels of lead) are subject to CERCLA release reporting requirements. Therefore, releases of used oil containing such contaminants into the environment in quantities greater than the reportable quantity must be reported to the National Response Center. The current RQs for CERCLA hazardous substances are listed in 40 CFR 302.4. In addition, under 40 CFR part 110, any discharge of oil that violates applicable water quality standards or clauses a film or sheen on a water surface must be reported to the National Response Center.

h. *Analysis Plan.* The owner or operator of a used oil processing or re-refining must establish analytical procedures to ensure a thorough knowledge of the contents of any used oil handled at the facility. These procedures are to be established through a written analysis plan describing the procedures to be used to comply with the analysis requirements, as required by § 279.55. Each facility must prepare an analysis plan which a facility will follow when performing sampling and analysis, keeping records, and when complying with the analytical requirements for documenting the used oil fuel specification.

For the analyses described below, the owner or operator must specify in the facility's analysis plan the frequency of sampling and analysis. The owner or operator must perform sampling and analysis on a schedule that is adequate to meet all applicable requirements and assures that all used oils managed at the facility are handled safely and in compliance with all applicable used oil and Subtitle C regulations.

i. Rebuttable presumption and halogen determination. An owner or operator of a used oil processor/re-refiner facility must ensure that any used oil handled (*i.e.*, received from a used oil generator or a collector/transporter) at the facility is not mixed with hazardous wastes. Procedures should be established within the facility's written analysis plan (required in § 279.55) and the results of each procedure documented as part of the facility operating record, to demonstrate that the owner or operator will assure against such mixing and comply with the halogen determination requirements of § 279.53. The analysis plan should specify how, or with what methods, the owner or operator will analyze used oil to assure that the used oil is not mixed with hazardous wastes. As discussed above, EPA presumes that any used oil containing more than 1,000 ppm halogens has been mixed with chlorinated hazardous wastes. To rebut this presumption, the owner or operator must be able to document (or provide a copy of documentation from prior used oil handlers) at any time that the used oil was not mixed with hazardous waste (*e.g.*, by demonstrating that the presence of 1,000 ppm or more of total halogens is from some other source). The Agency believes that a facility-prepared analysis plan will identify at what time during the chain of custody, the facility owner/operator will rebut the presumption of mixing. In addition, EPA believes that an analysis plan will also indicate a procedure for handling a shipment of the adulterated used oil if received by an used oil processor/re-refiner facility especially when the given facility is not a co-management facility (*i.e.*, permitted to manage hazardous waste). A facility may rebut the presumption of mixing when accepting used oil for processing, re-refining, or blending; upon producing a specification fuel; prior to marketing it as off-specification fuel; or both when accepting used oil and shipping recycled products (*e.g.*, burner fuel, lube feedstock, or reclaimed lubricants) to the end users.

Under § 279.53, analyzing for total halogens is required to determine whether used oil has been mixed with chlorinated (halogenated) listed hazardous wastes. If the total halogen content exceeds 1,000 ppm, it is presumed that mixing has occurred per the rebuttable presumption codified today as § 261.3(a)(2)(v).

As discussed above, the rebuttable presumption does not apply to: (1) Used metalworking oils/fluids containing chlorinated paraffins on the condition that these used oil/fluids are recycled under a tolling arrangement to produce reclaimed metalworking oils/fluids; or (2) used compressor oils removed from refrigeration units and that are contaminated with chlorinated fluorocarbons (CFCs), on the condition that these used oils are destined for reclamation of the CFCs at an off-site CFC reclamation facility. The exemption applies to these two types of oils that are not mixed with used oil from other sources or other halogenated hazardous wastes.

EPA is concerned about the burning of used oils containing high levels of halogens in uncontrolled burners. Both metalworking oils and used compressor oils that contain a high level of halogenated constituents (>4,000 ppm) can not be burned safely in uncontrolled boilers and furnaces. If such used oils are to be burned for energy recovery, they must be burned at facilities that are in compliance with subpart G of part 279 or, if the used oil has been mixed with hazardous waste, with subpart H of part 266.

ii. Specification used oil fuel. Owners or operators who claim an exemption from regulation under 40 CFR 279.11 for specification used oil fuel must analyze for the specification used oil fuel parameters (*i.e.*, arsenic, cadmium, chromium, lead, total halogens, and flash point) and provide documentation of testing and sampling methods used and the frequency of sampling in the facility's analysis plan. If an owner or operator of a used oil processor/re-refiner facility markets specification used oil fuel, the owner or operator must document that the used oil meets the specification levels in the facility operating record, and must cross reference documentation that the used oil meets the specification to the burner or marketer.

iii. Indicator parameters. In 1985, EPA proposed that all owners and operators of used oil processing and re-refining facilities that also manage hazardous wastes at the same facility, test their used oils for the presence of indicator parameters. Indicator parameters are those constituents that were commonly present in the hazardous wastes handled at the facility, but not commonly found in used oils.

The majority of commenters who commented on the proposed analytical requirements stated that there is no need for the proposed indicator parameter testing at co-management facilities. The commenters responding to the indicator parameter testing requirement argued that co-management facilities are hazardous waste facilities operating under interim status or a full permit. Commenters stated that intentional mixing of used oils and hazardous wastes does not occur at co-management facilities due to the fact that mixing would reduce the marketability and recyclability of the used oil. Upon consideration of the public comments, the Agency has decided not to finalize the proposed requirements for indicator parameter testing.

For the analyses described above, the owner or operator of a used oil recycling facility must specify in the facility's analysis plan the frequency of sampling and analysis. The owner or operator must perform sampling and analysis on a schedule that is adequate to meet all applicable requirements and assures that all used oils managed at the facility are handled safely and in compliance with all applicable used oil management standards.

In the 1985 proposed management standards, EPA requested comment on the need to specify a specific schedule for sampling and analysis at the processing and re-refining facilities. Although EPA received several comments on the subject, the commenters did not agree either on the need to set a specific schedule or what the schedule should be, if EPA specified a schedule. It is apparent from the public comments received on the subject that it is probably not possible to develop a testing frequency schedule that would be appropriate for all types and sizes of used oil processing and re-refining facilities and take into account the many facility-specific variables that affect sampling and analysis frequencies. Therefore, under today's rule, EPA is not providing a specific schedule, but is requiring owners or operators of used oil processing and re-refining facilities to establish a tailored sampling and analysis schedule that will be appropriate for their particular facility and that meets the intent of the sampling and analysis requirements. This schedule must be documented in the facility's analysis plan.

Records of all analyses conducted at the facility to comply with the sampling and analysis requirements must be

maintained at the facility in the facility's operating record for a period of three years, as specified in § 279.57(a).

i. *Tracking of Used Oil.* Commenters favored the 1991-proposed tracking requirements for used oil processors/re-refiners. EPA believes that these facilities are the ultimate decision makers for the fate of used oil. Therefore, the Agency is finalizing the majority of tracking requirements proposed in 1991 which include keeping the records of each used oil shipment accepted for management and the records of each shipment of used oil delivered to the endusers. The requirements are specified in § 279.56. Furthermore, these records may take the form of a log, invoice, manifest, bill of lading, or other shipping documents. These records will provide the information necessary for preparing biennial reports for the facilities' used oil activities required in § 279.57(b) discussed below.

j. *Operating Record.* Owners and operators of used oil processing and re-refining facilities are required to maintain operating records included in § 279.57(a) of today's rule, until closure of the facility. The records include used oil analyses performed in accordance with the analysis plan required under § 279.55 and summary reports detailing all incidences that require implementation of the contingency plan specified at § 279.52(b).

k. *Reporting requirements.* Owners and operators of used oil processing and re-refining facilities are required to report to EPA or an authorized state agency in a letter, on a biennial basis, the following information: (1) The facility's EPA identification number, name and address; (2) the calendar year covered by the report; and (3) the quantities of each type of used oil accepted for recycling and the manner in which used oil is recycled at the site (if the facility recycles used oil in more than one manner, the quantities of used oil recycled should be reported for each recycling method (*e.g.*, burning, processing)).

Reports documenting the information listed above must be submitted to EPA, or the authorized state agency, by March 1 of each even numbered year and cover used oil recycling activities conducted during the previous year. Reports need only be in the form of a letter or spreadsheet and no formal reporting form will be developed.

The information identified above is similar to that listed on the Hazardous Waste Biennial Report Form (No. 8700–13B). The information requests were designed in this manner to assist owners and operators of used oil processor and re-refiner facilities in preparing the used oil biennial report. Many owners and operators are familiar with the hazardous waste biennial reporting form.

Commenters supported the biennial reporting requirements proposed for used oil recyclers in the 1991 Supplemental Notice. As noted in the Supplemental Notice, EPA believes that the information provided by the used oil processing and re-refining facilities will help the Agency when developing Phase II management standards that may include incentives for encouraging DIY-generated used oil recycling and/or more stringent management standards for a particular form of recycling (*e.g.*, used oil burning). EPA also believes that the information collected from processors and re-refiners will allow the Agency to monitor the flow and disposition of used oil and to allow the Agency to assess the relative amounts of used oil that are recycled in different manners.

The reporting requirements promulgated today will apply only to used oil processors and re-refiners and not to used oil burners or to transporters who directly market used oil fuels. The Agency believes that the information that is required of processors and re-refiners will indicate quantities of specification fuel and off-specification fuel produced. In case the Agency wants more specific information on burning activities, EPA may obtain additional information through a survey or by reviewing shipping records maintained by burners and used oil transporters.

l. *Closure.* Owners and operators must ensure that the units and areas used to store and recycle used oil are closed to the extent necessary to protect human health and the environment and in a manner that controls, minimizes, or eliminates post-closure escape of used oil and used oil residues to the ground, atmosphere, and water. At the time of closure, owners and operators who store used oil in aboveground tanks must empty the tanks, remove or decontaminate residues from the tank system, remove and decontaminate containment system components, contaminated media, and any structures and equipment contaminated with used oil released after the effective date of today's rule. Contaminated media, components, structures and equipment, and any used oil removed from the site must be managed as a hazardous waste, if the media, waste, or material meets the definition of hazardous waste, per 40 CFR 261.3(d).

If the facility owner or operator cannot successfully remove and decontaminate all contaminated media at the facility, then the owner or operator must close the tank system(s) and perform closure and post-closure care in accordance with the requirements of 40 CFR 265.310 that apply to landfills. EPA deferred the financial responsibility requirement for used oil processors and re-refiners in the 1985 proposal and 1991 supplemental notice. EPA believes that the closure steps necessary under today's rule can be implemented without the financial responsibility requirements for facility closure established under subpart H of Part 264/265. The closure requirement promulgated today only requires unit closure and removal of contaminated media in the immediate vicinity of the used oil storage/processing unit. EPA believes these costs are not likely to be excessive and can be borne by owners/operators without the need for financial assurance that is necessary for RCRA subtitle C hazardous waste treatment, storage, and disposal facilities. In addition, the Agency believes that many used oil processors/re-refiners would as a business practice routinely set aside funds for complying with the business insurance requirements. (See Cost and Economics Impact of 1992 Used Oil Management Standards, August 1992, available in the docket accompanying this rule.)

Owners and operators who store used oil in underground storage tanks must comply with the closure requirements of 40 CFR part 280, subpart G.

Owners and operators who store used oil in containers must remove all containers from the site at the time of closure. The owner or operator must also remove and decontaminate all residues, contaminated containment system components, contaminated soils, and any structures and equipment contaminated with used oil and manage them as hazardous waste if the media, waste, or material meets the definition of hazardous waste, per 40 CFR 261.3(d) or 261.4(b).

Based on information gathered from documentation of Superfund sites where used oil was identified as one of the major constituents of concern managed at the site, EPA is convinced that closure requirements for tanks and containers and for the area at existing facilities are important. EPA believes that the secondary containment requirements for contalners and tanks established today will minimize the need for extensive closure in the future since the potential for a release of used oil to migrate into the environment will be reduced. The requirements of today's rule should ensure against damages that could result at abandoned sites by: (a)

controlling (containing) used oil spills or releases that may occur during the operation of used oil processing and re-refining facilities and (b) requiring the removal of contaminated soils in the vicinity of or beneath the aboveground used oil storage and processing units at closure.

m. *Other applicable requirements.* In addition to complying with the requirements of subpart F, owners and operators of used oil processing and re-refining facilities who also transport used oil off-site must comply with the requirements for used oil transporters in subpart E. Owners and operators of used oil processing and re-refining facilities who market used oil fuels must comply with the requirements of subpart H; owners and operators who burn used oil fuels must comply with the requirements of subpart G. Disposal of used oil must be performed in compliance with the requirements specified in part 279, subpart I. Similarly, management of used oil processing and re-refining residuals must be performed in compliance with the existing RCRA requirements. In addition, used oil generators who recycle used oil on-site in a manner other than burning for energy recovery must comply with the standards promulgated today for used oil processors and re-refiners.

5. Standards for Burners of Off-Specification Used Oil Fuel

a. *Applicability.* 40 CFR part 279, subpart G applies to owners and operators of facilities where off-specification used oil fuel is burned for energy recovery in any boiler or industrial furnace and hazardous waste incinerator subject to regulation under 40 CFR part 264 or 265, subpart O. The requirements are shown in Table VI.5. The requirements of 40 CFR part 279, subpart G are applicable to: (1) Owners and operators of facilities that burn used oil fuel for energy recovery where the fuel does not meet the specification levels for the constituents listed in § 279.11 (previously 40 CFR 266.41); (2) transporters or marketers who burn used oil fuels that do not meet the specification for used oil fuels (used oil transporters are also subject to 40 CFR part 279, subpart E and marketers are also subject to 40 CFR part 279 subpart H); and (3) used oil processing and re-refining facilities that also burn off-specification used oil fuels (used oil processing and re-refining facilities also are subject to 40 CFR part 279, subpart F). Used oil fuel, or used oil sent off-site to be burned for energy recovery, includes any fuel produced from used oil through processing, blending, or other treatment. The requirements of subpart G are merely the existing requirements of the former part 266, subpart E, with minor modifications. EPA summarizes these requirements below.

TABLE VI.5.—STANDARDS FOR BURNERS OF OFF-SPECIFICATION USED OIL

Requirement	New or Existing	Regulatory citation
Burners who perform other management activities.	New	§ 279.60(b)
Restrictions on burning.	Existing	§ 279.61
Notification and EPA identification number.	Existing	§ 279.62
Rebuttable presumption for used oil.	Existing	§ 279.63(a), (b), and (c)
Exceptions from rebuttable presumption for CFC and metalworking oils.	New	§ 279.63(c)(1) and (2)
Record retention for rebuttable presumption.	New	§ 279.63(d)
Type of storage units.	New	§ 279.64(a)
Condition of tanks and containers.	New	§ 279.64(b)
Secondary containment for containers and existing and new above ground tanks.	New	§ 279.64(c), (d) and (e)
Labelling of containers and tanks.	New	§ 279.64(f)
Responses to releases.	New	§ 279.64(g)
Tracking—acceptance and recordkeeping.	Existing	§ 279.65
Certification	Existing	§ 279.66
Management of residues.	New	§ 279.67
SPCC requirements, including spill prevention and control.	Existing (applicable independently).	40 CFR Part 112
UST requirements, including corrective action and financial responsibility.	Existing (applicable independently).	40 CFR Part 280
Inspections	N.A	None
Closure	N.A	None

The requirements under part 279, subpart G are not applicable to persons burning used oil fuel that meets the used oil fuel specifications of 40 CFR 279.11,[22] provided the marketer or burner of such fuel complies with the requirements of that section.

Used oils that are hazardous wastes may be burned for energy recovery in compliance with subpart G of part 279, instead of 40 CFR part 266, subpart H (standards for burning hazardous waste in boilers and industrial furnaces), provided the used oil fuel is hazardous solely because it exhibits a characteristic of hazardous waste by its own nature or was mixed with hazardous waste generated by a conditionally exempt small quantity generator regulated under 40 CFR 261.5.

Burners who treat off-specification fuel by processing, blending, or other treatment to meet the specification levels contained in 40 CFR 279.11, must comply with the processing and re-refining facility standards of 40 CFR part 279, subpart F and the used oil marketer standards of subpart H of part 279.

b. *Restrictions.* Used oil fuel that is off-specification (*i.e.*, used oil fuel exceeding any of the specifications of 40 CFR 279.11) may be burned only in industrial furnaces or boilers (defined in 40 CFR 260.10) that meet the following criteria: (1) Are located on the site as part of a manufacturing process (*e.g.*, cement kilns, asphalt plants) where materials are transformed into new products, including the component parts of products, by mechanical or chemical processes; (2) are utility boilers that generate electric power, steam, heated or cooled air, or other gases or fluids for sale for energy purposes; (3) are used oil-fired space heaters, provided that the burner complies with 40 CFR 279.23; or (4) are incinerators in compliance with parts 264/265, subpart O. (See § 279.61 for the specific restrictions.)

c. *On-site Burning in Space Heaters.* Used oil may be burned in a used oil-fired space heater, provided that the space heater burns only used oil that the owner or operator generates and/or used oil obtained from household DIY oil changers. The space heater must have a maximum capacity of not more than 0.5 million BTU per hour and the combustion gases from the burner unit must be vented to the ambient air.

d. *Notification Requirements.* Burners of off-specification used oil fuel must notify the appropriate EPA Regional Administrator using EPA Form 8700–12 or by submitting a letter, stating the location and general description of used oil burning activities, unless the owner or operator of the facility has previously notified the Agency of their used oil burning activities. Upon receipt of this notification, EPA will issue an EPA identification number to the burner. This requirement does not apply to: (1)

[22] The specification levels are: arsenic = 5 ppm, maximum; cadmium = 2 ppm, maximum; chromium = 10 ppm, maximum; lead = 100 ppm, maximum; flash point = 100°F, minimum; total halogens = 4,000 ppm maximum.

Burners who only burn specification used oil fuels; (2) burners of specification used oil fuel who receive the fuel from used oil marketers who have notified EPA of their used oil management activities and who have provided appropriate information concerning specification fuel claims; or (3) generators who burn used oil that is generated on site only in used oil-fired space heaters.

e. *Certification.* Before a burner may accept the first shipment of off-specification used oil fuel from a marketer, the burner must provide a one-time written notice certifying that the burner has notified EPA stating the location and general description of the burner's used oil management activities and that the burner will burn used oil only in an industrial furnace or boiler identified in 40 CFR 279.61(a).

f. *Storage Requirements.* Owners or operators of facilities that burn used oil for energy recovery must store all used oils either in tanks or containers. All aboveground tanks and containers must be maintained in good condition (*i.e.*, no visible signs of leaks or structural damage). EPA believes that the practice of storing used oil in unlined lagoons, ponds, pits or surface impoundments is not very common and it is inherently unsafe and poses an undue risk to human health and the environment.[23] Therefore, today's rule requires that all used oils be stored in aboveground tanks or containers or in underground storage tanks.

The owner or operator of a facility that burns used oil must label all aboveground tanks and containers used to store used oil and all fill pipes used to transfer used oil to underground storage tanks with the words "used oil." EPA is requiring owners and operators to clearly label storage units used to store used oil to assure against accidental mixing and ensure that only used oil is placed in tanks reserved for the storage of used oil.

Owners or operators of facilities that burn off-specification used oil and who store used oil in aboveground tanks or containers must equip the storage area surrounding the existing tanks or storage area holding containers with a floor and secondary containment structures (dikes, berms, or retaining walls) that are made of a material that is impervious to oil and that are capable of containing all potential spills and releases of used oil to soil, surface water, and ground water from the tanks or containers until the facility owner or operator can take measures to clean up the release. The floor under existing storage tanks must cover the entire area within the containment structure, except where existing tank portions meet the ground. For new tanks, the floor must cover the entire area within the containment structure (for additional discussion, see section VI.5.f of this preamble).

EPA is requiring secondary containment for aboveground storage areas because the Agency has documented that past storage practices at used oil management facilities has resulted in releases of used oil to the environment. In the background documents supporting this final rule, EPA has documented damages that have occurred as a result of past storage practices at used oil management facilities.[24]

If used oil is stored in underground tanks, the owner or operator of a used oil burner facility must comply with the UST requirements of 40 CFR part 280. In addition, burner facilities that meet the applicability criteria for the SPCC standards in 40 CFR part 112 must comply with those provisions as well.

g. *Response to releases.* Owners and operators of used oil burning facilities who store used oil in aboveground tanks and containers must comply with the same release response requirements as those promulgated for used oil processing and re-refining facilities. Whenever there is a release or spill of used oil to the environment, the owner or operator must remove released used oil and contaminated media from the area, including used oils held in the containment area. Released used oils and contaminated media removed from the area must be managed (*i.e.*, treated, recycled, disposed) in accordance with the requirements of this part and any other applicable parts of this chapter. These requirements do not apply to past releases that occurred at the facility prior to the effective date of the used oil program within an authorized state in which the facility is located. This above requirement applies only when there is a release to the environment. Under this rule, this would not include releases within contained areas such as concrete floors or impervious containment area, unless the releases go beyond the contained area.

In addition to the provisions listed above for releases of used oil and, in addition to the corrective action requirements for releases from USTs provided in 40 CFR part 280, subpart F, used oil burners of off-specification fuel are required, under CERCLA Section 103, to report a release of hazardous substances to the environment when the release is equal to or in excess of the reportable quantity (RQ) for the particular substance. Used oils that are contaminated with CERCLA hazardous substances (*e.g.*, due to the presence of elevated levels of lead) are subject to these CERCLA release reporting requirements. Therefore, releases of used oil containing such contamination into the environment in quantities greater than the reportable quantity must be reported to the National Response Center. The current RQs for CERCLA hazardous substances are listed in 40 CFR 302.4. In addition, under 40 CFR part 110, any discharge of oil that violates applicable water quality standards or causes a film or sheen on a water surface must be reported to the National Response Center.

h. *Used oil fuel analysis (halogens).* A used oil burner must ensure that any used oil fuel handled at the burner's facility is not mixed with hazardous wastes. EPA will continue to presume (per § 261.3(a)(2)(v), previously § 266.40) that any used oil containing more than 1,000 ppm halogens has been mixed with chlorinated hazardous wastes. To rebut this presumption, the owner or operator must be able to document that the used oil fuel was not mixed with hazardous waste (*e.g.*, by demonstrating that the presence of 1,000 ppm or more of total halogens is from some other source).

Note: Used oil fuel processors or marketers may conduct analyses to document that the used oil contains less than 1000 ppm halogens. Used oil burners may use this information in making their own determination and in rebutting the presumption of mixing.

i. *Recordkeeping and Reporting Requirements.* A burner who receives an invoice from a used oil marketer under the requirements of Subpart H must maintain a copy of each invoice for at least three years. Documentation of any used oil fuel analyses also must be maintained for at least three years. A burner must maintain a copy of each certification sent to a marketer for at least three years from the date the burner received the last shipment of off-specification used oil fuel from that marketer. A burner may use an acceptance/delivery log in lieu of an invoice.

[23] Any and all storage in of used oil in surface impoundments or other land-based units is strictly prohibited unless the owner or operator of the unit operates the unit in full compliance with 40 CFR part 264/265, subpart K.

[24] See "Summary Descriptions of Sixty-Three 'Used Oil' Superfund Sites." and "Summary Descriptions of Used Oil-Related Damages at RCRA-Permitted Facilities." Both of these documents are available in the docket for today's rule.

No reporting requirements are being promulgated for used oil burners of off-specification fuel. EPA believes that the Agency will be able to obtain burner-specific information by inspecting invoices kept by burners and the acceptance/delivery logs kept by collectors/transporters, processors, and re-refiners.

j. *Possible future regulations for used oil burners.* EPA received several comments suggesting that EPA revise the used oil fuel specification levels, particularly for lead. Such comments are beyond the scope of today's rule, since EPA did not propose any changes and EPA does not address these comments here. None the less, as noted in the 1991 Supplemental Proposal, EPA intends to conduct additional studies of used oil burning activities to address public concerns regarding potential lead emissions from used oil burners. After such studies are complete, EPA may either develop emissions standards for used oil burners or may revise the current specification limits for used oil fuels, if analysis suggests that additional controls are necessary to protect human health and environment.

EPA believes that the phase-down of lead in gasoline over the past 6 to 8 years may have resulted in a significant reduction of lead levels in used oils generated from gasoline-powered engines. The Agency's pre-1985 data show that used automotive engine oils that were sampled from storage tanks at processing and re-refining facilities averaged around 1,200 ppm lead. On the other hand, the Agency's data that were collected in 1988 and 1989 and the data submitted by the commenters in response to the 1991 Supplemental Proposal suggest that used oils from gasoline-powered engines that were sampled from storage tanks averaged approximately 80 ppm lead. These data suggest that the Lead Phase-down Program may have had a significant effect on reducing the lead in gasoline. Based on these data, EPA believes that a significant amount of used oil does not fail the used oil fuel specification limit for lead. However, if the Agency determines that the specification limit for lead should be lowered, greater quantities of used oil may then exceed the specification requirements.

k. *Closure Requirements.* In the 1985 and 1991 proposals, EPA considered deferring closure requirements for used oil burners, based on the lack of risk data supporting the need for closure requirements at these sites. Since 1991, while reviewing the available Superfund site information and RCRA enforcement case data, the Agency has not located substantive damage information specific to burners. This leads the Agency to believe that environmental damages at used oil burner sites does not appear to be a substantial concern (*i.e.*, have not resulted in environmental damage of a significant magnitude that it has resulted in the site being identified as the NPL site). Therefore, the Agency believes that closure requirements for used oil burners are unnecessary at this time, hence, EPA is deferring such requirements.

6. Standards for Used Oil Fuel Marketers

On November 29, 1985, EPA promulgated notification, analysis, and recordkeeping requirements for marketers of used oil fuels as part of the used oil final Phase I burning regulations (40 CFR 266.43). Today EPA is consolidating all of the regulations related to recycled used oil into one part of the CFR to alleviate confusion on the part of the regulated community and to provide consistency in the regulations. Therefore, the used oil fuel marketer requirements previously codified as 40 CFR 266.43 will now be codified as 40 CFR part 279, subpart H (Standards for Used Oil Fuel Marketers). EPA is changing the designated codification of the used oil fuel marketer requirements and reordering the appearance of these requirements without modification. Table VI.6 summarizes the requirements established for the used oil fuel marketers.

TABLE VI.6.—STANDARDS FOR MARKETERS OF USED OIL FUEL

Requirement	New or existing	Regulatory citation
Prohibitions	Existing	§ 279.71.
On-specification used oil-analysis	Existing	§ 279.72.
Notification and EPA identification number	Existing	§ 279.73.
Tracking—off-specification fuel	Existing (invoices)	§ 279.74(a).
Tracking—on-specification fuel	Existing	§ 279.74(b).
Recordkeeping	Existing	§ 279.74(c).
Certification	Existing	§ 279.75.

The used oil fuel marketer requirements are applicable to all used oil handlers that market used oil fuels. Fuel marketing is an activity that may be undertaken by used oil generators, transporters, processors, re-refiners, and used oil burners. Used oil handlers may certify that they are marketing off-specification used oil fuel or first claim that the used oil fuel they are marketing to non-industrial boilers and furnaces meets the specification limits established for used oil fuel. Under today's regulation, no party in the used oil industry can be simply a marketer. EPA believes that marketing is an activity that a used oil handler undertakes when selling used oils as a fuel. An entity that is selling off-specification used oil fuel can either be a generator or a transporter or in some cases a processor or re-refiner. Similarly, an entity selling specification used oil fuel may be a generator, transporter, processor, re-refiner, or a fuel oil dealer. A decision to market used oil as an off-specification fuel is solely an economic decision depending on the costs associated with marketing used oil as on-specification fuel (*i.e.*, used oil fuel meeting the specification limits). In the former case, used oil is shipped, as generated or consolidated without any processing, to an industrial boiler or furnace. In the later case, however, used oil is blended or processed to produce on-specification used oil fuel and is analyzed to document the claim that it meets the specification limits. Therefore, the marketing requirements of 40 CFR part 279, subpart H, in addition to all other applicable provisions of part 279, apply to all used oil marketers.

Under today's definition of marketers, it is logically impossible for a facility to be only a marketer of used oil fuel. EPA believes that a marketer of used oil fuel must either have generated, transported/stored at a transfer facility, and/or processed the used oil before marketing the used oil fuel. EPA received comments stating that persons who blend used oils from other sources should be regulated only as marketers. EPA disagrees. EPA believes that any person who blends different used oils

should be treated as processor (recycler) under today's rules. The blending and fuel production processes, and the associated storage of oils and fuels, have posed environmental risks as documented in the information available for the fuel oil marketers identified as NPL sites and from the RCRA enforcement actions being pursued by the Agency. Thus, EPA believes it is appropriate to regulate those who blend used oils to produce fuels under the processor/re-refiner standards established today. However, those facilities who consolidate shipments of used oil before sending the consolidated oil for recycling are classified as transfer facilities and are subject to the transporter standards.

7. Standards for Disposal of Used Oil and Use as a Dust Suppressant

a. *Disposal of Used Oil.* As explained above, EPA believes that most used oils are recyclable. Since there are cases where particular types or batches of used oil are not recyclable, EPA understands the need to provide for the safe and proper disposal of used oils in these limited circumstances. EPA is today promulgating disposal standards for non-recyclable used oils under 40 CFR part 279, subpart I given in Table VI.7.

TABLE VI.7.—STANDARDS FOR USE AS A DUST SUPPRESSANT AND DISPOSAL OF USED OIL

Requirement	New or existing	Regulatory citation
Disposal	New	§ 279.81
Use as a dust suppressant	New	§ 279.82

On May 20, 1992 (57 FR 21524), EPA promulgated a listing determination for used oils that are disposed. EPA determined that it was not necessary to list these used oils because those used oils that present an undue risk to human health and the environment typically and frequently fail the toxicity characteristic leaching procedure. Since such used oils are identified as a RCRA hazardous waste, EPA saw no need to list any used oils as hazardous waste when they are disposed.

Used oils that are identified as hazardous wastes and are not recyclable must be handled and disposed of as hazardous wastes in accordance with all applicable subtitle C regulations. Used oils that are hazardous wastes because they exhibit one or more characteristics of hazardous waste and are destined for disposal must be accompanied by a hazardous waste manifest when shipped off-site and must be transported to a permitted or interim status subtitle C disposal facility. In addition, all wastes that fail the extraction procedure toxicity (EP) test are currently prohibited from land disposal under 40 CFR part 268.

Used oils that are not mixed with listed hazardous wastes and do not exhibit a characteristic may be disposed of in an industrial solid waste landfill or a municipal solid waste landfill. Used oils that are disposed in municipal solid waste landfills after October 9, 1993, must be managed in accordance with the requirements of 40 CFR part 258. In addition, all nonhazardous used oils that cannot be recycled must be disposed of in accordance with all applicable Federal and State solid waste regulations.

b. *Use as a Dust Suppressant.* In the 1985 proposed used oil management standards, EPA proposed to list all used oils as hazardous waste. Since the Hazardous and Solid Waste Amendments banned the use of all hazardous wastes (those that are either listed or exhibit a hazardous waste characteristic other than ignitability) as dust suppressants, the proposed listing of used oils had the effect of banning the use of any used oil as a dust suppressant. Used oils are banned from use as dust suppressants under the statute only when mixed with a listed hazardous waste or when they exhibit the Toxicity Characteristic.

Although the Agency has determined that used oils need not be listed as hazardous wastes, EPA still believes that used oils should not be used for road oiling or as dust suppressants due to the tendency for used oils to contain hazardous wastes or be contaminated with hazardous or toxic constituents. There was overwhelming support from commenters for a ban on the use of used oil for road application and dust suppression. Direct application of used oil to the land allows for direct exposure of used oils and all potential contaminants to the environment. Therefore, in today's final rule, EPA is banning the use of all used oils for road or land application.

EPA recognizes that some states have established road oil control programs. A recent survey of states, however, showed that road oiling is not widely practiced, even in states that have such programs. Today's rule provides for states who wish to continue to allow road oiling under programs designed to control such activities to petition EPA to exempt their state from the national ban. This petition would usually be part of the state authorization package, but it may be a separate petition (*i.e.*, from an unauthorized state). The petition should show how the state will prevent the road application of used oil that is mixed with hazardous waste or that exhibits the toxicity characteristic. The petition should generally demonstrate how the state will minimize environmental impacts of road oiling.

E. Response to Major Comments

1. Listing Used Oil as a Hazardous Waste

Commenters overwhelmingly supported the option not to list used oils as hazardous waste but to rely on management standards to control potential mismanagement of used oils. In fact, commenters to the 1991 Supplemental Notice overwhelmingly supported listing Option Three, no listing of used oils and reliance on management standards to control mismanagement of used oils. EPA has concluded that existing EPA regulations, and particularly the Toxicity Characteristic, adequately control the disposal of used oils that are hazardous wastes. The new Federal criteria for municipal solid waste landfills in part 258, as well as the stormwater regulations and TSCA requirements, adequately regulate the disposal of nonhazardous used oils.

Based on public comments and the recycling presumption discussed in the 1991 Supplemental Notice, EPA has determined that used oils that are recycled do not pose a substantial present or potential threat to human health and the environment when they are managed in accordance with the standards promulgated today from the time they are generated until they are recycled in addition to the existing requirements under other statutes or regulatory programs. In making a no-list determination, EPA considered the technical criteria for listing in 40 CFR 261.11, the fate and possible mismanagement of recycled used oils, and the impact of the management standards proposed in 1985 and 1991 on the recycling of used oils, and as discussed above, EPA has concluded that the management standards issued today control those problems that have occurred in used oil recycling. Therefore, listing used oil is not necessary to ensure adequate protection.

2. Mixtures

Commenters were nearly unanimous in support of EPA's proposal to exclude wipers and other materials contaminated with used oil from the proposed listing. Based on public

comments and commenter-submitted data, the Agency has decided not to list any used oils as hazardous wastes. Therefore, mixtures of used oils and other materials are not automatically hazardous wastes via the mixture rule. Mixtures of used oils and listed hazardous wastes will be regulated as hazardous wastes, whether they are recycled or not. Mixtures of used oil and characteristic hazardous waste that exhibit a hazardous waste characteristic also must be managed as a hazardous waste, whether they are recycled or not. However, mixtures of nonhazardous materials and used oils that exhibit a characteristic by their own nature (*i.e.*, the used oil is characteristically hazardous prior to mixing) or mixtures of used oil and characteristic hazardous waste that do not exhibit a characteristic are subject to the standards in part 279 if they are being recycled. Of course, if such a mixture cannot be recycled and the mixture exhibits a characteristic, it must be disposed in accordance with all applicable subtitle C regulations.

Mixtures of used oil and other materials generally will be regulated under part 279. However, as discussed above, EPA has exempted wastewaters contaminated with very small amounts of used oil, since such mixtures are not likely to pose a significant hazard. If mixtures of used oil and sorbent materials from which used oil can not be separated, however, are burned for energy recovery, the Agency believes that such recycling is acceptable. In addition, it is subjected to the existing used oil specification fuel requirements that are in effect since 1985 and recodified in part 279 today.

3. Controls on Disposal

Commenters supported EPA's proposal to develop guidelines for the disposal of non-hazardous used oil. The standards being promulgated today as part 279 apply to all used oils that are being recycled. Based upon the representations of commenters that most used oil is recyclable and is indeed recycled once it is collected, EPA has adopted a "recycling presumption," which means that the Agency presumes that all used oils will be recycled. A used oil handler who has used oils that cannot be recycled must dispose of the used oil properly. Hazardous used oils must be disposed in subtitle C facilities and new Federal Criteria for municipal solid waste landfills under part 258, which go into effect in October, 1993, will control nonhazardous used oils that are disposed. For these reasons, EPA believes that establishing guidelines for the disposal of used oils is unnecessary.

4. DIY-Generated Used Oils

Nearly all the commenters said that listing used oil as a hazardous waste would discourage the recycling of DIY-generated used oil. As discussed above, EPA is not listing any used oils as hazardous wastes. As a result, the major disincentive cited by commenters for used oil generators to continue accepting used oil from DIY generators has been removed. Nonetheless, in the September 1991 Supplemental Proposal, EPA put forth several non-regulatory incentive options for encouraging increased collection and recycling of DIY-generated used oils. EPA has not evaluated all of these incentive programs to date but will continue to assess the need for DIY incentives, and development of a non-regulatory scheme for DIY used oils may be part of a future used oil package.

5. Recycling Presumption Criteria

As discussed in VI.B of this preamble almost all commenters supported the concept of the recycling presumption, but few supported establishment of formal criteria of "nonrecyclability." Commenters were concerned that the criteria for rebutting the recycling presumption (*e.g.*, water content, BTU value, or any other measure) are not a meaningful measure of recyclability, since basically any used oil can be recycled and the degree of treatment prior to recycling is a function of the cost to the used oil generator. EPA has determined that it is not practical to set such criteria. Therefore, EPA is not establishing formal criteria on which to base a determination of nonrecyclability. Rather, a used oil handler who is not recycling used oils under part 279 must dispose of the used oil in compliance with applicable regulations. In other words, the used oil handler then must determine whether the used oil exhibits any characteristic of hazardous waste and manage the used oil accordingly.

6. Ban on Road Oiling

Commenters agreed that used oils are currently not widely used for road oiling and dust suppression. In fact, 41 out of 50 states prohibit the use of used oil for these purposes. The Agency is aware, however, that the other states allow this practice under certain permitting conditions and at least one commenter favored allowing road oiling under specified conditions. Today's final rule is promulgated pursuant to pre-HSWA authority, specifically, the Used Oil Recycling Act of 1980. Due to this fact, a Federal ban on road oiling will be effective only in unauthorized states on the effective date of this rule. The ban will not be effective in authorized states until the state modifies its program by adopting the ban provision and EPA approves the modification. Under the provisions being promulgated today, a state may submit a waiver to EPA to allow road oiling in that state in accordance with state laws and regulations.

7. CERCLA Liability

Most comments received in response to the 1991 Notice supported implementation of the liability exemption in CERCLA section 114(c). In addition, many commenters favored elimination of a small quantity generator category in the part 279 standards. EPA is not establishing any used oil generator cut-off based on generation rate. All used oil generators are subject to uniform standards in part 279. As a result, no change is necessary to trigger the applicability of the exemption from liability in CERCLA section 114(c). Any used oil generator who meets the statutory definition of a "service station dealer" is eligible for the liability exemption.

8. Storage

Most commenters agreed that minimum technical requirements (*e.g.*, tanks and containers kept in good condition, clean up of spills associated with used oil storage) are necessary for the storage of used oil under part 279. The regulations promulgated today require that used oil be stored in tanks and containers that are maintained in good condition, with no visible leaks or signs of deterioration. These minimum standards provide a certain level of control against leaks and releases from storage units. Additional controls, such as secondary containment for storage areas provide further assurance against migration of used oil and prevention against the contamination of soil, surface water, and ground water. EPA believes that at used oil facilities the use of continuously fed tanks for aboveground storage is limited and when such tanks are being used the owner/operator would install proper shut off valves and other controls to ensure that flow of material between the tanks is restricted in case of a tank rupture or other accidental releases.

9. Secondary Containment

Due to commenter's concerns regarding the technical and financial burden associated with the 40 CFR parts 264/265, subpart J secondary containment requirements, the Agency is not requiring full secondary

containment, such as double-walled tanks, for used oil storage. Used oil transporters, processing and re-refining facilities, and burner facilities must instead equip their tanks and containers with secondary containment consisting of dikes, berms, or retaining walls and a floor. All components of the containment system must be sufficiently impervious to oil to prevent any used oil released to the containment system from migrating out to the soil, ground water, or surface waters. EPA believes that the requirements promulgated today are less burdensome than the supart J requirements, yet they are sufficiently protective of human health and the environment. Although, subpart J standards are not required by today's rule, such requirements, such as a double-walled tank, however, would be sufficient for compliance with today's requirements.

10. Financial Responsibility

In the September 1991 Supplemental Notice, EPA proposed to defer the establishment of financial responsibility requirements for the clean up and closure of used oil generator sites and used oil facilities where used oil is stored in aboveground tanks and containers. Based on commenters' concerns regarding the costs and availability of financial assurance mechanisms, the Agency is not requiring used oil handlers to demonstrate financial responsibility for releases of used oil, except as provided under 40 CFR part 280 for underground storage tanks. EPA agrees with the commenters that a formal financial responsibility requirement similar to that in parts 264/265 is overly burdensome for the majority of used oil handlers. In addition, such a requirement should not be necessary because used oil generally is not stored for long periods of time due to its recyclability and marketability as a commodity. Thus, there is little likelihood of catastrophic spills that might require expensive clean up activities. EPA determined that financial responsibility requirements established in subpart H of part 264/265 is not necessary since unit closure requirement rather than a facility closure requirement is imposed today. The facilities managing used oil in land-based units, however, must be closed like RCRA subtitle C landfills, if the used oil contained in the units subject to closure exhibits characteristic of toxicity.

11. Permit-By-Rule

The majority of commenters believed that the permit-by-rule mechanism was unnecessary for implementation and enforcement of the used oil management system under part 279. EPA agrees with the commenters and has not established any permit-by-rule requirements for used oil facilities. The Agency believes that the recordkeeping requirements in part 279 will provide sufficient information for enforcement of the used oil management standards. The Agency decided against the permit-by-rule requirement because the requirements in today's rule are basic management practices that are largely self-implementing and do not require additional permit consideration of site-specific conditions.

12. Definition of Used Oil

In 1985 and in 1991, EPA proposed a definition of used oil that followed the statutory definition of used oil, but included used synthetic oils within the definition. Several commenters contended that synthetic oils should not be included because they are not in the statutory definition. The definition of used oil promulgated today, as the definition proposed in 1985 and 1991, is very similar to the existing definition in 40 CFR 266.40(b) and the statutory definition in section 1004(36) of RCRA. The only change is the inclusion of synthetic oils within the definition, including those derived from coal or shale. As discussed in the 1985 preamble, EPA believes that synthetic oils should be included in the definition of used oil due to the fact that these oils generally are used for the same purposes as petroleum-derived oils, are mixed and managed in the same manner after use, and present the same level of hazard as petroleum-based oils.

VII. Effective Date

Under RCRA section 3010(b), hazardous waste regulations are generally to become effective six months after final rule promulgation. EPA believes that the policy reasons for allowing facilities six months to come into compliance with new RCRA hazardous waste rules also apply to today's used oil management standards. Therefore, today's final rule for the used oil listing decision and used oil management standards will become effective on March 8, 1993. However, as explained below, in most states the rule will take effect in two to three years, as states adopt the new requirements.

VIII. State Authorization

A. Applicability in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer and enforce the RCRA program for hazardous wastes within the State. (See 40 CFR part 271 for the standards and requirements for authorization.) Section 3006(h) of RCRA allows EPA to authorize state used oil management programs in the same manner as state hazardous waste programs, even if EPA does not identify or list used oil as a hazardous waste. In addition, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA following authorization of State used oil programs, although authorized States have primary enforcement authority. Sections 3008(d)(4), (d)(5), and (d)(7) of RCRA further clarify that EPA may assess criminal penalties for violations of used oil standards even if it does not identify used oil as a hazardous waste.

For rules written under RCRA provisions that predate the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), States with final authorization administer their hazardous waste programs entirely in lieu of EPA's federal program. The Federal requirements no longer apply in the authorized State. When new, more stringent Federal requirements are promulgated or enacted, the State must develop equivalent authorities within the timeframe set out in the part 271 regulations. The new Federal requirements, however, do not take effect in an authorized State until the State adopts the requirements as a State law. EPA may not enforce them until it approves the State requirements as a revision to the authorized State program.

The Hazardous and Solid Waste Amendments of 1984 revised this system for requirements and prohibitions imposed under provisions added to the statute by the 1984 Amendments. New HSWA rules take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out the HSWA requirements in authorized States until the State is granted authorization to do so. While States must still revise State law to impose HSWA requirements to achieve or retain RCRA authorization, the Federal rules apply until they do so.

Today's rules are generally more stringent than the preexisting Federal rules, which exempted recycled used oils from regulation as hazardous wastes, but provided management standards only for the burning of off-specification used oils. (See former 40 CFR part 266, subpart E.) Thus, states will be required to revise their programs to address today's rules. Moreover, the requirements for burning off-specification used oil promulgated today are more extensive than the preexisting

rules. EPA consequently expects that all States that adopted rules to reflect the existing requirements will need to revise their rules to be equivalent to the new "off-spec" standards.

Today's rules, however, are promulgated under section 3014(a) of RCRA, a provision that predates the 1984 amendments. The rules will take effect in states that do not have final authorization six months from the date that this rule is published in the **Federal Register**. In authorized states, the rules will not be applicable until a State revises its program to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires States that have final authorization to modify their programs to reflect Federal program changes and to submit their modifications to EPA for approval. The deadline by which the State must modify its program to reflect today's rules is July 1, 1994, if a statutory change is not needed, or July 1, 1995, if a statutory change is necessary. These deadlines may be extended in certain cases under 40 CFR 271.21(e)(3). Once EPA approves the State's submission, the State requirements become federally enforceable subtitle C requirements.

Unauthorized States that submit their final applications for initial authorization less than 12 months after the effective date of this rule are not required to include standards equivalent to these in their applications. Such states, however, must modify their programs to reflect today's rules under the schedule described above. States that submit final applications for initial authorization more than 12 months after the effective date of this rule must include standards equivalent to these rules in their applications. 40 CFR 271.3 sets out the requirements a state must meet when submitting a final application for initial authorization.

States with authorized RCRA programs already may have requirements similar to those in today's rule. These States may continue to enforce and administer their standards as a matter of State law. Such State rules, however, have not been assessed against the Federal rules promulgated today to determine whether they meet the statutory and regulatory requirements for authorization. Thus, such State rules cannot be considered part of the Federal RCRA program. EPA may not enforce them at this time.

B. Administration

As discussed in section VI.D. of the preamble, a used oil handler (e.g., transporter, processor/re-refiner, burner of off-specification rule, and marketer) who has not notified the EPA of the used oil management activity (e.g. used oil transporting, used oil processing and re-refining, fuel oil marketing, and burning of used oil as off-specification fuel) must notify the Agency of used oil activities and obtain an EPA identification number. The used oil generators are not subjected to the notification or EPA identification number requirement. Since 1985, the existing used oil marketers and burners of off-specification fuel have notified and have obtained the EPA identification numbers.

Used oil handlers who would be new to used oil recycling business must notify of their activity under regulations established to implement section 3010 of RCRA.[25] That is, in the unauthorized states, a used oil handler who has not previously notified of the used oil management activities must obtain an EPA notification form from EPA and submit the form (or a letter) 90 days from publication of these rules. In authorized states, the notification deadline will be established under state law (which must be no later than 90 days from effective date of state's used oil rulers). The used oil handlers will obtain notification forms from state and submit forms (or letters) with state.

Those used oil generators who intend to become eligible for an exemption from the third-party liability under the CERCLA section 114(c) are required to use the used oil transporters with EPA identification number for sending used oil for offsite recycling. In authorized states, such generators must make sure that the used oil transporter they intend to use has notified the Agency and has an EPA identification number.

IX. Relationship of This Rule to Other Programs

A. RCRA

Land Disposal Restrictions

HSWA mandated that the Agency promulgate land disposal prohibition determinations under a specific schedule for wastes identified and listed prior to the enactment of HSWA (RCRA sections 3004(d), 3004(e), and 3004(g)(4), 42 U.S.C. 6924 (d), (e) and (g)(4). If the Agency failed to promulgate land disposal restrictions by the dates specified in section 3004(g)(4), the wastes were absolutely prohibited from land disposal after May 8, 1990 (or in some cases November 8, 1986, or July 8, 1987). HSWA also requires the Agency to make a land disposal prohibition determination for any hazardous waste that is newly identified or listed in 40 CFR part 261 after November 8, 1984, within six months of the date the new listing is promulgated (RCRA section 3004(g)(4), 42 U.S.C. 6924(g)(4). However, the statute does not provide for automatic restriction or prohibition of the land disposal of such wastes if EPA fails to meet this deadline.

Since used oils that are recycled are exempt from subtitle C regulation under § 261.6(a)(4), used oils that are recycled are not subject to the land disposal restrictions requirements of 40 CFR part 268. In effect, today's part 279 standards are crafted to restrict the land disposal of used oils and, therefore, the used oil management standards further the goals of the LDR program. Used oils that are disposed and exhibit a hazardous characteristic or are mixed with a listed hazardous waste remain subject to all applicable subtitle C requirements, including the land disposal restrictions requirements of 40 CFR part 268.

Wastes, including used oils that are destined for disposal, that exhibit the TC are considered newly identified wastes and are not yet covered by the LDR, unless also EP Toxic (see the Third Land Disposal Restrictions Rule, June 1, 1990, 55 FR 22520). EPA published an Advance Notice of Proposed Rulemaking for the land disposal restriction of TC wastes (56 FR 55160, October 24, 1991) and continues to evaluate the treatability and capacity analyses for these wastes. The Agency is currently developing a final rule to address this issue.

B. MARPOL 73/78

The International Convention for the Prevention of Pollution from Ships (1973), as modified by the 1978 Protocol addressing the same topic, is known as MARPOL 73/78. This is an international agreement that focuses on preventing ship-generated ocean pollution. Annexes I–V of MARPOL 73/78 address ocean pollution from oil, noxious liquid substances (*i.e.*, bulk liquid chemicals), harmful substances, sewage, and garbage, respectively.

Concerning today's rule, the Agency believes that used oil and hazardous waste management requirements apply to used oil generated upon ships only upon removal of the oily waste from the ship. Therefore, used oil on-board is not subject to RCRA requirements, and MARPOL requirements applicable to on-board oil wastes (hazardous and non-

[25] The regulations established today regulate used oil under the authority of section 3014(a) of RCRA. Since EPA is not listing or identifying recycled used oil as a hazardous waste under today's rule, section 3010 of RCRA technically does not apply. EPA is, however, incorporating the 3010 notification requirements into its used oil management standards.

hazardous) will not conflict with the part 279 requirements.

The Agency has determined that the ship owner/operator, the owner of the used oil, and the person removing the used oil from the ship can all be considered "generators" of the used oil for purposes of 40 CFR 260.10. Any of these parties could perform any or all of the duties of the generator.

C. Clean Water Act (CWA)

The Clean Water Act authorizes EPA to control the discharge of pollutants into navigable waters. Section 311(b)(5) of the Act establishes reporting requirements for the release of hazardous substances and oils into navigable waters, which include wetlands. Concerning used oil, releases of oil to navigable waters that (1) cause a sheen to appear on the surface, (2) violate applicable water quality standards, or (3) cause a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines is reportable.

The Clean Water Act and recently enacted Oil Pollution Act authorize EPA to regulate activities that may harm navigable waters. As part of this mandate, EPA has established the Spill Prevention Control and Countermeasure (SPCC) program, which is designed to protect surface water from oil contamination. Each facility subject to the requirements is required to prepare and maintain an SPCC plan, which includes provisions for appropriate containment or diversionary structures to prevent discharged oil from reaching navigable waters. Concerning today's rule, used oil handlers must comply with all applicable SPCC requirements contained in 40 CFR part 112. EPA has, however, built the part 279 requirements upon the existing SPCC rules to minimize disruptions to existing regulatory programs.

D. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Section 104 of CERCLA authorizes the federal government to respond to any release or substantial threat of a release into the environment of any hazardous substance and any release or threatened release of a pollutant or contaminant that may present an imminent and substantial danger to public health. Section 101(14) defines the term "hazardous substance" and section 101(33) defines "pollutant or contaminant." Both of these definitions expressly exclude "petroleum, including crude oil or any fraction thereof" unless a petroleum waste has been specifically listed under RCRA or other environmental statutes. The Agency has interpreted the petroleum exclusion to include crude oil and fractions of crude oil, including hazardous substances that are indigenous in petroleum substances. However, hazardous substances that are added to petroleum or that increase in concentration solely as a result of contamination of the petroleum are not part of the petroleum and thus are not excluded.[26] Therefore, used oil that contains a hazardous substance due to contamination is subject to CERCLA reporting, response, and liability provisions.

E. Hazardous Materials Transportation Act (HMTA)

The U.S. Department of Transportation (DOT) regulates the transportation of hazardous materials [27] in commerce (49 CFR parts 171 to 179). The regulations address: (a) Interstate transportation of hazardous materials by motor vehicle, rail car, aircraft and vessel and (b) intrastate transportation of certain hazardous materials (hazardous wastes, hazardous substances, and flammable cryogenic liquids in portable tanks and cargo tanks) by motor vehicle. Used oil may be flammable or combustible under DOT classifications. In addition, used oil that exhibits a characteristic of hazardous waste and is destined for disposal is classified as a hazardous material due to the requirement that hazardous used oils being disposed must be accompanied by a hazardous waste manifest.

Used oil generators (shippers) have to comply with any and all applicable DOT regulations for identification and classification, packaging, marking, labeling, and manifesting of used oil that is destined for disposal. Transporters (carriers) will have to comply with any and all applicable DOT regulations for placarding, manifesting, recordkeeping, reporting, and incident response for such used oils.

F. Toxic Substances Control Act (TSCA)

TSCA authorizes EPA to control the manufacture, import, use and disposal of chemical substances. Section 6(e) of TSCA mandates EPA to control the manufacture, import, use, and disposal of polychlorinated biphenyls (PCBs). A primary use of PCBs, a viscous oil, was as an insulating material for electrical equipment (dielectric). PCBs were almost always mixed with mineral oil, silicone, or other oily materials. Because of the potential hazards posed by the uncontrolled use and disposal of PCBs, EPA has established a comprehensive program to control PCBs from cradle to grave.

TSCA regulations control the use of PCBs used for dust suppression. 40 CFR 761.20(d) prohibits the use of "waste oil" that contains any detectable concentration of PCBs as a sealant, coating, or dust control agent. Concerning today's rule, used oil used for dust suppression must meet the requirements of both RCRA and TSCA.

A release of 1 pound of PCBs into the environment must be reported immediately to the National Response Center in accordance with section 103(c) of CERCLA. However, TSCA regulations require that any spill of material containing 50 ppm or greater PCBs into sewers, drinking water, surface water, grazing lands, or vegetable gardens must be reported. Concerning today's rule, if the used oil contains PCBs, the most stringent, applicable reporting requirement must be followed.

X. Regulatory Impact Analysis

Today's final rule combines a decision not to list recycled used oil with a set of tailored management standards for recycled used oil under section 3014 of RCRA applicable to used oil generators and subsequent handlers. This section of the preamble summarizes the cost and economic impact screening analysis of the 1992 used oil management standards.

Executive Order 12291 (46 FR 13193) requires that a regulatory agency determine whether a new regulation will be "major" and, if so, that a Regulatory Impact Analysis (RIA) be conducted. Three criteria are used to define a major rule: (1) That the rule has an annual effect on the economy of $100 million or more, (2) that the rule creates a major increase in costs or prices, or (3) that the rule has significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of US based enterprises to compete with foreign-based enterprises in domestic or export markets. The Environmental Protection Agency believes that the 1992 Used Oil Management Standards do not comprise a major rule, and therefore a complete RIA is not required. The results of this cost screening analysis support this conclusion. A further discussion of the cost screening analysis is available in the regulatory docket for today's rule in a report titled, "Cost and Economic Impact of 1992 Used Oil Management Standards," August 4, 1992.

[26] Memorandum from Francis Blake, EPA's General Counsel, concerning the CERCLA petroleum exclusion, July 31, 1987.

[27] Any material identified or classified as a hazardous waste under RCRA is classified a hazardous material under DOT (49 CFR 171.3).

Based on the preliminary cost screening analysis for the options presented in the September Supplemental Notice, public comments received, and subsequent analysis in response to comments, the Agency estimates that these management standards will most likely impose nationwide annualized compliance costs of less than $10 million per year, within a range of between $4 and $11 million. Costs of this magnitude are not expected to result in measurable changes in recycled used oil flows, either for on-site uses or within the commercial recycling sectors. With possible localized exceptions, the Agency does not expect the standards to result in a substantial number of business failures among used oil recycling companies or to affect employment, prices, or international trade in any measurable degree.

Although the Agency has not been able to adequately quantify the benefits to the environment or to human health of these management standards, due to the lack of comprehensive data on the frequency and extent of used oil releases to the environment, EPA believes that today's decisions will result in two principal types of benefits. First, by requiring specific secondary containment measures for used oil storage and other tankage at all major used oil handling facilities, the Agency is providing an additional safeguard against any substantial environmental release of used oil to the soil, to ground waters, or to surface waters at points where releases would be most likely to occur.

The Agency does not expect today's decisions by themselves to substantially expand used oil recycling. However, it is a relatively low cost insurance policy against the environmental mismanagement of used oil resources within the commercial recycling sectors. Implementation of section 3014 management standards limits CERCLA liability for those automobile servicing facilities that accept do-it-yourselfer (DIY) used oil for recycling and thus encourages expansion of collection locations. Thus, today's rule is consistent with the could provide a necessary complement to a wide variety of possible future private sector, State, or federal government initiatives to encourage increased recycling of household and other do-it-yourselfer used oil not presently being adequately managed and which is generally not effectively controlled by traditional regulatory approaches.

The remainder of this section of the preamble briefly describes the major options for management standards considered by the Agency in reaching today's decision, summarizes estimated compliance cost, and reviews expected impacts.

A. Regulatory Options Considered

EPA has considered a wide range of management standards options over the years, ranging from a listing of used oil as a hazardous waste under virtually full subtitle C standards for generators and handlers to various tailored options under section 3014(a) of RCRA. A summary of the approximate compliance costs for several of these alternatives is presented in Table X.1.

TABLE X-1.—HISTORICAL COMPARISON OF COMPLIANCE COSTS OF OPTIONS CONSIDERED FOR USED OIL MANAGEMENT STANDARDS

[Millions of 1991 dollars per year]

Listing recycled used oil as hazardous waste without tailored 3014 standards (1985 proposal option updated to 1991) [1]	$500
Section 3014 management options (1985 proposal updated to 1991) [2]	$204
1991 supplemental notice [3]	$2-25
1992 final rule	$4-11

[1] Option assumed burning as used oil fuel under part 266, subpart E, rather than as hazardous waste under subparts D and H. Costs are updated to 1991 from the 1985 RIA to allow for inflation and certain intervening regulatory changes such as the underground storage tank (UST) rule. However, costs for this historical proposal do not include estimates for corrective action for prior releases or cost implications of the mixture and derived from rules. Costs are not revised to address comments on the 1985 proposed rule.

[2] Costs updated from the 1985 RIA to allow for inflation, but not to respond to comments.

[3] Costs are as presented in table X.D.1. (56 FR 48071, September 23, 1991). They are not revised to address comments. However, see subsection A.2 below for discussion of other cost estimates.

1. Listing Recycled Used Oil Without Tailored Standards

Listing recycled used oil, without issuing special section 3014 Management Standards or otherwise exempting recycled used oil from subtitle C regulations, would have subjected recycled used oil generators, handlers, and users to the full spectrum of hazardous waste management standards. These would include recordkeeping and manifesting of all shipments, storage requirements including secondary containment, facility closure and financial assurance, and additional burning restrictions. In the extreme it would also impose facility corrective action for prior releases, although this was not covered in the 1985 RIA or in the present update.

Since this was not presented as an explicit option in the September 1991 Supplemental Notice, the Agency did not present compliance cost estimates for Full subtitle C management of recycled oil in the 1991 Cost and Impact Screening Analysis. However, a similar Full subtitle C management scenario was presented as Alternative 1 in the Regulatory Impact Analysis (November, 1985) accompanying the 1985 used oil proposed rulemaking. The Agency has subsequently revised and updated the 1985 estimate for this regulatory alternative to account for intervening changes in certain subtitle C requirements, recycle market changes and general cost inflation. We found that, even assuming retention of the present part 266 subpart E used oil burning requirements (in place of the part 266, subparts D and H hazardous waste burning standards for boilers and furnaces), the incremental annual cost of subtitle C management for recycled used oil would still cost about $500 million per year, or about $0.53 per gallon of oil recycled. This does not include consideration of additional possibly substantial costs for prior release corrective action or for implications of the mixing and derived-from rules.

The Agency has long recognized that used oil management standards drawn too stringently could be counterproductive: that by imposing too high a cost on acceptable forms of recycling, the regulations could actually encourage increased dumping and other environmentally undesirable practices by generators, commercial haulers, and others.

Although incremental management costs of $0.53 per gallon for recycling would still be substantially less than alternative subtitle C disposal options for most generators, costs in this range would also provide a strong incentive to avoid regulation altogether by engaging in illegal dumping and improper land disposal and burning activity. The Agency notes that virtually all used oil fuel is currently sold for little more than and in some instances less than 53 cents per gallon: Imposing regulatory requirements which cost this amount would virtually eliminate recycling incentives within most of the commercial recycling sector.

2. Tailored Standards Under Section 3014

More appropriate to today's final rule, the Agency has also considered a wide range of tailored standards under section 3014(a) of RCRA. The estimated annual cost in the RIA for the 1985 proposal was $167 million ($204 million updated to 1991). The 1985 proposal closely paralleled subtitle C Standards in many respects.

The September 1991 Supplemental Notice provided additional options which were substantially less costly than earlier proposals, but which still covered all sectors and a wide range of permitting, testing, spill prevention and cleanup, storage, recordkeeping and reporting requirements.

The nationwide annual costs estimated for the 1991 Supplemental Proposal ranged from $25 million per year (with no small quantity generator exemption) to about $2 million per year with an extensive SQG exemption.

Various commenters criticized the 1991 estimates as being too low. In a few instances it was argued that EPA's unit costs for specific activities or services were too low. Another criticism was that the Agency has overestimated the degree to which various standards were already being met, either through normal business practices at establishments (e.g., generator recordkeeping regarding used oil sales transactions) or due to the pre-existence of other federal, State or local regulatory requirements (e.g., OSHA workplace regulations, SPCC spill prevention and storage requirements, or local fire ordinances).

The Agency has reviewed its estimating assumptions in detail. While, in the main, most of the assumptions and resulting cost estimates in the September 1991 costs analysis are reasonable given the limited available data the Agency was able to gather, we agree that many of the estimates are subject to substantial uncertainties and should be interpreted accordingly. In addition, several possible management standard elements were not included in the cost screening, either due to oversight or to the premise of the Notice that certain elements might be considered subsequently in a Phase II proposal. Examples of additional management standard options and annual costs that could have been added in a more extensive analysis include the following:

- Subtitle C secondary containment for used oil collection and processor tankage—$8 million.
- Closure and financial responsibility for processors and rerefiners—$2 million.
- Mandatory testing of all incoming and outgoing shipments of used oil—$15–20 million.

Though not costed in detail, with these and other possible design features, especially more extensive requirements on the nation's nearly 700,000 commercial, industrial, and large farms used oil generators (though not necessarily included explicitly in the September Notice), the national cost estimates for used oil regulation in the 1991 Proposal could well have exceeded $100 million per year. On the other hand, several of the options discussed, especially combinations involving small quantity or other generator exemptions and only selective controls on other sectors, would have suggested costs on the order of $10 million or less.

Based on 750 million gallons per year of used oil entering the commercial used oil recycling system, national management standards costing $100 to $200 million per year would translate roughly into an average of 13 to 26 cents per gallon of oil recycled. As stated above, this additional cost (which EPA estimates to equal or comprise a significant fraction of the price of products derived from used oil) would have dramatically reduced used oil recycling and may have led to increased uncontrolled disposal.

B. Final Rule Compliance Costs

As described in section VI of this preamble, today's rulemaking pertains only to land based management standards for recycled used oil under section 3014(a) of RCRA. It does not impose hazardous waste listing or further regulation of used oil processing or rerefining residuals, which continue to be subject to testing for toxicity characteristics under existing regulations prior to disposal.

1. Nationwide Annual Costs

Table X.2 summarizes the nationwide annual compliance costs for today's rule, by affected sector and for each substantive requirement. Total estimated costs range between approximately $4.1 to $11.0 million per year, with a best estimate of about $7.5 million. The major portion of the total falls on the generating sector ($2.7 to $5.9 million, mostly for future spill cleanups of environmental releases) and on the used oil processing sector ($1.3 to $4.8 million, primarily for biennial reporting, secondary containment of tank storage areas, additional operational recordkeeping, and new closure requirements).

TABLE X–2.—NATIONWIDE ANNUAL COMPLIANCE COSTS FOR 1992 USED OIL MANAGEMENT STANDARDS

[In thousands of dollars]

Requirement	Generators	Independent collectors	Burners (off-spec)	Processors/ rerefiners/fuel oil dealers	Totals
Storage:					
Label tanks and drums	502	2	3	4–5	511–512
Drums and tanks in "good" condition	61–99	(*)	(*)	(*)	61–99
Secondary containment		15–179	11–138	59–964	85–1,281
Reporting, planning, recordkeeping:					
Identification numbers		1	(*)	(*)	1
Biennial report				118–155	118–155
Analysis plan				9–12	9–12
Contingency plan				86–116	86–116
Shipment and delivery records		(*)	(*)	(*)	
Operating record				435–590	435–590
Closure				613–2,938	613–2,938
Response to environmental releases	2,183–5,261	5	(*)	3–4	2,191–5,270
Totals	2,746–5863	23–187	14–141	1,327–4,784	4,110–10,975

* Indicates the facility type is subject to the requirement, but no incremental cost is incurred, while a blank space indicates the facility type is not subject to the requirement.

For several of the line item requirements, a wide range of estimated costs is presented, reflecting substantial uncertainty regarding the extent of existing baseline compliance with the newly imposed standards. As noted in the preamble to the September 1991 Supplemental Notice, many existing federal, State, and local government regulations already directly regulate or impinge upon many of the same practices addressed by today's rules.

For example, at least 7 States regulate used oils as hazardous wastes in varying degrees, and both the federal oil spill prevention and control and counter measures program (SPCC) and OSHA regulations relate to preparedness and prevention as well as cleanup of spilled oils including used oils.

In particular, it is notable that SPCC regulations cover all of the 90 percent or more of all major used oil handling facilities (collectors, processors, fuel oil dealers, and burners) that are located near surface waters. Although the presence of these other regulations has in some instances allowed the Agency to forgo new regulatory requirements, in other cases, lack of data or definitive standards contributes to considerable uncertainty regarding the adequacy of existing standards or extent of compliance. For some additional used oil requirements contained in today's rule, such as spill cleanup for non-SPCC generators or closure soil remediation at processing facilities, EPA does not have sufficiently comprehensive information on the frequency or extent of necessary compliance actions to estimate potential costs more precisely.

2. Individual Facility Costs

Costs at the individual facility level can vary widely, depending on baseline compliance assumptions and differing sector requirements in today's management standards. In general, the lowest unit costs will be experienced by generators, since they face the fewest and (usually) the least costly new requirements. The vast majority of generators will face no incremental costs other than tank or container labeling.

Compliance costs at the individual facility level are presented in Table X.3 for commercial used oil handlers and burners of off-specification used oil fuel. Within the commercial management sectors, the lowest facility-level costs will be born by smaller independent collectors and industrial boiler and furnace burners of off-specification fuel. Burners that only burn specification fuel experience no new requirements and are not considered within the scope of affected facilities in this analysis. For independent collectors and affected burners, the higher cost facilities are those requiring upgraded secondary containment, including both secondary release containment berms and impervious pavement in storage areas. Independent collectors may also incur environmental release costs for releases outside of secondary containment areas. Such facilities may or may not currently be in compliance with baseline SPCC and OSHA regulations. Facilities in these sectors with adequate preexisting secondary containment (50 to 90 percent of facilities according to EPA's costing assumptions) will otherwise face negligible new cost requirements.

TABLE X-3.—ANNUAL FACILITY-LEVEL COMPLIANCE COSTS: COMMERCIAL USED OIL HANDLERS AND BURNERS

Facility type	Total number of facilities [1]	Cost range for affected facilities (dollars per year)
Independent collector	383	$6–$1,976
Minor processors	70	4,280–22,389
Major processors	112	6,989–44,155
Re-refiners	4	9,246–64,671
Fuel oil dealers:		
Low estimate	25	4,280–22,389
High estimate	100	4,280–22,389
Total handlers:		
Low estimate	594	6–64,671
High estimate	669	6–64,671
Burners	1,155	2–335

[1] The number of facilities affected by individual requirements varies by requirement, from zero cost (unaffected) up to all facilities affected.

The most substantial unit costs will be born by facilities in the processing sectors (including processors, rerefiners, and fuel oil dealers that blend off-specification fuel). All facilities in this sector will face additional record keeping, reporting, and contingency planning as well as new tank closure requirements. In addition, the cost estimates assume that some fraction will require upgraded secondary containment, closure soil treatment, and release response costs to meet today's standards.

3. Cost Per Gallon of Used Oil

The total annual costs of these section 3014 management standards ($4.1 to $11.0 million per year), averaged across the nation's total annual recycling rate of about 900 million gallons per year, approximates 0.5 to 1.2 cents per gallon of recycled oil. Focusing only on the 775 million gallons per year flowing through the commercial recycling system, the total nationwide compliance cost of $1.3 to $4.8 million for the recycling sectors would translate into an average cost to commercial recyclers of about 0.2 to 0.6 cents per gallon by EPA's estimates.

Table X.4 summarizes the Agency's cost per gallon estimates in more detail for affected facilities in the commercial handling and burning sectors. The highest cost per gallon figures are at the small processor and fuel oil dealer-blender facilities, with costs at the most affected of these facilities possibly ranging as high as 2.2 cents per gallon. These high relative costs are explained primarily by the relatively low volume of used oil handled and the relatively high fixed costs of secondary containment and closure requiring soil cleanup.

TABLE X-4.—NATIONAL AVERAGE AND INDIVIDUAL FACILITY-LEVEL COMPLIANCE COST-PER-GALLON: COMMERCIAL USED OIL HANDLERS AND BURNERS

Facility type	Total number of facilities	Facility cost per gallon (cents)	National average cost per gallon (cents)
Independent collector	383	0.00–0.66	0.02–0.16
Minor processors	70	0.43–2.24	0.46–1.20
Major processors	112	0.14–0.88	0.16–0.50
Rerefiners	4	0.05–0.32	0.05–0.16
Fuel oil dealers:			
Low estimate	25	0.43–2.24	[1]0.17–0.45
High estimate	100	0.43–2.24	[1]0.69–1.82
Total handlers:			
Low estimate	594	0.00–2.24	0.16–0.20
High estimate	669	0.00–2.24	0.48–0.58
Burners	1,155	0.00–0.22	[1]0.00–0.03

[1] Includes both on-spec and off-spec oil, for a total of 66 million gallons for fuel oil dealers and 55.1 million gallons for burners. If considered separately, off-spec oil will be a fraction of this total, which would make the cost-per-gallon higher.

In contrast, larger processors and rerefiners, even those with similar more stringent requirements, would experience substantially lower per gallon compliance costs, due to the economies of scale inherent in their larger oil volumes and the nature of the major compliance activities. Among the larger facilities in the processing and rerefiner groups, even the worst case situations would still face per gallon costs of less than one cent per gallon of oil. Most facilities would see costs less than a half-cent per gallon, and a substantial fraction would be under a quarter-cent.

C. Final Rule Impacts

1. Effects on Used Oil Flows

Costs for generators are primarily fixed costs or spill clean-up costs which may correlate only weakly with the volume of used oil handled. Therefore, EPA does not expect generator compliance costs to influence acceptance of household Do-It-Yourself (DIY) used oil or to adversely change the relative costs of recycling compared

with dumping or disposal. Thus, used oil flows to recycling should not be negatively affected by these rules, and recycling flows could be positively affected due to reduced spills and spill losses and the CERCLA exemptions for service stations.

Costs for the commercial recycling sectors (including collectors, processors, rerefiners, and fuel oil dealers) total $1.3 to 4.8 million per year. If substantial enough, these costs should have affected recycle flows, either by causing a loss of collector/processor facilities or by being shifted back onto generators and providing a disincentive to recycle. However, set against 775 million gallon per year entering the commercial recycle flows, these total compliance costs average only 0.2 to 0.6 cents per gallon. These costs are not large enough to substantially affect generator decisions concerning recycling, even if all these costs were passed back to the generator in pickup charges. In the worst case, a few small processors could face unit costs as high as 2.2 cents per gallon if they have to install secondary containment and also face soil removal treatment closure costs. This does not suggest major repercussions for recycle flows, but could involve some small processing facility dislocations.

Burners face new compliance costs for storage of used oil derived fuel under today's rulemaking only if they burn off-specification fuel and are not already in compliance due to prior SPCC or OSHA requirements. Numbers of such burners are not known with any accuracy, although about 1200 in total have notified EPA as off-specification burners since 1985. Affected burners have three options:

(1) Incur the costs and either absorb them or pass them back to fuel marketers in negotiated lower prices. The total maximum cost here for the maximally affected burner is 0.2 cents per gallon. It is questionable whether this is a decision-changing level.

(2) Substitute fuel—either virgin fuel oil, currently at a higher cost of up to 15 percent, or specification used oil fuel from another used oil fuel dealer.

(3) Negotiate with the present used oil fuel supplier to pre-blend (with other used oil or virgin fuel) to meet the specification.

Basically the same analysis and options apply to fuel oil dealers that blend off-specification fuel as for burners. EPA's current estimate is that less than 25 percent of marketed used oil-derived fuel is routed through dealers. The fractions of total used oil fuel that is currently off-specification fuel is thought to be low, based on recent communications with used oil processing industry representatives and EPA's own sampling of unprocessed used oil. Based on the low compliance cost per gallon, flows in this sector will not be significantly affected one way or another.

2. Effects on Used Oil Management Structure

In general, the structure of the recycling industry could be somewhat influenced by today's rule. If anything, there will be a tendency for some small processors that do not now have adequate secondary containment to become less competitive (2.2 cents gallon maximum competitive disadvantage). These would generally be the same facilities with prior releases to the environment that would have to be cleaned up at closure (with soil treatment) and they may opt to close. Already-marginal operations with poor credit might not survive this requirement.

There may also be some tendency for rerefiners to be advantaged with respect to other processors because of lower cost/gallon compliance costs. The main factors influencing this judgment are:

1. Rerefiners are newer and are arguably (according to their comments) already in compliance with all or most of today's requirements.

2. Rerefiners are large and have economies of scale relative to smaller processors in terms of compliance cost per gallon.

3. Rerefiners are less affected by fuel market (burner) effects, because they typically produce only a small fraction of output as fuel and the rerefined fuel product is typically unregulated specification fuel.

In summary, the Agency expects no effects on generators. Generators ultimately pay the total costs (either directly or indirectly, via shifting) but these total costs spread over hundreds of thousands of generators will not measurably affect generator day-to-day decisions.

3. Effects on Human Health and the Environment

Since the Agency believes that recycle flows will not be obstructed or seriously altered by this rule, the Agency expects no negative effects on human health or the environment due to compliance costs. Do-It-Yourself oil recycling will not be decreased and may in fact be increased by the CERCLA exemption for service stations.

The four major effects of today's rule making would generally be positive, but of unknown magnitude. These include:

1. Increased spill cleanup and reduced environmental releases for generators.

2. Better secondary containment and future spill cleanup for larger handlers.

3. Closure requirements that provide for cleanup of prior tankage area releases at processor/handler facilities.

4. More comprehensive tracking at the collector level, due to expansion of notification and recordkeeping for all collectors and not just those who currently market directly to burners.

4. Relationship to Future Agency Actions Regarding Financial Incentives or Other Actions

Today's management standards are designed to protect human health and environmental risk from ground pathway damages with minimum effect on existing used oil recycling flows and markets. As such they provide minimum interference with used oil markets and thus are inherently neutral with respect to future incentive programs. Since the Agency believes they do not measurably redirect flows, today's rules do not preempt or compete with objectives or goals of incentives currently under study to improve recycling. Basically today's rules provide uniform standards to be met by used oil handlers in terms of storage and tracking. They do not compete with, preclude, or bias future Agency or other initiatives to expand recycling nor are the costs of today's rules large enough to affect the efficiency of such future programs.

The Agency believes that today's management standards are compatible with any future program designed to increase (or redirect) recycling since they do not in themselves introduce any arbitrary or unnecessary imbalances between or among recycling technologies or end-used used-oil-derived product markets.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96–345), requires Federal agencies to consider "small entities" throughout the regulatory process. Section 603 of the RFA requires an initial screening analysis to be performed to determine whether a substantial number of small entities will be significantly affected by the regulation. If so, regulatory alternatives which eliminate or mitigate the impacts must be considered.

Based on employment or sales, the vast majority of all used oil generators, collectors and processors are small businesses; blenders of virgin and used oil fuel, re-refiners, and burners are less likely to be small businesses. Overall, the economic analysis indicates that impacts are not significant for over 99 percent of the generators and for all of the other facility types affected, with the possible exception of some minor processors and some fuel oil dealers that currently blend used oil fuel with virgin oil fuel. Only a small fraction of

the farm section (about 2.5 percent), including only large commercial farms, will be subject to today's rule as a result of the small farm generator exemption.

A very small fraction (less than 0.2 percent) of small business used oil generators may face incremental costs of approximately $1,300 per year to cleanup a 250 gallon spill. This annual cost would only be incremental if the facility would not have cleaned up this spill without these new requirements to address release to the environment. We believe this is not an unreasonable cost burden for a very small fraction of small businesses, especially given the potential environmental damage of a spill of this size. Approximately 90 percent of generators would incur cost of less than $1 per year for labels for tanks and drums.

For the remaining sectors, only some minor processors and some fuel blenders/fuel oil dealers would incur significant costs. Approximately 30 percent of minor processors in the high-cost scenario would face incremental compliance costs of 2.2 cents per gallon. This cost increase may be sufficient to put the facility at a competitive disadvantage with other used oil processors. These minor processors might not be able to pass these costs back to customers since other firms that had already invested in these measures would incur lower costs. If the facility were already a marginal operation with poor credit, it might be forced to close.

Similarly, some small business fuel oil dealers that blend used oil fuel with virgin oil fuel might incur cost as high as 2.2 cents per gallon of used oil. Since the used oil is blended with virgin fuel, the cost impact per gallon of final product would be substantially less (only 0.2 cents per gallon of finished product assuming a typical blending rate of 10 percent used oil). Furthermore, these blenders may have other, low cost option for avoiding compliance costs such as refusing to accept off-specification oil from used oil suppliers, or simply discontinuing blending used oil at all.

In general, although a large population of small businesses will be subject to various provisions of this rule, only an extremely small fraction of these businesses will incur substantial costs. Therefore the Agency certifies that the final rule will not have significant economic impacts on substantial numbers of small businesses or entities.

XII. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* When approved, or if not approved by the effective date of this rule, EPA will publish a technical amendment to that effect in the **Federal Register**. An information Collection Request document has been prepared by EPA [ICR No. 1286.03] and a copy may be obtained from Sandy Farmer, Information Policy Branch, EPA, 401 M Street, SW.

Public reporting burden for this collection of information varies by sector. The public reporting burden for used oil transporters averages from 18 to 27 minutes annually per respondent. For used oil processing and re-refining facilities, the reporting burden averages from 48 minutes to 25 hours annually per respondent, and for burners of off-specification fuel, the reporting burden averages as 9 minutes annually per respondent. The type of information required includes, time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460; and to the Office of Management and Budget, Washington, DC, 20503, marked "Attention: Desk Officer for EPA."

List of Subjects

40 CFR Part 260

Administrative practice and procedure, Confidential business information, Hazardous waste.

40 CFR Part 261

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 266

Energy, Hazardous waste, Petroleum, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 279

Petroleum, Recycling, Reporting and recordkeeping requirements, Used oil.

Dated: August 11, 1992.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, 40 CFR chapter I is amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921-6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

2. Section 260.10 is amended by adding a definition for "Used Oil", in alphabetical order to read as follows:

§ 260.10 Definitions.

* * * * *

Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use in contaminated by physical or chemical impurities.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

4. Section 261.3(a)(2) is amended by adding paragraph [v] to read as follows:

§ 261.3 Definition of Hazardous Waste.

(a) * * *

(2) * * *

(v) *Rebuttable presumption for used oil.* Used oil containing more than 1000 ppm total halogens is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. Persons may rebut this presumption by demonstrating that the used oil does not contain hazardous waste (for example, by using an analytical method from SW-846, Third Edition, to show that the used oil does not contain significant concentrations of halogenated hazardous constituents listed in appendix VIII of part 261 of this chapter). EPA Publication SW-846, Third Edition, is available for the cost of $110.00 from the Government Printing Office, Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954, 202-783-3238 (document number 955-001-00000-1).

(A) The rebuttable presumption does not apply to metalworking oils/fluids containing chlorinated paraffins, if they are processed, through a tolling agreement, to reclaim metalworking

oils/fluids. The presumption does apply to metalworking oils/fluids if such oils/fluids are recycled in any other manner, or disposed.

(B) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units where the CFCs are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

* * * * *

§ 261.5 [Amended]

5. Section 261.5(j) is amended by revising "subpart E of part 266" to read "subpart G of part 279".

§ 261.6 [Amended]

6. Section 261.6 is amended by removing paragraph (a)(2)(iii), and redesignating paragraphs (a)(2) (iv) and (v) as paragraphs (a)(2) (iii) and (iv).

7. Section 261.6 is amended by removing paragraph (a)(3) (iii), and redesignating paragraphs (a)(3) (iv) through (a)(3)(viii) as paragraphs (a)(3)(iii) through (a)(3)(vii).

8. Section 261.6 is amended by adding paragraph (a) (4) to read as follows:

§ 261.6 Requirements for recyclable materials.

(a) * * *

(4) Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of parts 260 through 268 of this chapter, but is regulated under part 279 of this chapter. Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed.

* * * * *

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

9. The authority citation for part 266 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3004, and 3014 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), 6924, and 6934).

Subpart E—[Removed]

10. Subpart E of part 266 is removed and reserved.

11. Section 266.100 is amended by revising paragraph (b)(1) to read as follows:

§ 266.100 Applicability.

* * * * *

(b) * * *

(1) Used oil burned for energy recovery that is also a hazardous waste solely because it exhibits a characteristic of hazardous waste identified in subpart C of part 261 of this chapter. Such used oil is subject to regulation under part 279 of this chapter;

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

12. The authority citation for part 271 continues to read as follows:

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

Subpart A—Requirements for Final Authorization

13. Section 271.1(a) is amended by revising paragraph (a) to read as follows:

§ 271.1 Purpose and Scope.

(a) This subpart specifies the procedures EPA will follow in approving, revising, and withdrawing approval of State programs and the requirements State programs must meet to be approved by the Administrator under sections 3006(b), (f) and (h) of RCRA.

* * * * *

14. Subpart A of part 271 is amended by adding § 271.26 to read as follows:

§ 271.26 Requirements for used oil management.

The State shall have standards for used oil management which are equivalent to 40 CFR part 279. These standards shall include:

(a) Standards for used oil generators which are equivalent to those under subpart C of part 279 of this chapter;

(b) Standards for used oil collection centers and aggregation points which are equivalent to those under subpart D of part 279 of this chapter;

(c) Standards for used oil transporters and transfer facilities which are equivalent to those under subpart E of part 279 of this chapter;

(d) Standards for used oil processors and re-refiners which are equivalent to those under subpart F of part 279 of this chapter;

(e) Standards for used oil burners who burn off-specification used oil for energy recovery which are equivalent to those under subpart G of part 279 of this chapter;

(f) Standards for used oil fuel marketers which are equivalent to those under subpart H of part 279 of this chapter; and

(g) Standards for use as a dust suppressant and disposal of used oil which are equivalent to those under subpart I of part 279 of this chapter. A State may petition (e.g., as part of its authorization petition submitted to EPA under § 271.5 EPA to allow the use of used oil (that is not mixed with hazardous waste and does not exhibit a characteristic other than ignitability) as a dust suppressant. The State must show that it has a program in place to prevent the use of used oil/hazardous waste mixtures or used oil exhibiting a characteristic other than ignitability as a dust suppressant. In addition, such programs must minimize the impacts of use as a dust suppressant on the environment.

15. Title 40 of the Code of Federal Regulations is amended by adding part 279 to read as follows:

PART 279—STANDARDS FOR THE MANAGEMENT OF USED OIL

Subpart A—Definitions

Sec.
279.1 Definitions.

Subpart B—Applicability

279.10 Applicability.
279.11 Used oil specifications.
279.12 Prohibitions.

Subpart C—Standards for Used Oil Generators

279.20 Applicability.
279.21 Hazardous waste mixing.
279.22 Used oil storage.
279.23 On-site burning in space heaters.
279.24 Off-site shipments.

Subpart D—Standards for Used Oil Collection Centers and Aggregation Points

279.30 Do-it-yourselfer used oil collection centers.
279.31 Used oil collection centers.
279.32 Used oil aggregate points owned by the generator.

Subpart E—Standards for Used Oil Transporter and Transfer Facilities

279.40 Applicability.
279.41 Restrictions on transporters who are not also processors or re-refiners.
279.42 Notification.
279.43 Used oil transportation.
279.44 Rebuttable presumption for used oil.
279.45 Used oil storage at transfer facilities.
279.46 Tracking.
279.47 Management of residues.

Subpart F—Standards for Used Oil Processors and Re-Refiners

279.50 Applicability.
279.51 Notification.
279.52 General facility standards.
279.53 Rebuttable presumption for used oil.

Authority: Sections 1006, 2002(a), 3001 through 3007, 3010, 3014, and 7004 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, and 6974); and Sections 101(37) and 114(c) of CERCLA (42 U.S.C. 9601(37) and 9614(c)).

Subpart A—Definitions

§ 279.1 Definitions.

Terms that are defined in §§ 260.10, 261.1, and 280.12 of this chapter have the same meanings when used in this part.

Aboveground tank means a tank used to store or process used oil that is not an underground storage tank as defined in § 280.12 of this chapter.

Container means any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled.

Do-it-yourselfer used oil collection center means any site or facility that accepts/aggregates and stores used oil collected only from household do-it-yourselfers.

Existing tank means a tank that is used for the storage or processing of used oil and that is in operation, or for which installation has commenced on or prior to the effective date of the authorized used oil program for the State in which the tank is located. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin installation of the tank and if either (1) A continuous on-site installation program has begun, or

(2) The owner or operator has entered into contractual obligations—which cannot be canceled or modified without substantial loss—for installation of the tank to be completed within a reasonable time.

Household "do-it-yourselfer" used oil means oil that is derived from households, such as used oil generated by individuals who generate used oil through the maintenance of their personal vehicles.

Household "do-it-yourselfer" used oil generator means an individual who generates household "do-it-yourselfer" used oil.

New tank means a tank that will be used to store or process used oil and for which installation has commenced after the effective date of the authorized used oil program for the State in which the tank is located.

Processing means chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived product. Processing includes, but is not limited to: blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining.

Re-refining distillation bottoms means the heavy fraction produced by vacuum distillation of filtered and dehydrated used oil. The composition of still bottoms varies with column operation and feedstock.

Tank means any stationary device, designed to contain an accumulation of used oil which is constructed primarily of non-earthen materials, (e.g., wood, concrete, steel, plastic) which provides structural support.

Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use if contaminated by physical or chemical impurities.

Used oil aggregation point means any site or facility that accepts, aggregates, and/or stores used oil collected only from other used oil generation sites owned or operated by the owner or operator of the aggregation point, from which used oil is transported to the aggregation point in shipments of no more than 55 gallons. Used oil aggregation points may also accept used oil from household do-it-yourselfers.

Used oil burner means a facility where used oil not meeting the specification requirements in § 279.11 is burned for energy recovery in devices identified in § 279.61(a).

Used oil collection center means any site or facility that is registered/licensed/permitted/recognized by a state/county/municipal government to manage used oil and accepts/aggregates and stores used oil collected from used oil generators regulated under subpart C of this part who bring used oil to the collection center in shipments of no more than 55 gallons under the provisions of § 279.24. Used oil collection centers may also accept used oil from household do-it-yourselfers.

Used oil fuel marketer means any person who conducts either of the following activities:

(1) Directs a shipment of off-specification used oil from their facility to a used oil burner; or

(2) First claims that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11 of this part.

Used oil generator means any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation.

Used oil processor/re-refiner means a facility that processes used oil.

Used oil transfer facility means any transportation related facility including loading docks, parking areas, storage areas, and other areas where shipments of used oil are held for more than 24 hours during the normal course of transportation and not longer than 35 days. Transfer facilities that store used oil for more than 35 days are subject to regulation under subpart F of this part.

Used oil transporter means any person who transports used oil, any person who collects used oil from more than one generator and transports the collected oil, and owners and operators of used oil transfer facilities. Used oil transporters may consolidate or aggregate loads of used oil for purposes of transportation but, with the following exception, may not process used oil. Transporters may conduct incidental processing operations that occur in the normal course of used oil transportation (e.g., settling and water separation), but that are not designed to produce (or make more amenable for production of) used oil derived products or used oil fuel.

Subpart B—Applicability

§ 279.10 Applicability.

This section identifies those materials which are subject to regulation as used oil under this part. This section also identifies some materials that are not subject to regulation as used oil under this part, and indicates whether these materials may be subject to regulation as hazardous waste under parts 260 through 266, 268, 270, and 124 of this chapter.

(a) *Used oil.* EPA presumes that used oil is to be recycled unless a used oil handler disposes of used oil, or sends used oil for disposal. Except as provided in § 279.11, the regulations of this part apply to used oil, and to materials identified in this section as being subject to regulation as used oil, whether or not the used oil or material exhibits any characteristics of hazardous waste identified in subpart C of part 261 of this chapter.

(b) *Mixtures of used oil and hazardous waste*—(1) *Listed hazardous waste.* (i) Mixtures of used oil and hazardous waste that is listed in subpart D of part 261 of this chapter are subject to regulation as hazardous waste under parts 260 through 266, 268, 270, and 124 of this chapter, rather than as used oil under this part.

(ii) *Rebuttable presumption for used oil.* Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. Persons may rebut this presumption by demonstrating that the used oil does not contain hazardous waste (for example, by using an analytical method from SW–846, Edition III, to show that the used oil does not contain significant concentrations of halogenated hazardous constituents listed in appendix VIII of part 261 of this chapter). EPA Publication SW–846, Third Edition, is available for the cost of $110.00 from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954, (202) 783–3238 (document number 955–001–00000–1).

(A) The rebuttable presumption does not apply to metalworking oils/fluids containing chlorinated paraffins, if they are processed, through a tolling arrangement as described in § 279.24(c), to reclaim metalworking oils/fluids. The presumption does apply to metalworking oils/fluids if such oils/fluids are recycled in any other manner, or disposed.

(B) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units where the CFCs are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

(2) *Characteristic hazardous waste.* Mixtures of used oil and hazardous waste that exhibits a hazardous waste characteristic identified in subpart C of part 261 of this chapter are subject to:

(i) Except as provided in paragraph (b)(2)(iii) of this section, regulation as hazardous waste under parts 260 through 266, 268, 270, and 124 of this chapter rather than as used oil under this part, if the resultant mixture exhibits any characteristics of hazardous waste identified in subpart C of part 261 of this chapter; or

(ii) Regulation as used oil under this part, if the resultant mixture does not exhibit any characteristics of hazardous waste identified under subpart C of part 261 of this chapter.

(iii) Regulation as used oil under this part, if the mixture is of used oil and a waste which is hazardous solely because if exhibits the characteristic of ignitability and is not listed in subpart D of part 261 of this chapter (e.g., mineral spirits), provided that the mixture does not exhibit the characteristic of ignitability under § 261.21 of this chapter.

(3) *Conditionally exempt small quantity generator hazardous waste.* Mixtures of used oil and conditionally exempt small quantity generator hazardous waste regulated under § 261.5 of this chapter are subject to regulation as used oil under this part.

(c) *Mixtures of used oil with non-hazardous solid wastes.* Mixtures of used oil and non-hazardous solid waste are subject to regulation as used oil under this part.

(d) *Mixtures of used oil with products.* (1) Except as provided in paragraph (d)(2) of this section, mixtures of used oil and fuels or other products are subject to regulation as used oil under this part.

(2) Mixtures of used oil and diesel fuel mixed on-site by the generator of the used oil for use in the generator's own vehicles are not subject to this part once the used oil and diesel fuel have been mixed. Prior to mixing, the used oil is subject to the requirements of subpart C of this part.

(e) *Materials derived from used oil.* (1) Materials that are reclaimed from used oil that are used beneficially and are not burned for energy recovery or used in a manner constituting disposal (e.g., re-refined lubricants) are:

(i) Not used oil and thus are not subject to this part, and

(ii) Not solid wastes and are thus not subject to the hazardous waste regulations of parts 260 through 266, 268, 270, and 124 of this chapter as provided in § 261.3(c)(2)(i) of this chapter.

(2) Materials produced from used oil that are burned for energy recovery (e.g., used oil fuels) are subject to regulation as used oil under this part.

(3) Except as provided in paragraph (e)(4) of this section, materials derived from used oil that are disposed of or used in a manner constituting disposal are:

(i) Not used oil and thus are not subject to this Part, and

(ii) Are solid wastes and thus are subject to the hazardous waste regulations of parts 260 through 266, 268, 270, and 124 of this chapter if the materials are identified as hazardous waste.

(4) Re-refining distillation bottoms that are used as feedstock to manufacture asphalt products are:

(i) Not subject to this part at this time, and

(ii) Not subject to the hazardous waste regulations of parts 260 through 266, 268, 270, and 124 of this chapter at this time.

(f) *Wastewater.* Wastewater, the discharge of which is subject to regulation under either section 402 or section 307(b) of the Clean Water Act (including wastewaters at facilities which have eliminated the discharge of wastewater), contaminated with *de minimis* quantities of used oil are not subject to the requirements of this part. For purposes of this paragraph, *"de minimis"* quantities of used oils are defined as small spills, leaks, or drippings from pumps, machinery, pipes, and other similar equipment during normal operations or small amounts of oil lost to the wastewater treatment system during washing or draining operations. This exception will not apply if the used oil is discarded as a result of abnormal manufacturing operations resulting in substantial leaks, spills, or other releases, or to used oil recovered from wastewaters.

(g) *Used oil introduced into crude oil or natural gas pipelines.* Used oil that is placed directly into a crude oil or natural gas pipeline is subject to the management standards of this part only prior to the point of introduction to the pipeline. Once the used oil is introduced to the pipeline, the material is exempt from the requirements of this part.

(h) *Used oil on vessels.* Used oil produced on vessels from normal shipboard operations is not subject to this part until it is transported ashore.

(i) *PCB contaminated used oil.* PCB-containing used oil regulated under part 761 of this chapter is exempt from regulation under this part.

§ 279.11 Used oil specifications.

Used oil burned for energy recovery, and any fuel produced from used oil by processing, blending, or other treatment is subject to regulation under this part unless it is shown not to exceed any of the allowable levels of the constituents and properties in the specification shown in Table 1. Once used oil that is to be burned for energy recovery has

been shown not to exceed any specification and the person making that showing complies with §§ 279.72, 279.73, and 279.74(b), the used oil is no longer subject to this part.

TABLE 1—USED OIL NOT EXCEEDING ANY SPECIFICATION LEVEL IS NOT SUBJECT TO THIS PART WHEN BURNED FOR ENERGY RECOVERY [1]

Constituent/property	Allowable level
Arsenic	5 ppm maximum.
Cadmium	2 ppm maximum.
Chromium	10 ppm maximum.
Lead	100 ppm maximum.
Flash point	100 °F minimum.
Total halogens	4,000 ppm maximum.[2]

[1] The specification does not apply to mixtures of used oil and hazardous waste that continue to be regulated as hazardous waste (see § 279.10(b)).

[2] Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste under the rebuttable presumption provided under § 279.10(b)(1). Such used oil is subject to subpart H of part 266 of this chapter rather than this part when burned for energy recovery unless the presumption of mixing can be successfully rebutted.

§ 279.12 Prohibitions.

(a) *Surface impoundment prohibition.* Used oil shall not be managed in surface impoundments or waste piles unless the units are subject to regulation under parts 264 or 265 of this chapter.

(b) *Use as a dust suppressant.* The use of used oil as a dust suppressant is prohibited, except when such activity takes place in one of the states listed in § 279.82(c).

(c) *Burning in particular units.* Off-specification used oil fuel may be burned for energy recovery in only the following devices:

(1) Industrial furnaces identified in § 260.10 of this chapter;

(2) Boilers, as defined in § 260.10 of this chapter, that are identified as follows:

(i) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes;

(ii) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale; or

(iii) Used oil-fired space heaters provided that the burner meets the provisions of § 279.23.

Subpart C—Standards for Used Oil Generators

§ 279.20 Applicability.

(a) *General.* Except as provided in paragraphs (a)(1) through (a)(4) of this section, this subpart applies to all used oil generators. A used oil generator is any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation.

(1) *Household "do-it-yourselfer" used oil generators.* Household "do-it-yourselfer" used oil generators are not subject to regulation under this part.

(2) *Vessels.* Vessels at sea or at port are not subject to this subpart. For purposes of this subpart, used oil produced on vessels from normal shipboard operations is considered to be generated at the time it is transported ashore. The owner or operator of the vessel and the person(s) removing or accepting used oil from the vessel are co-generators of the used oil and are both responsible for managing the waste in compliance with this subpart once the used oil is transported ashore. The co-genenerators may decide among them which party will fulfill the requirements of this subpart.

(3) *Diesel fuel.* Mixtures of used oil and diesel fuel mixed by the generator of the used oil for use in the generator's own vehicles are not subject to this part once the used oil and diesel fuel have been mixed. Prior to mixing, the used oil fuel is subject to the requirements of this subpart.

(4) *Farmers.* Farmers who generate an average of 25 gallons per month or less of used oil from vehicles or machinery used on the farm in a calendar year are not subject to the requirements of this part.

(b) *Other applicable provisions.* Used oil generators who conduct the following activities are subject to the requirements of other applicable provisions of this part as indicated in paragraphs (b)(1) through (5) of this section:

(1) Generators who transport used oil, except under the self-transport provisions of § 279.24 (a) and (b), must also comply with subpart E of this part.

(2) Generators who process or re-refine used oil must also comply with subpart F of this part.

(3) Generators who burn off-specification used oil for energy recovery, except under the on-site space heater provisions of § 279.23, must also comply with subpart G of this part.

(4) Generators who direct shipments of off-specification used oil from their facility to a used oil burner or first claim that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11 must also comply with subpart H of this part.

(5) Generators who dispose of used oil, including the use of used oil as a dust suppressant, must also comply with subpart I of this part.

§ 279.21 Hazardous waste mixing.

(a) Generators shall not mix hazardous waste with used oil except as provided in § 279.10(b)(2) (ii) and (iii).

(b) The rebuttable presumption for used oil of § 279.10(b)(1)(ii) applies to used oil managed by generators. Under the rebuttable presumption for used oil of § 279.10(b)(1)(ii), used oil containing greater than 1,000 ppm total halogens is presumed to be a hazardous waste and thus must be managed as hazardous waste and not as used oil unless the presumption is rebutted. However, the rebuttable presumption does not apply to certain metalworking oils/fluids and certain used oils removed from refrigeration units.

§ 279.22 Used oil storage.

As specified in § 279.10(f), wastewaters containing "de minimis" quantities of used oil are not subject to the requirements of this part, including the prohibition on storage in units other than tanks or containers. Used oil generators are subject to all applicable Spill Prevention, Control and Countermeasures (40 CFR part 112) in addition to the requirements of this Subpart. Used oil generators are also subject to the Underground Storage Tank (40 CFR part 280) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of this subpart.

(a) *Storage units.* Used oil generators shall not store used oil in units other than tanks, containers, or units subject to regulation under parts 264 or 265 of this chapter.

(b) *Condition of units.* Containers and aboveground tanks used to store used oil at generator facilities must be:

(1) In good condition (no severe rusting, apparent structural defects or deterioration); and

(2) Not leaking (no visible leaks).

(c) *Labels.* (1) Containers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words "Used Oil."

(2) Fill pipes used to transfer used oil into underground storage tanks at generator facilities must be labeled or marked clearly with the words "Used Oil."

(d) *Response to releases.* Upon detection of a release of used oil to the environment not subject to the requirements of part 280, subpart F of this chapter which has occurred after the effective date of the authorized used oil program for the State in which the

release is located, a generator must perform the following cleanup steps:

(1) Stop the release;

(2) Contain the released used oil;

(3) Clean up and manage properly the released used oil and other materials; and

(4) If necessary to prevent future releases, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

§ 279.23 On-site burning in space heaters.

(a) Generators may burn used oil in used oil-fired space heaters provided that:

(1) The heater burns only used oil that the owner or operator generates or used oil received from household do-it-yourself used oil generators;

(2) The heater is designed to have a maximum capacity of not more than 0.5 million Btu per hour; and

(3) The combustion gases from the heater are vented to the ambient air.

(b) (Reserved)

§ 279.24 Off-site shipments.

Except as provided in paragraphs (a) through (c) of this section, generators must ensure that their used oil is transported only by transporters who have obtained EPA identification numbers.

(a) *Self-transportation of small amounts to approved collection centers.* Generators may transport, without an EPA identification number, used oil that is generated at the generator's site and used oil collected from household do-it-yourselfers to a used oil collection center provided that:

(1) The generator transports the used oil in a vehicle owned by the generator or owned by an employee of the generator;

(2) The generator transports no more than 55 gallons of used oil at any time; and

(3) The generator transports the used oil to a used oil collection center that is registered, licensed, permitted, or recognized by a state/county/municipal government to manage used oil.

(b) *Self-transportation of small amounts to aggregation points owned by the generator.* Generators may transport, without an EPA identification number, used oil that is generated at the generator's site to an aggregation point provided that:

(1) The generator transports the used oil in a vehicle owned by the generator or owned by an employee of the generator;

(2) The generator transports no more than 55 gallons of used oil at any time; and

(3) The generator transports the used oil to an aggregation point that is owned and/or operated by the same generator.

(c) *Tolling arrangements.* Used oil generators may arrange for used oil to be transported by a transporter without an EPA identification number if the used oil is reclaimed under a contractual agreement pursuant to which reclaimed oil is returned by the processor/re-refiner to the generator for use as a lubricant, cutting oil, or coolant. The contract (known as a "tolling arrangement") must indicate:

(1) The type of used oil and the frequency of shipments;

(2) That the vehicle used to transport the used oil to the processing/re-refining facility and to deliver recycled used oil back to the generator is owned and operated by the used oil processor/re-refiner; and

(3) That reclaimed oil will be returned to the generator.

Subpart D—Standards for Used Oil Collection Centers and Aggregation Points

§ 279.30 Do-it-yourselfer used oil collection centers.

(a) *Applicability.* This section applies to owners or operators of all do-it-yourselfer (DIY) used oil collection centers. A DIY used oil collection center is any site or facility that accepts/aggregates and stores used oil collected only from household do-it-yourselfers.

(b) *DIY used oil collection center requirements.* Owners or operators of all DIY used oil collection centers must comply with the generator standards in subpart C of this part.

§ 279.31 Used oil collection centers.

(a) *Applicability.* This section applies to owners or operators of used oil collection centers. A used oil collection center is any site or facility that accepts/aggregates and stores used oil collected from used oil generators regulated under subpart C of this part who bring used oil to the collection center in shipments of no more than 55 gallons under the provisions of § 279.24(a). Used oil collection centers may also accept used oil from household do-it-yourselfers.

(b) *Used oil collection center requirements.* Owners or operators of all used oil collection centers must:

(1) Comply with the generator standards in subpart C of this part; and

(2) Be registered/licensed/permitted/recognized by a state/county/municipal government to manage used oil.

§ 279.32 Used oil aggregation points owned by the generator.

(a) *Applicability.* This section applies to owners or operators of all used oil aggregation points. A used oil aggregation point is any site or facility that accepts, aggregates, and/or stores used oil collected only from other used oil generation sites owned or operated by the owner or operator of the aggregation point, from which used oil is transported to the aggregation point in shipments of no more than 55 gallons under the provisions of § 279.24(b). Used oil aggregation points may also accept used oil from household do-it-yourselfers.

(b) *Used oil aggregation point requirements.* Owners or operators of all used oil aggregation points must comply with the generator standards in subpart C of this part.

Subpart E—Standards for Used Oil Transporter and Transfer Facilities

§ 279.40 Applicability.

(a) *General.* Except as provided in paragraphs (a)(1) through (a)(4) of this section, this subpart applies to all used oil transporters. Used oil transporters are persons who transport used oil, persons who collect used oil from more than one generator and transport the collected oil, and owners and operators of used oil transfer facilities.

(1) This subpart does not apply to on-site transportation.

(2) This subpart does not apply to generators who transport shipments of used oil totalling 55 gallons or less from the generator to a used oil collection center as specified in § 279.24(a).

(3) This subpart does not apply to generators who transport shipments of used oil totalling 55 gallons or less from the generator to a used oil aggregation point owned or operated by the same generator as specified in § 279.24(b).

(4) This subpart does not apply to transportation of used oil generated by household do-it-yourselfers from the initial generator to a regulated used oil generator, collection center, aggregation point, processor/re-refiner, or burner subject to the requirements of this part. Except as provided in paragraphs (a)(1) through (a)(3) of this section, this subpart does, however, apply to transportation of collected household do-it-yourselfer used oil from regulated used oil generators, collection centers, aggregation points, or other facilities where household do-it-yourselfer used oil is collected.

(b) *Imports and exports.* Transporters who import used oil from abroad or export used oil outside of the United

States are subject to the requirements of this subpart from the time the used oil enters and until the time it exits the United States.

(c) *Trucks used to transport hazardous waste.* Unless trucks previously used to transport hazardous waste are emptied as described in § 261.7 of this chapter prior to transporting used oil, the used oil is considered to have been mixed with the hazardous waste and must be managed as hazardous waste unless, under the provisions of § 279.10(b), the hazardous waste/used oil mixture is determined not to be hazardous waste.

(d) *Other applicable provisions.* Used oil transporters who conduct the following activities are also subject to other applicable provisions of this part as indicated in paragraphs (d)(1) through (5) of this section:

(1) Transporters who generate used oil must also comply with subpart C of this part;

(2) Transporters who process or re-refine used oil, except as provided in § 279.41, must also comply with subpart F of this part;

(3) Transporters who burn off-specification used oil for energy recovery must also comply with subpart G of this part;

(4) Transporters who direct shipments of off-specification used oil from their facility to a used oil burner or first claim that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11 must also comply with subpart H of this partuel Marketers of this part; and

(5) Transporters who dispose of used oil, including the use of used oil as a dust suppressant, must also comply with subpart I of this part.

§ 279.41 Restrictions on transporters who are not also processors or re-refiners.

(a) Used oil transporters may consolidate or aggregate loads of used oil for purposes of transportation. However, except as provided in paragraph (b) of this section, used oil transporters may not process used oil unless they also comply with the requirements for processors/re-refiners in subpart F of this part.

(b) Transporters may conduct incidental processing operations that occur in the normal course of used oil transportation (e.g., settling and water separation), but that are not designed to produce (or make more amenable for production of) used oil derived products unless they also comply with the processor/re-refiner requirements in subpart F of this part.

§ 279.42 Notification.

(a) *Identification numbers.* Used oil transporters who have not previously complied with the notification requirements of RCRA section 3010 must comply with these requirements and obtain an EPA identification number.

(b) *Mechanics of notification.* A used oil transporter who has not received an EPA identification number may obtain one by notifying the Regional Administrator of their used oil activity by submitting either:

(1) A completed EPA Form 8700-12 (To obtain EPA Form 8700-12 call RCRA/Superfund Hotline at 1-800-424-9346 or 703-920-9810); or

(2) A letter requesting an EPA identification number.

Call RCRA/Superfund Hotline to determine where to send a letter requesting an EPA identification number. The letter should include the following information:

(i) Transporter company name;

(ii) Owner of the transporter company;

(iii) Mailing address for the transporter;

(iv) Name and telephone number for the transporter point of contact;

(v) Type of transport activity (i.e., transport only, transport and transfer facility, transfer facility only);

(vi) Location of all transfer facilities at which used oil is stored;

(vii) Name and telephone number for a contact at each transfer facility.

§ 279.43 Used oil transportation.

(a) *Deliveries.* A used oil transporter must deliver all used oil received to:

(1) Another used oil transporter, provided that the transporter has obtained an EPA identification number;

(2) A used oil processing/re-refining facility who has obtained an EPA identification number;

(3) An off-specification used oil burner facility who has obtained an EPA identification number; or

(4) An on-specification used oil burner facility.

(b) *Shipping.* Used oil transporters must comply with all applicable packaging, labeling, and placarding requirements of the U.S. Department of Transportation under 49 CFR parts 173, 178 and 179. Used oil that meets the definition of combustible liquid (flash point below 200 °F but at or greater than 100 °F) or flammable liquid (flash point below 100 °F) is subject to Department of Transportation Hazardous Materials Regulations at 49 CFR Parts 100 through 177.

(c) *Used oil discharges.* (1) In the event of a discharge of used oil during transportation, the transporter must take appropriate immediate action to protect human health and the environment (e.g., notify local authorities, dike the discharge area).

(2) If a discharge of used oil occurs during transportation and an official (State or local government or a Federal Agency) acting within the scope of official responsibilities determines that immediate removal of the used oil is necessary to protect human health or the environment, that official may authorize the removal of the used oil by transporters who do not have EPA identification numbers.

(3) An air, rail, highway, or water transporter who has discharged used oil must:

(i) Give notice, if required by 49 CFR 171.15 to the National Response Center (800-424-8802 or 202-426-2675); and

(ii) Report in writing as required by 49 CFR 171.16 to the Director, Office of Hazardous Materials Regulations, Materials Transportation Bureau, Department of Transportation, Washington, DC 20590.

(4) A water transporter who has discharged used oil must give notice as required by 33 CFR 153.203.

(5) A transporter must clean up any used oil discharged that occurs during transportation or take such action as may be required or approved by federal, state, or local officials so that the used oil discharge no longer presents a hazard to human health or the environment.

§ 279.44 Rebuttable presumption for used oil.

(a) To ensure that used oil is not a hazardous waste under the rebuttable presumption of § 279.10(b)(1)(ii), the used oil transporter must determine whether the total halogen content of used oil being transporter or stored at a transfer facility is above or below 1,000 ppm.

(b) The transporter must make this determination by:

(1) Testing the used oil; or

(2) Applying knowledge of the halogen content of the used oil in light of the materials or processes used.

(c) If the used oil contains greater than or equal to 1,000 ppm total halogens, it is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. The owner or operator may rebut the presumption by demonstrating that the used oil does not contain hazardous waste (for example, by using an analytical method from SW-846, Edition III, to show that the used oil does not contain significant concentrations of halogenated hazardous constituents

listed in Appendix VIII of part 261 of this chapter). EPA Publication SW–846, Third Edition, is available for the cost of $110.00 from the Government Printing Office, Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250–7954. (202) 783–3238 (document number 955–001–00000–1).

(1) The rebuttable presumption does not apply to metalworking oils/fluids containing chlorinated paraffins, if they are processed, through a tolling arrangement as described in § 279.24(c), to reclaim metalworking oils/fluids. The presumption does apply to metalworking oils/fluids if such oils/fluids are recycled in any other manner, or disposed.

(2) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units if the CFC are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

(d) *Record retention.* Records of analyses conducted or information used to comply with paragraphs (a), (b), and (c) of this section must be maintained by the transporter for at least 3 years.

§ 279.45 Used oil storage at transfer facilities.

As specified in § 279.10(f), wastewaters containing "de minimis" quantities of used oil are not subject to the requirements of this part, including the prohibition on storage in units other than tanks or containers. Used oil transporters are subject to all applicable Spill Prevention, Control and Countermeasures (40 CFR part 112) in addition to the requirements of this subpart. Used oil generators are also subject to the Underground Storage Tank (40 CFR part 280) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of this subpart.

(a) *Applicability.* This section applies to used oil transfer facilities. Used oil transfer facilities are transportation related facilities including loading docks, parking areas, storage areas, and other areas where shipments of used oil are held for more than 24 hours during the normal course of transportation and not longer than 35 days. Transfer facilities that store used oil for more than 35 days are subject to regulation under subpart F of this chapter.

(b) *Storage units.* Owners or operators of used oil transfer facilities may not store used oil in units other than tanks, containers, or units subject to regulation under parts 264 or 265 of this chapter.

(c) *Condition of units.* Containers and aboveground tanks used to store used oil at transfer facilities must be:

(1) In good condition (no severe rusting, apparent structural defects or deterioration); and

(2) Not leaking (no visible leaks).

(d) *Secondary containment for containers.* Containers used to store used oil at transfer facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dikes, berms, or retaining walls.

(2) The entire containment system, including walls and floors, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(e) *Secondary containment for existing aboveground tanks.* Existing aboveground tanks used to store used oil at transfer facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall except areas where existing portions of the tank meet the ground; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floors, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(f) *Secondary containment for new aboveground tanks.* New aboveground tanks used to store used oil at transfer facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floors, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(g) *Labels.* (1) Containers and aboveground tanks used to store used oil at transfer facilities must be labeled or marked clearly with the words "Used Oil."

(2) Fill pipes used to transfer used oil into underground storage tanks at transfer facilities must be labeled or marked clearly with the words "Used Oil."

(h) *Response to releases.* Upon detection of a release of used oil to the environment not subject to the requirements of part 280 subpart F which has occurred after the effective date of the authorized used oil program for the State in which the release is located, the owner/operator of a transfer facility must perform the following cleanup steps:

(1) Stop the release;

(2) Contain the release used oil;

(3) Clean up and manage properly the released used oil and other materials; and

(4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

§ 279.46 Tracking.

(a) *Acceptance.* Used oil transporters must keep a record of each used oil shipment accepted for transport. Records for each shipment must include:

(1) The name and address of the generator, transporter, or processor/re-refiner who provided the used oil for transport;

(2) The EPA identification number (if applicable) of the generator, transporter, or processor/re-refiner who provided the used oil for transport;

(3) The quantity of used oil accepted;

(4) The date of acceptance; and

(5) The signature, dated upon receipt of the used oil, of a representative of the generator, transporter, or processor/re-refiner who provided the used oil for transport.

(b) *Deliveries.* Used oil transporters must keep a record of each shipment of used oil that is delivered to another used oil transporter, or to a used oil burner, processor/re-refiner, or disposal facility. Records of each delivery must include:

(1) The name and address of the receiving facility or transporter;

(2) The EPA identification number of the receiving facility or transporter;

(3) The quantity of used oil delivered;

(4) The date of delivery;

(5) The signature, dated upon receipt of the used oil, of a representative of the receiving facility or transporter.

(c) *Exports of used oil.* Used oil transporters must maintain the records described in paragraphs (b)(1) through (b)(4) of this section for each shipment of used oil exported to any foreign country.

(d) *Record retention.* The records described in paragraphs (a), (b), and (c) of this section must be maintained for at least three years.

§ 279.47 Management of residues.

Transporters who generate residues from the storage or transport of used oil must manage the residues as specified in § 279.10(e).

Subpart F—Standards for Used Oil Processors and Re-Refiners

§ 279.50 Applicability.

(a) The requirements of this subpart apply to owners and operators of facilities that process used oil. Processing means chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products. Processing includes, but is not limited to: blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining. The requirements of this subpart do not apply to:

(1) Transporters that conduct incidental processing operations that occur during the normal course of transportation as provided in § 279.41; or

(2) Burners that conduct incidental processing operations that occur during the normal course of used oil management prior to burning as provided in § 279.61(b).

(b) *Other applicable provisions.* Used oil processors/re-refiners who conduct the following activities are also subject to the requirements of other applicable provisions of this part as indicated in paragraphs (b)(1) through (b)(5) of this section.

(1) Processors/re-refiners who generate used oil must also comply with subpart C of this part;

(2) Processors/re-refiners who transport used oil must also comply with subpart E of this part;

(3) Except as provided in paragraphs (b)(3)(i) and (b)(3)(ii) of this section, processors/re-refiners who burn off-specification used oil for energy recovery must also comply with subpart G of this part. Processor/re-refiners burning used oil for energy recovery under the following conditions are not subject to subpart G of this part:

(i) The used oil is burned in an on-site space heater that meets the requirements of § 279.23; or

(ii) The used oil is burned for purposes of processing used oil, which is considered burning incidentally to used oil processing;

(4) Processors/re-refiners who direct shipments of off-specification used oil from their facility to a used oil burner or first claim that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11 must also comply with subpart H of this part; and

(5) Processors/re-refiners who dispose of used oil, including the use of used oil as a dust suppressant, also must comply with subpart I of this part.

§ 279.51 Notification.

(a) *Identification numbers.* Used oil processors and re-refiners who have not previously complied with the notification requirements of RCRA section 3010 must comply with these requirements and obtain an EPA identification number.

(b) *Mechanics of notification.* A used oil processor or re-refiner who has not received an EPA identification number may obtain one by notifying the Regional Administrator of their used oil activity by submitting either:

(1) A completed EPA Form 8700–12 (To obtain EPA Form 8700–12 call RCRA/Superfund Hotline at 1–800–424–9346 or 703–920–9810); or

(2) A letter requesting an EPA identification number.

Call RCRA/Superfund Hotline to determine where to send a letter requesting an EPA identification number. The letter should include the following information:

(i) Processor or re-refiner company name;

(ii) Owner of the processor or re-refiner company;

(iii) Mailing address for the processor or re-refiner;

(iv) Name and telephone number for the processor or re-refiner point of contact;

(v) Type of used oil activity (i.e., process only, process and re-refine);

(vi) Location of the processor or re-refiner facility.

§ 279.52 General facility standards.

(a) *Preparedness and prevention.* Owners and operators of used oil processors and re-refiners facilities must comply with the following requirements:

(1) *Maintenance and operation of facility.* Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of used oil to air, soil, or surface water which could threaten human health or the environment.

(2) *Required equipment.* All facilities must be equipped with the following, unless none of the hazards posed by used oil handled at the facility could require a particular kind of equipment specified in paragraphs (a)(2)(i) through (iv) of this section:

(i) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(ii) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or State or local emergency response teams;

(iii) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment and decontamination equipment; and

(iv) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

(3) *Testing and maintenance of equipment.* All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

(4) *Access to communications or alarm system.* (i) Whenever used oil is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required in paragraph (a)(2) of this section.

(ii) If there is ever just one employee on the premises while the facility is operating, the employee must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, unless such a device is not required in paragraph (a)(2) of this section.

(5) *Required aisle space.* The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency,

unless aisle space is not needed for any of these purposes.

(6) *Arrangements with local authorities.* (i) The owner or operator must attempt to make the following arrangements, as appropriate for the type of used oil handled at the facility and the potential need for the services of these organizations:

(A) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of used oil handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;

(B) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(C) Agreements with State emergency response teams, emergency response contractors, and equipment suppliers; and

(D) Arrangements to familiarize local hospitals with the properties of used oil handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(ii) Where State or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operating record.

(b) *Contingency plan and emergency procedures.* Owners and operators of used oil processors and re-refiners facilities must comply with the following requirements:

(1) *Purpose and implementation of contingency plan.* (i) Each owner or operator must have a contingency plan for the facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of used oil to air, soil, or surface water.

(ii) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release or used oil which could threaten human health or the environment.

(2) *Content of contingency plan.* (i) The contingency plan must describe the actions facility personnel must take to comply with paragraphs (b) (1) and (6) of this section in response to fires, explosions, or any unplanned sudden or non-sudden release of used oil to air, soil, or surface water at the facility.

(ii) If the owner or operator has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with part 112 of this chapter, or part 1510 of chapter V of this title, or some other emergency or contingency plan, the owner or operator need only amend that plan to incorporate used oil management provisions that are sufficient to comply with the requirements of this part.

(iii) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to paragraph (a)(6) of this section.

(iv) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see paragraph (b)(5) of this section), and this list must be kept up to date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(v) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(vi) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of used oil or fires).

(3) *Copies of contingency plan.* A copy of the contingency plan and all revisions to the plan must be:

(i) Maintained at the facility; and

(ii) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

(4) *Amendment of contingency plan.* The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

(i) Applicable regulations are revised;

(ii) The plan fails in an emergency;

(iii) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of used oil, or changes the response necessary in an emergency;

(iv) The list of emergency coordinators changes; or

(v) The list of emergency equipment changes.

(5) *Emergency coordinator.* At all times, there must be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristic of used oil handled, the location of all records within the facility, and facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan.

Guidance: The emergency coordinator's responsibilities are more fully spelled out in paragraph (b)(6) of this section. Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of used oil handled by the facility, and type and complexity of the facility.

(6) *Emergency procedures.* (i) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or the designee when the emergency coordinator is on call) must immediately:

(A) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(B) Notify appropriate State or local agencies with designated response roles if their help is needed.

(ii) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and a real extent of any released materials. He may do this by observation or review of facility records of manifests and, if necessary, by chemical analysts.

(iii) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (e.g., the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-offs from water of chemical agents used to control fire and heat-induced explosions).

(iv) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(A) If his assessment indicated that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(B) He must immediately notify either the government official designated as the on-scene coordinator for the geographical area (in the applicable regional contingency plan under part 1510 of this title), or the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include:

(*1*) Name and telephone number of reporter;

(*2*) Name and address of facility;

(*3*) Time and type of incident (e.g., release, fire);

(*4*) Name and quantity of material(s) involved, to the extent known;

(*5*) The extent of injuries, if any; and

(*6*) The possible hazards to human health, or the environment, outside the facility.

(v) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other used oil or hazardous waste at the facility. These measures must include, where applicable, stopping processes and operation, collecting and containing released used oil, and removing or isolating containers.

(vi) If the facility stops operation in response to a fire, explosion, or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(vii) Immediately after an emergency, the emergency coordinator must provide for recycling, storing, or disposing of recovered used oil, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

(viii) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(A) No waste or used oil that may be incompatible with the released material is recycled, treated, stored, or disposed of until cleanup procedures are completed; and

(B) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(C) The owner or operator must notify the Regional Administrator, and appropriate State and local authorities that the facility is in compliance with paragraph (h) of this section before operations are resumed in the affected area(s) of the facility.

(ix) The owner or operator must note in the operating record the time, date and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(A) Name, address, and telephone number of the owner or operator;

(B) Name, address, and telephone number of the facility;

(C) Date, time, and type of incident (e.g., fire, explosion);

(D) Name and quantity of material(s) involved;

(E) The extent of injuries, if any;

(F) An assessment of actual or potential hazards to human health or the environment, where this is applicable;

(G) Estimated quantity and disposition of recovered material that resulted from the incident.

§ 279.53 Rebuttable presumption for used oil.

(a) To ensure that used oil managed at a processing/re-refining facility is not hazardous waste under the rebuttable presumption of § 279.10(b)(1)(ii), the owner or operator of a used oil processing/re-refining facility must determine whether the total halogen content of used oil managed at the facility is above or below 1,000 ppm.

(b) The owner or operator must make this determination by:

(1) Testing the used oil; or

(2) Applying knowledge of the halogen content of the used oil in light of the materials or processes used.

(c) If the used oil contains greater than or equal to 1,000 ppm total halogens, it is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. The owner or operator may rebut the presumption by demonstrating that the used oil does not contain hazardous waste (for example, by using an analytical method from SW–846, Edition III, to show that the used oil does not contain significant concentrations of halogenated hazardous constituents listed in appendix VIII of part 261 of this chapter). EPA Publication SW–846, Third Edition, is available for the cost of $110.00 from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh PA 15250–7954, (202) 783–3238 (document number 955–001–00000–1).

(1) The rebuttable presumption does not apply to metalworking oils/fluids containing chlorinated paraffins, if they are processed, through a tolling agreement, to reclaim metalworking oils/fluids. The presumption does apply to metalworking oils/fluids if such oils/fluids are recycled in any other manner, or disposed.

(2) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units where the CFCs are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

§ 279.54 Used oil management.

As specified in § 279.10(f), wastewaters containing "de minimis" quantities of used oil are not subject to the requirements of this part, including the prohibition on storage in units other than tanks or containers. Used oil processor/re-refiners are subject to all applicable Spill Prevention, Control and Countermeasures (40 CFR part 112) in addition to the requirements of this subpart. Used oil generators are also subject to the Underground Storage Tank (40 CFR part 280) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of this subpart.

(a) *Management units.* Used oil processors/re-refiners may not store or process used oil in units other than tanks, containers, or units subject to regulation under part 264 or 265 of this chapter.

(b) *Condition of units.* Containers and aboveground tanks used to store or process used oil at processing and re-refining facilities must be:

(1) In good condition (no severe rusting, apparent structural defects or deterioration); and

(2) Not leaking (no visible leaks).

(c) *Secondary containment for containers.* Containers used to store or process used oil at processing and re-refining facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(d) *Secondary containment for existing aboveground tanks.* Existing aboveground tanks used to store or process used oil at processing and re-refining facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall except areas where existing portions of the tank meet the ground; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(e) *Secondary containment for new aboveground tanks.* New aboveground tanks used to store or process used oil at processing and re-refining facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(f) *Labels.* (1) Containers and aboveground tanks used to store or process used oil at processing and re-refining facilities must be labeled or marked clearly with the words "Used Oil."

(2) Fill pipes used to transfer used oil into underground storage tanks at processing and re-refining facilities must be labeled or marked clearly with the words "Used Oil."

(g) *Response to releases.* Upon detection of a release of used oil to the environment not subject to the requirements of part 280, subpart F of this chapter which has occurred after the effective date of the authorized used oil program for the State in which the release is located, an owner/operator must perform the following cleanup steps:

(1) Stop the release;

(2) Contain the released used oil;

(3) Clean up and mange properly the released used oil and other materials; and

(4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

(h) *Closure.*—(1) *Aboveground tanks.* Owners and operators who store or process used oil in aboveground tanks must comply with the following requirements:

(i) At closure of a tank system, the owner or operator must remove or decontaminate used oil residues in tanks, contaminated containment system components, contaminated soils, and structures and equipment contaminated with used oil, and manage them as hazardous waste, unless the materials are not hazardous waste under this chapter.

(ii) If the owner or operator demonstrates that not all contaminated soils can be practicably removed or decontaminated as required in paragraph (h)(1)(i) of this section, then the owner or operator must close the tank system and perform post-closure care in accordance with the closure and post-closure care requirements that apply to hazardous waste landfills (§ 265.310 of this chapter).

(2) *Containers.* Owners and operators who store used oil in containers must comply with the following requirements:

(i) At closure, containers holding used oils or residues of used oil must be removed from the site;

(ii) The owner or operator must remove or decontaminate used oil residues, contaminated containment system components, contaminated soils, and structures and equipment contaminated with used oil, and manage them as hazardous waste, unless the materials are not hazardous waste under part 261 of this chapter.

§ 279.55 Analysis plan.

Owners or operators of used oil processing and re-refining facilities must develop and follow a written analysis plan describing the procedures that will be used to comply with the analysis requirements of § 279.53 and, if applicable, § 279.72. The owner or operator must keep the plan at the facility.

(a) *Rebuttable presumption for used oil in § 279.53.* At at minimum, the plan must specify the following:

(1) Whether sample analyses or knowledge of the halogen content of the used oil will be used to make this determination.

(2) If sample analyses are used to make this determination:

(i) The sampling method used to obtain representative samples to be analyzed. A representative sample may be obtained using either:

(A) One of the sampling methods in appendix I of part 261 of this chapter; or

(B) A method shown to be equivalent under §§ 260.20 and 260.21 of this chapter;

(ii) The frequency of sampling to be performed, and whether the analysis will be performed on-site or off-site; and

(iii) The methods used to analyze used oil for the parameters specified in § 279.53; and

(3) The type of information that will be used to determine the halogen content of the used oil.

(b) *On-specification used oil fuel in § 279.72.* At a minimum, the plan must specify the following if § 279.72 is applicable:

(1) Whether sample analyses or other information will be used to make this determination;

(2) If sample analyses are used to make this determination:

(i) The sampling method used to obtain representative samples to be analyzed. A representative sample may be obtained using either:

(A) One of the sampling methods in appendix I of part 261 of this chapter; or

(B) A method shown to be equivalent under § 260.20 and 260.21 of this chapter;

(ii) Whether used oil will be sampled and analyzed prior to or after any processing/re-refining;

(iii) The frequency of sampling to be performed, and whether the analysis will be performed on-site or off-site; and

(iv) The methods used to analyze used oil for the parameters specified in § 279.72; and

(3) The type of information that will be used to make the on-specification used oil fuel determination.

§ 279.56 Tracking.

(a) *Acceptance.* Used oil processors/re-refiners must keep a record of each used oil shipment accepted for processing/re-refining. These records may take the form of a log, invoice, manifest, bill of lading or other shipping documents. Records for each shipment must include the following information:

(1) The name and address of the transporter who delivered the used oil to the processor/re-refiner;

(2) The name and address of the generator or processor/re-refining from

whom the used oil was sent for processing/re-refining;

(3) The EPA identification number of the transporter who delivered the used oil to the processor/re-refiner;

(4) The EPA identification number (if applicable) of the generator or processor/re-refiner from whom the used oil was sent for processing/re-refining;

(5) The quantity of used oil accepted; and

(6) The date of acceptance.

(b) *Delivery.* Used oil processor/re-refiners must keep a record of each shipment of used oil that is shipped to a used oil burner, processor/ re-refiner, or disposal facility. These records may take the form of a log, invoice, manifest, bill of lading or other shipping documents. Records for each shipment must include the following information:

(1) The name and address of the transporter who delivers the used oil to the burner, processor/re-refiner or disposal facility;

(2) The name and address of the burner, processor/re-refiner or disposal facility who will receive the used oil;

(3) The EPA identification number of the transporter who delivers the used oil to the burner, processor/re-refiner or disposal facility;

(4) The EPA identification number of the burner, processor/re-refiner, or disposal facility who will receive the used oil;

(5) The quantity of used oil shipped; and

(6) The date of shipment.

(c) *Record retention.* The records described in paragraphs (a) and (b) of this section must be maintained for at least three years.

§ 279.57 Operating record and reporting.

(a) *Operating record.* (1) The owner or operator must keep a written operating record at the facility.

(2) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility;

(i) Records and results of used oil analyses performed as described in the analysis plan required under § 279.55; and

(ii) Summary reports and details of all incidents that require implementation of the contingency plan an specified in § 279.52(b).

(b) *Reporting.* A used oil processor/re-refiner must report to the Regional Administrator, in the form of a letter, on a biennial basis (by March 1 of each even numbered year), the following information concerning used oil activities during the previous calendar year;

(1) The EPA identification number, name, and address of the processor/re-refiner;

(2) The calendar year covered by the report; and

(3) The quantities of used oil accepted for processing/re-refining and the manner in which the used oil is processed/re-refined, including the specific processes employed.

§ 279.58 Off-site shipments of used oil.

Used oil processors/re-refiners who initiate shipments of used oil off-site must ship the used oil using a used oil transporter who has obtained an EPA identification number.

§ 279.59 Management of residues.

Owners and operators who generate residues from the storage, processing, or re-fining of used oil must manage the residues as specified in § 279.10(e).

Subpart G—Standards for Used Oil Burners Who Burn Off-Specification Used Oil for Energy Recovery

§ 279.60 Applicability.

(a) *General.* The requirements of this subpart apply to used oil burners except as specified in paragraphs (a)(1) and (a)(2) of this section. A used oil burner is a facility where used oil not meeting the specification requirements in § 279.11 is burned for energy recovery in devices identified in § 279.61(a). Facilities burning used oil for energy recovery under the following conditions are not subject to this Subpart:

(1) The used oil is burned by the generator in an on-site space heater under the provisions of § 279.23; or

(2) The used oil is burned by a processor/re-refiner for purposes of processing used oil, which is considered burning incidentally to used oil processing.

(b) *Other applicable provisions.* Used oil burners who conduct the following activities are also subject to the requirements of other applicable provisions of this part as indicated below.

(1) Burners who generate used oil must also comply this subpart C of this part;

(2) Burners who transport used oil must also comply with subpart E of this part;

(3) Except as provided in § 279.61(b), burners who process or re-refine used oil must also comply with subpart F of this part;

(4) Burners who direct shipments of off-specification used oil from their facility to a used oil burner or first claim that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11 must also comply with subpart H of this part; and

(5) Burners who dispose of used oil, including the use of used oil as a dust suppressant, must comply with subpart I of this part.

(c) *Specification fuel.* This subpart does not apply to persons burning used oil that meets the used oil fuel specification of § 279.11, provided that the burner complies with the requirements of subpart H of this part.

§ 279.61 Restrictions on burning.

(a) Off-specification used oil fuel may be burned for energy recovery in only the following devices:

(1) Industrial furnaces identified in § 260.10 of this chapter;

(2) Boilers, as defined in § 260.10 of this chapter, that are identified as follows:

(i) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes;

(ii) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale; or

(iii) Used oil-fired space heaters provided that the burner meets the provisions of § 279.23; or

(3) Hazardous waste incinerators subject to regulation under subpart O of parts 264 or 265 of this chapter.

(b)(1) With the following exception, used oil burners may not process used oil unless they also comply with the requirements of subpart F of this part.

(2) Used oil burners may aggregate off-specification used oil with virgin oil or on-specification used oil for purposes of burning, but may not aggregate for purposes of producing on-specification used oil.

§ 279.62 Notification

(a) *Identification numbers.* Used oil burners who have not previously complied with the notification requirements of RCRA section 3010 must comply with these requirements and obtain an EPA identification number.

(b) *Mechanics of notification.* A used oil burner who has not received an EPA identification number may obtain one by notifying the Regional Administrator of their used oil activity by submitting either:

(1) A completed EPA Form 8700–12 (To obtain EPA Form 8700–12 call RCRA/Superfund Hotline at 1–800–424–9346 or 703–920–9810); or

(2) A letter requesting an EPA identification number. Call the RCRA/Superfund Hotline to determine where to send a letter requesting an EPA identification number. The letter should include the following information:

(i) Burner company name;

(ii) Owner of the burner company;

(iii) Mailing address for the burner;

(iv) Name and telephone number for the burner point of contact;

(v) Type of used oil activity; and

(vi) Location of the burner facility.

§ 279.63 Rebuttable presumption for used oil.

(a) To ensure that used oil managed at a used oil burner facility is not hazardous waste under the rebuttable presumption of § 279.10(b)(1)(ii), a used oil burner must determine whether the total halogen content of used oil managed at the facility is above or below 1,000 ppm.

(b) The used oil burner must determine if the used oil contains above or below 1,000 ppm total halogens by:

(1) Testing the used oil;

(2) Applying knowledge of the halogen content of the used oil in light of the materials or processes used; or

(3) If the used oil has been received from a processor/refiner subject to regulation under subpart F of this part, using information provided by the processor/re-refiner.

(c) If the used oil contains greater than or equal to 1,000 ppm total halogens, it is presumed to be a hazardous waste/ because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. The owner or operator may rebut the presumption by demonstrating that the used oil does not contain hazardous waste (for example, by using an analytical method from SW–846, Edition III, to show that the used oil does not contain significant concentrations of halogenated hazardous constituents listed in appendix VIII of part 261 of this chapter). EPA Publication SW–846, Third Edition, is available for the cost of $110.00 from the Government Printing Office, Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250–7954. 202–783–3238 (document number 955–001–00000–1).

(1) The rebuttable presumption does not apply to metalworking oils/fluids containing chlorinated paraffins, if they are processed, through a tolling arrangement as described in § 279.24(c), to reclaim metalworking oils/fluids. The presumption does apply to metalworking oils/fluids if such oils/fluids are recycled in any other manner, or disposed.

(2) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units where the CFCs are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

(d) *Record retention.* Records of analyses conducted or information used to comply with paragraphs (a), (b), and (c) of this section must be maintained by the burner for at least 3 years.

§ 279.64 Used oil storage.

As specified in § 279.10(f), wastewaters containing "de minimis" quantities of used oil are not subject to the requirements of this Part, including the prohibition on storage in units other than tanks or containers. Used oil burners are subject to all applicable Spill Prevention, Control and Countermeasures (40 CFR part 112) in addition to the requirements of this subpart. Used oil generators are also subject to the Underground Storage Tank (40 CFR part 280) standards for used oil stored in underground tanks whether or not the used oil exhibits any characteristics of hazardous waste, in addition to the requirements of this subpart.

(a) *Storage units.* Used oil burners may not store used oil in units other than tanks, containers, or units subject to regulation under parts 264 or 265 of this chapter.

(b) *Condition of units.* Containers and aboveground tanks used to store oil at burner facilities must be:

(1) In good condition (no severe rusting, apparent structural defects or deterioration); and

(2) Not leaking (no visible leaks).

(c) *Secondary containment for containers.* Containers used to store used oil at burner facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(d) *Secondary containment for existing aboveground tanks.* Existing aboveground tanks used to store used oil at burner facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall except areas where existing portions of the tank meet the ground; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(e) *Secondary containment for existing aboveground tanks.* New aboveground tanks used to store used oil at burner facilities must be equipped with a secondary containment system.

(1) The secondary containment system must consist of, at a minimum:

(i) Dikes, berms or retaining walls; and

(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall; or

(iii) An equivalent secondary containment system.

(2) The entire containment system, including walls and floor, must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water.

(f) *Labels.* (1) Containers and aboveground tanks used to store used oil at burner facilities must be labeled or marked clearly with the words "Used Oil."

(2) Fill pipes used to transfer used oil into underground storage tanks at burner facilities must be labeled or marked clearly with the words "Used Oil."

(g) *Response to releases.* Upon detection of a release of used oil to the environment not subject to the requirements of part 280 subpart F which has occurred after the effective date of the authorized used oil program for the State in which the release is located, a burner must perform the following cleanup steps:

(1) Stop the release;

(2) Contain the released used oil;

(3) Clean up and manage properly the released used oil and other materials; and

(4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

§ 279.65 Tracking.

(a) *Acceptance.* Used oil burners must keep a record of each used oil shipment accepted for burning. These records may take the form of a log, invoice, manifest, bill of lading, or other shipping documents. Records for each shipment must include the following information:

(1) The name and address of the transporter who delivered the used oil to the burner;

(2) The name and address of the generator or processor/re-refiner from whom the used oil was sent to the burner;

(3) The EPA identification number of the transporter who delivered the used oil to the burner;

(4) The EPA identification number (if applicable) of the generator or processor/re-refiner from whom the used oil was sent to the burner;

(5) The quantity of used oil accepted; and

(6) The date of acceptance.

(b) *Record retention.* The records described in paragraph (a) of this section must be maintained for at least three years.

§ 279.66 Notices.

(a) *Certification.* Before a burner accepts the first shipment of off-specification used oil fuel from a generator, transporter, or processor/re-refiner, the burner must provide to the generator, transporter, or processor/re-refiner a one-time written and signed notice certifying that:

(1) The burner has notified EPA stating the location and general description of his used oil management activities; and

(2) The burner will burn the used oil only in an industrial furnace or boiler identified in § 279.61(a).

(b) *Certification retention.* The certification described in paragraph (a) of this section must be maintained for three years from the date the burner last receives shipment of off-specification used oil from that generator, transporter, or processor/re-refiner.

§ 279.67 Management of residues.

Burners who generate residues from the storage or burning of used oil must manage the residues as specified in § 279.10(e).

Subpart H–Standards for Used Oil Fuel Marketers

§ 279.70 Applicability.

(a) Any person who conducts either of the following activities is subject to the requirements of this section:

(1) Directs a shipment of off-specification used oil from their facility to a used oil burner; or

(2) First claims that used oil that is to be burned for energy recovery meets the used oil fuel specifications set forth in § 279.11.

(b) The following persons are not marketers subject to this subpart:

(1) Used oil generators, and transporters who transport used oil received only from generators, unless the generator or transporter directs a shipment of off-specification used oil from their facility to a used oil burner. However, processors/re-refiners who burn some used oil fuel for purposes of processing are considered to be burning incidentally to processing. Thus, generators and transporters who direct shipments of off-specification used oil to processor/re-refiners who incidently burn used oil are not marketers subject to this Subpart;

(2) Persons who direct shipments of on-specification used oil and who are not the first person to claim the oil meets the used oil fuel specifications of § 279.11.

(c) Any person subject to the requirements of this Subpart must also comply with one of the following:

(1) Subpart C of this part—Standards for Used Oil Generators;

(2) Subpart E of this part—Standards for Used Oil Transporters and Transfer Facilities;

(3) Subpart F of this part—Standards for Used Oil Processors and Re-refiners; or

(4) Subpart G of this part—Standards for Used Oil Burners who Burn Off-Specification Used Oil for Energy Recovery.

§ 279.71 Prohibitions.

A used oil fuel marketer may initiate a shipment of off-specification used oil only to a used oil burner who:

(a) Has an EPA identification number; and

(b) Burns the used oil in an industrial furnace or boiler identified in § 279.61(a).

§ 279.72 On-specification used oil fuel.

(a) *Analysis of used oil fuel.* A generator, transporter, processor/re-refiner, or burner may determine that used oil that is to be burned for energy recovery meets the fuel specifications of § 279.11 by performing analyses or obtaining copies of analyses or other information documenting that the used oil fuel meets the specifications. Such used oil that is to be burned for energy recovery is not subject to further regulation under this part.

(b) *Record retention.* A generator, transporter, processor/re-refiner, or burner who first claims that used oil that is to be burned for energy recovery meets the specifications for used oil fuel under § 279.11, must keep copies of analyses of the used oil (or other information used to make the determination) for three years.

§ 279.73 Notification.

(a) A used oil fuel marketer subject to the requirements of this section who has not previously complied with the notification requirements of RCRA Section 3010 must comply with these requirements and obtain an EPA identification number.

(b) A marketer who has not received an EPA identification number may obtain one by notifying the Regional Administrator of their used oil activity by submitting either:

(1) A completed EPA Form 8700–12; or

(2) A letter requesting an EPA identification number. The letter should include the following information:

(i) Marketer company name;

(ii) Owner of the marketer;

(iii) Mailing address for the marketer;

(iv) Name and telephone number for the marketer point of contact; and

(v) Type of used oil activity (i.e., generator directing shipments of off-specification used oil to a burner).

§ 279.74 Tracking.

(a) *Off-specification used oil delivery.* Any used oil generator who directs a shipment of off-specification used oil to a burner must keep a record of each shipment of used oil to a used oil burner. These records may take the form of a log, invoice, manifest, bill of lading or other shipping documents. Records for each shipment must include the following information:

(1) The name and address of the transporter who delivers the used oil to the burner;

(2) The name and address of the burner who will receive the used oil;

(3) The EPA identification number of the transporter who delivers the used oil to the burner;

(4) The EPA identification number of the burner;

(5) The quantity of used oil shipped; and

(6) The date of shipment.

(b) *On-specification used oil delivery.* A generator, transporter, processor/re-refiner, or burner who first claims that used oil that is to be burned for energy recovery meets the fuel specifications under § 279.11 must keep a record of each shipment of used oil to an on-specification used oil burner. Records for each shipment must include the following information:

(1) The name and address of the facility receiving the shipment;

(2) The quantity of used oil fuel delivered;

(3) The date of shipment or delivery; and

(4) A cross-reference to the record of used oil analysis or other information used to make the determination that the oil meets the specification as required under § 279.72(a).

(c) *Record retention.* The records described in paragraphs (a) and (b) of this section must be maintained for at least three years.

§ 279.75 Notices.

(a) *Certification.* Before a used oil generator, transporter, or processor/re-refiner directs the first shipment of off-specification used oil fuel to a burner, he must obtain a one-time written and signed notice from the burner certifying that:

(1) The burner has notified EPA stating the location and general description of used oil management activities; and

(2) The burner will burn the off-specification used oil only in an industrial furnace or boiler identified in § 279.61(a).

(b) *Certification retention.* The certification described in paragraph (a) of this section must be maintained for three years from the date the last shipment of off-specification used oil is shipped to the burner.

Subpart I—Standards for Use as a Dust Suppressant and Disposal of Used Oil

§ 279.80 Applicability.

The requirements of this subpart apply to all used oils that cannot be recycled and are therefore being disposed.

§ 279.81 Disposal.

(a) *Disposal of hazardous used oils.* Used oils that are identified as a hazardous waste and cannot be recycled in accordance with this part must be managed in accordance with the hazardous waste management requirements of parts 260 through 266, 268, 270 and 124 of this chapter.

(b) *Disposal of nonhazardous used oils.* Used oils that are not hazardous wastes and cannot be recycled under this part must be disposed in accordance with the requirements of parts 257 and 258 of this chapter.

§ 279.82 Use as a dust suppressant.

(a) The use of used oil as a dust suppressant is prohibited, except when such activity takes place in one of the states listed in paragraph (c) of this section.

(b) A State may petition (e.g., as part of its authorization petition submitted to EPA under § 271.5 of this chapter or by a separate submission) EPA to allow the use of used oil (that is not mixed with hazardous waste and does not exhibit a characteristic other than ignitability) as a dust suppressant. The State must show that it has a program in place to prevent the use of used oil/hazardous waste mixtures or used oil exhibiting a characteristic other than ignitability as a dust suppressant. In addition, such programs must minimize the impacts of use as a dust suppressant on the environment.

(c) *List of States.* [Reserved]

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