

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 247**

[SWH-FRL-5909-6]

RIN 2050-AE23

**Comprehensive Guideline for Procurement of Products Containing Recovered Materials**

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

**SUMMARY:** The Environmental Protection Agency today is issuing an amendment to the May 1, 1995 Comprehensive Procurement Guideline (CPG). EPA is designating 12 new items that are or can be made with recovered materials. These items are shower and restroom dividers/partitions; consolidated and reprocessed latex paint for specified uses; parking stops; channelizers; delineators; flexible delineators; plastic fencing for specified uses; garden and soaker hoses; lawn and garden edging; printer ribbons; plastic envelopes; and pallets. In addition, this action clarifies EPA's previous designation of floor tiles, structural fiberboard, and laminated paperboard as items that can be made with recovered materials.

The CPG implements section 6002 of the Resource Conservation and Recovery Act (RCRA), which requires EPA to designate items that are or can be produced with recovered materials and to recommend practices for the procurement of designated items by procuring agencies. Once EPA designates an item, RCRA requires any procuring agency using appropriated Federal funds to procure that item to purchase it with the highest percentage of recovered materials practicable. Today's action will foster markets for materials recovered from solid waste by using government purchasing power to stimulate the use of these materials in the manufacture of new products.

RCRA section 6002 provides certain limited exceptions to the general requirement to buy EPA-designated items. Under certain circumstances based on competition, price, availability, and performance, procuring agencies are not required to purchase an item designated by EPA. In the May 1, 1995 CPG, EPA codified the RCRA section 6002 procurement requirements for the convenience of procuring agencies so they can find all of the RCRA section 6002 procurement provisions, as well as EPA's item designations, in one location. EPA inadvertently omitted the limitations

from the codification of agency requirements, however. Today, EPA is codifying these procurement limitations with the affirmative procurement program portion of the CPG for the convenience of procuring agencies.

**EFFECTIVE DATES:** The amendments to the Comprehensive Procurement Guideline designating additional procurement items (§§ 247.3; 247.12 through 247.17) are effective on November 13, 1998. The amendment adding the procurement limitations (§ 247.2(d)) is effective November 13, 1997.

**ADDRESSES:** The public docket for this notice is Docket F-97-CP2F-FFFFF. Documents related to today's notice are available for viewing in the RCRA Information Center (RIC), which is located at U.S. Environmental Protection Agency, Crystal Gateway One, 1235 Jefferson Davis Highway, Ground Floor, Arlington, VA 22202. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, except for Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling (703) 603-9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost \$0.15/page. The index and some supporting materials are available electronically. See Section VIII of the "Supplementary Information" section below for information on accessing the documents electronically.

**FOR FURTHER INFORMATION CONTACT:**

*General procurement guidelines information:* RCRA Hotline at (800) 424-9346, TDD (800) 553-7672 (hearing impaired) or, in the Washington, DC area at (703) 412-9810 or TDD (703) 412-3323.

*Technical information on individual item recommendations:* For paper and paper products, vehicular products, construction products, non-paper office products, and pallets: Dana Arnold, (703) 308-7279; for landscaping products, transportation products, and park and recreation products: Terry Grist, (703) 308-7257.

**SUPPLEMENTARY INFORMATION:****Preamble Outline**

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**I. Authority**

This amendment to the Comprehensive Procurement Guideline is promulgated under the authority of sections 2002(a) and 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6912(a) and 6962, and section 502 of Executive Order 12873, "Federal Acquisition, Recycling, and Waste Prevention" (58 FR 54911, October 22, 1993).

**II. Regulated Entities**

This action may potentially affect those procuring agencies that purchase the following: shower and restroom dividers/partitions, consolidated and reprocessed latex paint for specified uses, floor tiles, structural fiberboard, laminated paperboard, parking stops, temporary traffic control devices, plastic fencing for specified uses, garden and soaker hose, lawn and garden edging, printer ribbons, plastic envelopes, or pallets. For purposes of RCRA section 6002, procuring agencies include the following: (1) any Federal agency; (2) any State or local agencies using appropriated Federal funds for a procurement; or (3) any contractors with these agencies (with respect to work performed under the contract). See

RCRA section 1004(17). The requirements of section 6002 apply to such procuring agencies only when

procuring designated items where the price of the item exceeds \$10,000 or the quantity of the item purchased in the

previous year exceeded \$10,000. Potential regulated entities for this rule are shown in Table 1.

TABLE 1.—ENTITIES POTENTIALLY SUBJECT TO SECTION 6002 REQUIREMENTS TRIGGERED BY CPG AMENDMENTS

Category	Examples of regulated entities
Federal Government .....	Federal departments or agencies that procure \$10,000 or more worth of a designated item in a given year.
State Government .....	A State agency that uses appropriated Federal funds to procure \$10,000 or more worth of a designated item in a given year.
Local Government .....	A local agency that uses appropriated Federal funds to procure \$10,000 or more worth of a designated item in a given year.
Contractor .....	A contractor working on a project funded by appropriated Federal funds that purchases \$10,000 or more worth of a designated item in a given year.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that could potentially be subject to regulatory requirements triggered by this action. To determine whether your procurement practices are affected by this action, you should carefully examine the applicability criteria in 40 CFR 247.2. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**III. Background**

Section 6002(e) of RCRA requires EPA to designate items that are or can be made with recovered materials and to recommend practices to assist procuring agencies in meeting their obligations with respect to procurement of designated items under RCRA section 6002. RCRA requires that each procuring agency, when purchasing an EPA-designated item, must purchase that item composed of the highest percentage of recovered materials practicable.

Executive Order 12873 (Executive Order) establishes the procedure for EPA to follow in implementing RCRA section 6002(e). Section 502 of the Executive Order directs EPA to issue a Comprehensive Procurement Guideline (CPG) that designates items that are or can be made with recovered materials. Concurrent with the CPG, EPA must publish its recommended procurement practices for purchasing designated items, including recovered materials content levels, in a related Recovered Materials Advisory Notice (RMAN). The Executive Order also directs EPA to update the CPG annually and to issue RMANs periodically to reflect changing market conditions. The original CPG (CPG I) was published on May 1, 1995 (60 FR 21370). It established eight product categories, designated 19 new items, and consolidated five earlier item

designations. Concurrently, EPA published the first RMAN (RMAN I) (60 FR 21386).

On November 7, 1996, EPA proposed to designate 13 additional items (CPG II) and published draft recommendations for purchasing those items containing recovered materials (RMAN II). See 61 FR 57748–57759 and 61 FR 57760–57766, respectively. EPA also proposed clarifications of the previous designations of floor tiles, structural fiberboard, and laminated paperboard. In addition, EPA proposed to codify the RCRA section 6002 limitations on the affirmative procurement requirements, which had inadvertently been omitted from CPG I. Today, EPA is (1) designating 12 of the items, (2) clarifying the previous designations of floor tiles, structural, fiberboard, and laminated paperboard, and (3) codifying the procurement limitations. As explained in section V.B.3 below, EPA has decided not to designate ink jet cartridges. The 12 newly-designated items are listed below under their associated product category.

*Construction Products*

- Shower and restroom dividers/partitions
- Consolidated and reprocessed latex paint for specified uses

*Transportation Products*

- Parking stops
- Channelizers
- Delineators
- Flexible delineators

*Park and Recreation Products*

- Plastic fencing for specified uses

*Landscaping Products*

- Garden and soaker hoses
- Lawn and garden edging

*Non-Paper Office Products*

- Printer ribbons
- Plastic envelopes

*Miscellaneous*

*Pallets*

*A. Criteria for Selecting Items for Designation*

While not limiting consideration to these criteria, RCRA section 6002(e) requires EPA to consider the following when determining which items it will designate:

- (1) Availability of the item;
- (2) Potential impact of the procurement of the item by procuring agencies on the solid waste stream;
- (3) Economic and technological feasibility of producing the item; and
- (4) Other uses for the recovered materials used to produce the item.

EPA consulted with Federal procurement and requirements officials to identify other criteria to consider when selecting items for designation. Based on these discussions, the Agency concluded that the limitations set forth in RCRA section 6002(c) should also be factored into its selection decisions. This provision requires each procuring agency that procures an item designated by EPA to procure the item composed of the highest percentage of recovered materials practicable, while maintaining a satisfactory level of competition. A procuring agency, however, may decide not to procure an EPA-designated item containing recovered materials if it determines: (1) the item is not reasonably available within a reasonable period of time; (2) the item fails to meet the performance standards set forth in the agency's specification; or (3) the item is available only at an unreasonable price.

EPA recognized that these limitations could limit the potential impact of an individual item designation to the extent they provide procuring agencies with a rationale for not purchasing EPA-designated items with recovered materials content. (The limitations of section 6002(c) also effectively describe the circumstances in which a designated

item is "available" for purposes of the statute.) For this reason, EPA takes into account the limitations cited in RCRA section 6002(c) in its selection of items for designation in the CPG. Thus, in the May 1, 1995 CPG I, the Agency stated that it had developed the following criteria for use in selecting items for designation: use of materials found in solid waste, economic and technological feasibility and performance, impact of government procurement, availability and competition, and other uses for recovered materials. EPA provided a detailed discussion of these criteria in the CPG I background documents and repeated that discussion, for the convenience of the reader, in Section II of the document entitled, "Comprehensive Procurement Guideline (CPG) II—Supporting Analyses." A copy of this document is included in the RCRA public docket for the proposed CPG II rule, docket F-96-CP2P-FFFFF.

In CPG I, EPA stated that it had adopted two approaches in its designation of items that are made with recovered materials. For some items, such as floor tiles, the Agency designated broad categories of items and provided information in the RMAN as to their appropriate applications or uses. For other items, such as plastic trash bags, EPA designated specific items, and, in some instances, included in the designation the specific types of recovered materials or applications to which the designation applies. The Agency explained these approaches to designating items in the preamble to CPG I (60 FR 21373, May 1, 1995).

EPA sometimes had information on the availability of a particular item made with a specific recovered material (e.g., plastic), but no information on the availability of the item made from a different recovered material or any indication that it is possible to make the item with a different recovered material. In these instances, EPA concluded that it was appropriate to include the specific material in the item designation in order to provide vital information to procuring agencies as they seek to fulfill their obligations to purchase designated items composed of the highest percentage of recovered materials practicable. This information enables the agencies to focus their efforts on products that are currently available for purchase, reducing their administrative burden. EPA also included information in the proposed CPG, as well as in the draft RMAN that accompanied the proposed CPG, that advised procuring agencies that EPA is not recommending the purchase of an item made from one particular material over a similar item made from another material. For example, EPA included the following statement in the preamble discussion for plastic desktop accessories (59 FR 18879, April 20, 1994): This designation does not

preclude a procuring agency from purchasing desktop accessories manufactured from another material, such as wood. It simply requires that a procuring agency, when purchasing plastic desktop accessories, purchase these accessories made with recovered materials."

The Agency understands that some procuring agencies may believe that the designation of a broad category of items in the CPG requires them (1) to procure all items included in such category with recovered materials content and (2) to establish an affirmative procurement program for the entire category of items, even where specific items within the category may not meet current performance standards. This is clearly not required under RCRA as implemented through the CPG and the RMAN. RCRA section 6002 does not require a procuring agency to purchase items with recovered materials content that are not available or that do not meet a procuring agency's specifications or reasonable performance standards for the contemplated use. Further, section 6002 does not require a procuring agency to purchase such items if the item with recovered materials content is only available at an unreasonable price or the purchase of such item is inconsistent with maintaining a reasonable level of competition. However, EPA stresses that, when procuring any product for which a recovered materials alternative is available that meets the procuring agency's performance needs, if all other factors are equal, the procuring agency should seek to purchase the product made with highest percentage of recovered materials practicable.

The items designated today have all been evaluated with respect to the EPA's criteria. Details of these evaluations are discussed in "Final CPG II/RMAN II Background Document," which has been placed in the docket for the final CPG II and RMAN II and is available electronically. (See Section VIII below for Internet access directions.)

#### *B. Procurement Limitations of RCRA Section 6002*

In the May 1, 1995 CPG, the Agency amended 40 CFR 247.2 to include the RCRA provisions on the applicability of the guidelines to procuring agencies. (See 60 FR 21381.) In that amendment, EPA inadvertently failed to include the statutory exceptions to the general requirement to purchase designated items set forth in section 6002(c)(1) (A) through (C). Today, in § 247.2(d), EPA is adding these procurement limitations. As discussed in the previous section, these provisions authorize a procuring

agency to decide not to purchase EPA designated items with recovered materials based on the following determinations:

1. The agency is unable to secure a satisfactory level of competition;
2. The item is not reasonably available within a reasonable period of time;
3. The item fails to meet the reasonable performance standards set forth in the agency's specification; and
4. The item is available only at an unreasonable price.

EPA received no comments on the proposed language and, as noted above, is today amending § 247.2 to add these provisions. EPA is making this amendment effective immediately. Section 553(d) of the Administrative Procedure Act authorizes an exception to the general requirement that a substantive rule must be published 30 days before its effective date where an agency determines there is good cause for doing so. As explained above, these amendments merely codify the statutory conditions spelled out in section 6002(c) under which a procuring agency may determine not to procure items designated in the guidelines. Today's amendments do not change a procuring agency's current obligations under section 6002 of RCRA to procure designated items to the maximum extent practicable but merely restate in the regulations the exceptions to the general requirement provided in the statute. Under the circumstances, there is good cause for making these amendments effective immediately.

#### *C. Clarification of Floor Tiles, Structural Fiberboard and Laminated Paperboard Designations*

In the May 1, 1995 CPG, EPA designated floor tiles, structural fiberboard, and laminated paperboard and, in the RMAN, provided recommendations for purchasing these items containing recovered materials. EPA has since learned that there may be some confusion on the part of procuring agencies as to their obligation to purchase these items for specific applications. In fact, the Agency received inquiries regarding the requirements to purchase floor tile and structural fiberboard for use as acoustical ceiling tile. Based on these inquiries, the Agency concluded that it should clarify the obligations of procuring agencies with respect to these items. Additionally, the Agency published a separate notice in the **Federal Register** providing additional information to assist procuring agencies in determining their obligation to purchase designated items for specific

applications and to clarify these issues. See 61 FR 58067, November 12, 1996.

#### 1. Floor Tiles

In the original CPG, EPA designated 19 items that are, or can be, produced with recovered materials content, including floor tiles and patio blocks containing recovered rubber or plastic [40 CFR 247.12(e)]. The Agency designated these items as broad categories of items, encompassing many different applications. In the companion RMAN, however, the Agency recommended that procuring agencies purchase floor tiles with specified minimum recovered rubber or plastic content for "heavy duty/commercial type" applications only. EPA limited the recommended applications to heavy-duty/commercial-type uses because, at the time CPG I was issued, the Agency was not aware of any manufacturers that made floor tile with recovered materials for standard office flooring. However, at least two manufacturers were reportedly considering using recovered materials in standard office flooring and one manufacturer indicated that these products would be available in 1995, the year CPG I was issued. This information suggested to the Agency that floor tiles could be made with recovered materials for standard office flooring. Therefore, the Agency elected to broadly designate floor tiles and limit its initial recommendations to heavy-duty/commercial type uses. The Agency has no information that standard office floor tiles are currently commercially available containing recovered materials.

In CPG I and RMAN I, EPA used the term "heavy-duty, commercial-type uses" because there were no published industry-wide definitions to describe the applications to which the recovered materials requirements of the CPG should be applied. In the supporting analysis for RMAN I, EPA explained what it meant by "heavy-duty, commercial-type applications." There, the Agency described, in general terms, a number of commercial and industrial settings where the use of such tiles with recovered materials content would be appropriate. These would include entranceways in airports and stores, furniture showrooms, skating rinks and fitness centers. EPA has learned that this discussion may have caused some confusion. Some procuring agencies may have confused EPA's description of the areas where, given special circumstances, such tiles might be appropriate, with an EPA recommendation that such tile should always be used in such settings. This

was not the Agency's intention. Therefore, the Agency is today clarifying its recommendation that the use of these tiles would be appropriate for specialty purpose uses at such locations (e.g., raised, open-web tiles for drainage on school kitchen flooring). Such specialty purpose uses involve limited flooring areas where grease, tar, snow, ice, wetness or similar substances or conditions are likely to be present. Commenters also supported the Agency in its views about the limitations on uses for floor tiles containing recovered materials. Thus, EPA is not, at this time, recommending floor tile made with recovered materials for standard office or more general purpose uses.

#### 2. Structural Fiberboard and Laminated Paperboard

In CPG I, EPA designated structural fiberboard and laminated paperboard products for applications other than building insulation [40 CFR 247.12(b)]. EPA included acoustical and non-acoustical ceiling tiles and lay-in panels in its list of applications to which the designation applies. Since CPG I was issued, one manufacturer of mineral fiber ceiling products has expressed concern over the scope of the structural fiberboard and laminated paperboard designations, particularly as they apply to acoustical and non-acoustical ceiling tiles and lay-in panels.

EPA is clarifying that the specific applications included in the structural fiberboard and laminated paperboard designation, i.e., building board, sheathing, shingle backer, sound deadening board, roof insulating board, insulating wallboard, acoustical and non-acoustical ceiling tile, acoustical and non-acoustical lay-in panels, floor underlayments, and roof overlay (coverboard), apply to the purchase of cellulosic fiber structural fiberboard and laminated paperboard products only. The listed applications, and therefore the designation, do not apply to products made from other similar or competing materials. In other words, if a procuring agency is purchasing a cellulosic fiberboard acoustical ceiling tile, then the agency should purchase the ceiling tile made with recovered materials. However, if the agency prefers to purchase a ceiling tile made with mineral fiber rather than fiberboard, it is free to do so. In the latter instance, there is no requirement to purchase a cellulosic fiberboard ceiling tile.

#### IV. Definitions

Today, in § 247.3, EPA is adding definitions for the following new item-specific terms: channelizers,

delineators, flexible delineators, garden hoses, latex paint, lawn edging, pallets, parking stops, plastic fencing, printer ribbons, restroom dividers/partitions, shower dividers/partitions, and soaker hoses. These definitions are based on industry definitions, including ASTM or other standard specifications, or represent descriptions of the scope of items being designated.

For several items being designated today, EPA recommends in the final RMAN II that procuring agencies use two-part content levels—a postconsumer recovered materials component and a total recovered materials component. In these instances, EPA found that both types of materials were being used to manufacture the products. Recommending only postconsumer content levels would be contrary to the RCRA mandate to maximize the use of recovered materials because it would fail to acknowledge the contribution to solid waste management made by manufacturers using other manufacturers' byproducts as feedstock.

Because the recommendations for the items being designated today use the terms "postconsumer materials" and "recovered materials," the definitions for these terms are repeated in this action as a reference for the convenience of the reader. These definitions were part of CPG I and can be found at 40 CFR § 247.3.

*Postconsumer materials* means a material or finished product that has served its intended end use and has been diverted or recovered from waste destined for disposal, having completed its life as a consumer item. *Postconsumer material* is part of the broader category of recovered materials.

*Recovered materials* means waste materials and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within an original manufacturing process.

#### V. Comment Summary and Agency's Response

EPA received submittals from 20 commenters in response to the proposed CPG II and the draft RMAN II. These commenters represented various interests, including Federal agencies, State agencies, local governments, product manufacturers, and product users. A summary of the comments and EPA's response can be found in "Final CPG II/RMAN II Background Document."

In this section, EPA discusses the major comments regarding the proposed CPG II. For a discussion of the major comments pertaining to the draft RMAN II, see the preamble to the notice of

availability of the final RMAN II, which is found in the notices section of today's **Federal Register**.

#### A. General Comments

##### 1. Recordkeeping and Reporting

*Comment:* A Federal agency expressed concern about the burden of tracking purchases of each procurement item designated by EPA and the potential difficulty in establishing the infrastructure to institute policies and procedures at a time when administrative staff is being reduced. The commenter further noted that the use of government credit cards increases the difficulty of tracking purchases. In addition, the commenter suggested that an interagency reporting task force convened by the Office of Federal Procurement Policy (OFPP) and the Office of the Federal Environmental Executive (OFEE) should address streamlining reporting requirements.

*Response:* Because EPA addressed the RCRA reporting requirements in the CPG I rulemaking, reporting issues were not addressed as part of the CPG II proposal. See, for example, the background documents for the final CPG I and RMAN I for EPA's previous discussions of the RCRA annual review and reporting requirements: "Items Designated in the Comprehensive Procurement Guideline—Supporting Analyses," pages 40–41, and "RMAN for Items Designated in the Comprehensive Procurement Guideline—Supporting Analyses," pages 8–9.

The requirement that Federal procuring agencies report on their procurement of EPA-designated items is mandated by RCRA section 6002(g) and Section 301 of Executive Order 12873. Therefore, reporting is not at the discretion of OFEE or EPA. While EPA and OFEE are cognizant of the labor necessary to collect and report annual procurement data, neither office is authorized to significantly change the data contained in the final report.

As noted by the commenter, OFEE and OFPP chartered an interagency steering committee to identify streamlining initiatives for the data collection requirements. As a result of the committee's recommendations, the agency data collection requirements for FY96 were reduced by 1/3 by capturing data in a more efficient manner. For agencies that requisition CPG items from the U.S. General Services Administration's (GSA) Federal Supply System, the supply center tracks and reports on the agencies purchases. While this significantly reduces an agency's data collection and reporting

burden, the final report contains the same itemized information.

##### 2. Interaction Between RCRA Section 6002 and the Federal Acquisition Regulation

*Comment:* A Federal agency raised issues specific to the Federal Acquisition Regulation (FAR), which governs Federal acquisition activities. The agency stated that the proposed CPG II and draft RMAN II did not adequately address the importance of and the responsibility of key non-procurement personnel, who generally develop and define a procuring agency's environmental needs. The agency referenced provisions of the FAR. Additionally, the agency stated that the draft RMAN II provides no specific guidance on the use of required sources, such as Federal Prison Industries (UNICOR) and Javits-Wagner-O'Day (JWOD) participating non-profit agencies.

*Response:* EPA has stated on many occasions that implementation of RCRA section 6002 must be consistent with other Federal procurement law. For example, in Appendix I to "Final CPG II/RMAN II Background Document," EPA states the following:

The purchase of recycled products under RCRA section 6002 must be consistent with other Federal procurement law, which requires that contracts be awarded to the lowest priced, responsive, responsible bidder \* \* \*

On August 27, 1997, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued an interim rule amending the Federal Acquisition Regulation (FAR) parts 1, 10, 11, 13, 15, 23, 36, 42, and 52 to reflect the government's preference for the acquisition of environmentally-sound and energy-efficient products and services and to establish an affirmative procurement program favoring items containing the maximum practicable content of recovered materials. See 62 FR 44809, August 22, 1997.

As the commenter indicated, the FAR specifies the role of contracting officers and other agency personnel in acquisitions, as well as providing for implementation of the required sources requirements and the RCRA section 6002 affirmative procurement requirements. To the extent that the FAR generally dictates use of certain required sources like UNICOR, EPA believes that it is reasonable to assume that federal procuring agencies will look to such sources for procurement of designated items. In fact, required sources such as UNICOR and the National Industries for the Blind offer several of the items previously designated by EPA (e.g., toner cartridges, recycled paper products).

Therefore, EPA refers procuring agencies to the FAR for guidance regarding these acquisitions issues.

##### 3. Designation of Materials

*Comment:* A commenter requested that EPA designate steel in order to recognize that this material is recyclable, has a high recycling rate, and contains recovered materials.

*Response:* EPA agrees that steel, like many metals, is both recyclable and can contain recovered materials. EPA also agrees that steel, like many metals, is a waste management success story in terms of its recyclability, high recycling rate, and recovered materials content. EPA also applauds the steel industry's source reduction efforts to produce stronger, lighter weight steel products, in response to customer demand.

However, RCRA specifically requires EPA to designate products that are or can be made with recovered materials, not the component materials used in those products. Accordingly, EPA designates products that are manufactured with steel, but not materials, such as steel, that can contain recovered materials.

#### B. Comments on Proposed Item Designations

No commenters opposed the designations of the following items: parking stops, channelizers, delineators, flexible delineators, garden and soaker hoses, lawn and garden edging, printer ribbons, plastic envelopes, and pallets. EPA is promulgating these items as proposed. Commenters suggested revisions to the designations of shower and restroom dividers, latex paint, and snow fencing, and opposed the proposed designation of ink jet cartridges. In response, EPA is designating shower and restroom dividers and latex paint, with modifications, and revising the designation of snow fencing to plastic fencing for specific uses. EPA is not designating ink jet cartridges at this time. The comments on shower and restroom dividers and snow fencing, and the significant comments pertaining to the proposed designations of latex paint and ink jet cartridges, as well as EPA's response, are discussed in the following subsections. For a full discussion of the comments and EPA's response, including additional research conducted by EPA, see "Final CPG II/RMAN II Background Document."

##### 1. Shower and Restroom Dividers

*Comment:* EPA received one comment suggesting that shower and restroom dividers be referred to as dividers/partitions.

*Response:* After additional research into industry practices, EPA found that both of the terms—"partitions" and "dividers"—are commonly used. Generally speaking, "partition" implies that a door is used, and "divider" implies a dividing wall. Based on the comment and the additional research, EPA is revising the term for this item in the final CPG II and companion RMAN II to "shower and restroom dividers/partitions."

## 2. Latex Paint

*Comment:* A commenter opposed the proposed designation of latex paint based on concerns about performance and availability. The commenter further noted that the proposed designation was overly broad and did not reflect the variety of different latex paint applications in government buildings and their performance requirements. The commenter suggested that EPA could limit the designation and recommendations to interior and exterior architectural applications where color, consistency of performance, and durability are not primary concerns and a spray-gun application is not used.

EPA met with the commenter on June 17, 1997 to discuss this and other comments. A copy of the meeting notes has been placed in the RCRA docket for the final CPG II.

In supplemental comments, the commenter suggested that EPA distinguish between consolidated and reprocessed latex paints. The commenter suggested that EPA revise the designation so as to designate only:

- Consolidated latex paint used for covering graffiti, where consistent color and consistency of performance are not primary concerns.
- Reprocessed latex paint used for interior and exterior architectural applications where the reprocessed latex paint meets all end use specifications (e.g., color, weathering, durability, hiding power, and applicability) for a particular application.

These suggestions are similar to the applications for reprocessed and consolidated latex paints that EPA had recommended in the draft RMAN II.

The commenter stated that adding the language about end use specifications in the suggested designation would alleviate paint industry concerns that the listing of latex paints will require the use of reprocessed latex paints for all interior and exterior uses without regard to any performance criteria. The commenter further stated that the selection of latex paint for a particular application is a complex process and

that, while the GSA specification for "recycled" latex paint covers certain performance attributes, it may not include all of the attributes necessary for a particular application. The commenter referenced three ASTM latex paint specifications that the commenter believes procuring agencies should consider in evaluating whether reprocessed latex paint has the appropriate performance attributes for a particular application. A copy of the supplemental comments is included in the docket for the final CPG II.

*Response:* EPA agrees that reprocessed and consolidated latex paints are not suitable for all applications. In the proposed CPG II, EPA noted, for example, that there is little available information on the performance of reprocessed or consolidated paints for non-architectural applications. See 61 FR 57752. In the draft RMAN II, EPA recommended the use of consolidated paint in limited applications, such as covering graffiti, where color and consistency of performance are not primary concerns. EPA recommended the use of reprocessed paint for interior and exterior architectural applications. See Section C-7 of the draft RMAN II at 61 FR 57763.

In researching latex paint for the proposed CPG II, EPA identified a latex paint study by the California Polytechnic University (CalPoly). The CalPoly study included testing of reprocessed and consolidated latex paints for various key parameters that measure the performance and durability of paint for a number of different applications. The CalPoly study concluded that reprocessed paints are suitable for these applications reviewed in the study. A copy of this study was included in the docket for the proposed CPG II and draft RMAN II, docket F-96-CP2P-FFFFF. Both the GSA's Engineering and Commodity Management Division and CalPoly found that latex paints containing postconsumer materials can be manufactured to provide consistent performance, normal coverage and hiding of the underlying surface, and durability. In addition, the GSA specification provides for testing of color and application properties, among other requirements.

Latex paints containing postconsumer materials also can be formulated to be used in spray-guns. According to paint manufacturers and municipalities contacted by EPA, spray applications of reprocessed latex paint pose few, if any, problems as long as the paint is clean and has been filtered properly. EPA notes, however, that some users have

encountered problems with clogged spray nozzles, and one manufacturer recommends using a larger diameter spray tip to ensure that the nozzle will not become clogged. GSA specification TT-P-2846 requires that the reprocessed and consolidated latex paint meet specified brushing, roller coating, and spraying properties, which should ensure that manufacturers properly filter their products.

EPA also conducted additional research into the applications for which agencies currently are using reprocessed latex paints. EPA found that agencies currently are using reprocessed paints for the same uses for which they would normally use latex paint—e.g., interior and exterior wallboard, ceilings, and trim; exterior gutter boards; and concrete, stucco, masonry, and wood, as well as metal surfaces.

After considering the comments and conducting further research on reprocessed latex applications, EPA has concluded that the proposed designation of "latex paint" is too broad given the uses for which consolidated and reprocessed latex paints currently are available. As discussed above in Section III.A, EPA sometimes designates broad category items and provides information in the RMAN as to their appropriate applications or uses. In other instances, EPA designates specific items and might include in the designation the specific types of applications to which the designation applies. The approach that EPA uses depends on the whether items manufactured from other types of materials or for other applications are made with or could contain recovered materials. In the past, if EPA was not aware that items used for other applications were available, EPA limited its designations so as not to create an unnecessary burden on agencies to try to purchase an item that is not available. (See the preamble to CPG I, 60 FR 21373, May 1, 1995, for a more detailed discussion of EPA's approach.)

Based on the available information, EPA has concluded that consolidated latex paints are currently used for graffiti abatement. EPA further has determined that reprocessed latex paints are available for architectural applications, but not for non-architectural applications, such as marking pavements or athletic fields. EPA also agrees with the commenter that reprocessed latex paints may not be available for all architectural performance needs.

Therefore, to avoid confusion by procuring agencies about the scope of the latex paint designation, EPA has

concluded that it is preferable to limit the scope of the latex paint designation, rather than designating the broad category "latex paint," and recommending specific applications for using consolidated and reprocessed latex paints in RMAN II. A narrower designation will enable procuring agencies to focus their procurement efforts on the types of latex paint currently available either through GSA or directly from paint manufacturers.

Therefore, in today's final CPG II, EPA is revising the broad "latex paint" designation to provide the following specific designations:

- Consolidated latex paint used for covering graffiti.
- Reprocessed latex paint used for interior and exterior architectural applications such as wallboard, ceilings, and trim; gutter boards; and concrete, stucco, masonry, wood, and metal surfaces.

Under this revised designation, procuring agencies must purchase reprocessed latex paint for the interior and exterior architectural applications for which they would ordinarily use latex paint, such as wallboard, concrete, stucco, masonry, wood, and metal. Procuring agencies requiring a latex paint not meeting GSA's general "recycled" latex paint specification should determine whether a latex paint containing recovered materials is available and if not, may use a latex paint not containing recovered materials for that particular application.

As discussed in section III.B above, RCRA section 6002 provides that a procuring agency is not required to purchase an EPA-designated item containing recovered materials if that item is not reasonably available or fails to meet the reasonable performance standards set forth in the agency's specifications. Thus, if an agency has a particular need (e.g., color, weathering, durability, hiding power) for a particular application, and consolidated or reprocessed latex paint is not available (or does not meet that specification), the agency may purchase a latex paint not containing recovered materials. Given the obligation of procuring agencies to procure designated items with the highest percentage of recovered materials practicable, an agency should thoroughly research the availability of consolidated or reprocessed latex paint meeting its specifications.

However, because RCRA provides for performance exceptions to the requirement to purchase EPA-designated items containing recovered materials, it would be redundant for EPA to include performance

considerations in the description of the designation of consolidated and reprocessed latex paints. For this reason, in the final designations published today, EPA has not included the language about end use specifications suggested by the commenter.

*Comment:* The commenter also had noted that an Army Corps of Engineers study of reprocessed and consolidated latex paints had not yet been completed. The commenter stated that it was therefore premature for EPA to designate latex paints.

*Response:* EPA noted in the background document for the proposed CPG II that the Paint Technology Center at the U.S. Army Construction Engineering Research Laboratories (USACERL) was planning to test the performance of latex paint containing postconsumer materials. See page 28, "Comprehensive Procurement Guideline (CPG) II—Supporting Analyses," August 1, 1996. EPA contacted USACERL about the study of reprocessed latex paint. USACERL informed EPA that it does not have any specific concerns about the performance qualities of reprocessed latex paint in different applications. Rather, USACERL tested reprocessed latex paints to confirm that they met GSA specification TT-P-2846 for "recycled" latex paints. USACERL also tested reprocessed latex paints against the GSA specifications for interior and exterior latex paints. To date, USACERL found that the reprocessed paints tested met the specifications for recycled latex paint and interior latex paints. USACERL is completing testing against the exterior paint specification, but the reprocessed latex paints performed well against the exterior paint tests conducted to date. Based on this information about the results of the USACERL testing of reprocessed and consolidated latex paints, EPA does not believe that the designation of latex paint should be delayed pending the final outcome of the USACERL study.

Further, USACERL informed EPA that the Army uses acrylic latex paints to paint primed metal and expressed concern only about the availability of reprocessed latex paint containing 100% acrylic. USACERL had not researched the availability of this item, however. EPA notes that under RCRA section 6002, a procuring agency is not required to purchase an EPA-designated item containing recovered materials if that item does not meet the agency's reasonable performance standards or if the item is not reasonably available. If the Army requires acrylic latex paints for a particular application and this item

is not available containing recovered materials, then the Army is not required to purchase latex paint containing recovered materials for that application. For such situations, EPA has previously recommended that agencies place a statement in their affirmative procurement programs indicating that the item is not available.

Because the purpose of the government buy-recycled program is to develop markets for recovered materials, EPA is reluctant to exclude acrylic latex paints from the scope of the latex paint designation. Rather, EPA believes that the Army should determine periodically whether acrylic latex paints containing recovered materials are available in order to encourage the recovery of this type of paint from the waste stream. Further, EPA notes that during development of CPG II, neither the Army nor any other Federal agency requested that EPA limit the scope of the designation. Therefore, in the final CPG II, EPA is designating latex paints and not excluding acrylic latex paints.

*Comment:* The commenter further stated that EPA had failed to examine the true costs of using reprocessed latex paint because it is "likely" that more coats of reprocessed paint would be required and "it seems likely that" more frequent repainting will be required where reprocessed latex paint is used. The commenter provided no documentation to support these comments.

*Response:* The information available to EPA from research, product testing by CalPoly, and users indicates that reprocessed latex paints cover the same as virgin latex paints and do not require more frequent repainting. This information is included in the record for this rulemaking. According to the CalPoly research report and additional research conducted by EPA, reprocessed and consolidated paints meet specifications for sag resistance (a measure of a paint's tendency to run on a vertical surface), contrast ratios (ability to hide the underlying surface), and scrub resistance (an indication of the resistance of a paint film to repeated washing or scrubbing). None of the users contacted by EPA had experienced problems with paint coverage or durability. Based on this testing and use information, EPA believes that procuring agencies will not incur additional costs from extra or more frequent coats of paint.

*Comment:* The commenter also noted that reprocessed and consolidated latex paints are not universally available in the United States.

*Response:* EPA has never limited its designations only to items that are

“universally” available or immediately available in every part of the United States. Because the purpose of the federal buy-recycled program is to develop markets for, and spur development of, products containing recovered materials, it has always been understood that these items might not be available to all procuring agencies in all instances. Nor does RCRA specify universal availability as a criteria for EPA to consider when designating items. Rather, it is expected that, as procuring agencies seek to purchase products containing recovered materials, these items will become more widely and universally available. For this reason, RCRA section 6002 provides that procuring agencies are not required to buy an EPA-designated item containing recovered materials if that item is not available within a reasonable time.

EPA explicitly recognized this early in its development of the guidelines program. Thus, for example, in the first procurement guideline issued in 1983, EPA designated cement and concrete containing coal fly ash, even though coal fly ash was not available in every part of the country. EPA recommended that agencies provide incentives for greater availability by allowing for the use of coal fly ash as an optional or alternate material. EPA stated that “[a]llowing fly ash will also serve as an incentive to potential users in that area. Contractors will not make the commitment necessary to use fly ash unless it is more readily accepted. Including it in bid solicitations and allowing it to be used provides this incentive.” See 48 FR 4242, January 28, 1983.

### 3. Snow Fencing

*Comment:* GSA recommended that EPA revise the definition of “snow fencing” by adding “and to delineate construction areas.”

*Response:* EPA reviewed its research into snow fencing and found that plastic fencing containing recovered materials can be used for several applications, including control of drifting snow and sand and as a warning or safety barrier at construction areas. Plastic fencing used in these applications is called many names—snow fencing, temporary fencing, beach or dune fencing, warning barrier, and safety barrier. While “snow fencing” is a commonly used term, EPA agrees with GSA that using this term alone can mislead procuring agencies about the scope of EPA’s designation. Therefore, in § 247.14(b) of today’s final CPG II, EPA is revising the designation of “snow fencing” as follows: plastic fencing containing recovered plastic for

use in controlling snow or sand drifting and as a warning/safety barrier in construction or other applications. EPA also is changing the term “snow fencing” to “plastic fencing” in the definitions and adding the phrase “and to provide a warning or barrier in construction and other areas” to the definition.

### 4. Ink Jet Cartridges

Commenters raised a number of concerns in opposing the proposed designation of ink jet cartridges. These comments raised solid waste, performance, quality, availability, and patent and trademark concerns. After considering the information submitted by commenters, EPA has concluded that there is insufficient evidence to support a designation of ink jet cartridges at this time. On April 14, 1997, EPA published a Notice of Data Availability in the **Federal Register** (62 FR 18072) to notify interested parties of the tentative decision not to designate ink jet cartridges, summarize the information available to the Agency, and request further public comment.

EPA received only two responses to the April 14 notice—one from a vendor of ink jet refilling equipment and additional information from one of the original commenters. The vendor appears to have promising technology for resolving many of the performance and solid waste issues raised by commenters. The vendor did not, however, submit sufficient information to change EPA’s earlier conclusion that there is insufficient information to support designating ink jet cartridges at this time. In particular, the commenter did not address the lack of industry quality and performance standards. Therefore, EPA has decided not to designate ink jet cartridges in today’s final CPG II. EPA also is deleting the recommendations for purchasing ink jet cartridges from the final RMAN II published in the notice section of today’s **Federal Register**. EPA will continue to monitor developments in ink jet cartridge and refilling/remufacturing technology and will consider designating ink jet cartridges in the future.

### C. Comments on Other Items Considered for Designation

In the background document for the proposed CPG II, EPA stated that it had considered the following 12 items and determined that it was inappropriate to designate them: lead-acid batteries, water retention systems, flat sheet glass, wall covering, ceramic and glass tile, glass fiber-reinforced concrete, curbing, dock bumpers, glass beads for reflective

paint, magazine boxes, rulers, and pallet stretch wrap. EPA requested additional information demonstrating that the items should be reconsidered for possible future designation. No comments were submitted on these items or on EPA’s decision not to designate them. Therefore, EPA is no longer considering these items for future designation in the CPG.

### D. Comments on Public Participation Process

On September 20, 1995, EPA issued a notice in the **Federal Register** explaining the procedures for interested persons to (1) suggest items for EPA to consider for designation in future updates to the CPG and (2) provide information for EPA to use in developing or revising its recommendations for recovered materials content levels contained in the RMANs that accompany the CPG updates (60 FR 48714). EPA stated that it would issue annual notices to request additional information from interested persons.

No comments were received on these procedures, and EPA plans to continue to use them. Over 30 commenters submitted information on items for EPA to consider. Some of these comments provided supporting information for items designated in today’s CPG II. EPA currently is evaluating the other items for potential designation in future CPG updates. Because EPA is still considering these items, we will not be issuing annual notices requesting additional suggestions and information. However, persons wishing to submit information for EPA to consider may send it to: Buy Recycled Program, U.S. Environmental Protection Agency, 5306W, 401 M Street, SW., Washington, DC 20460. Any submittals should address the seven areas listed in the September 20, 1995 **Federal Register** notice. See 60 FR 48715.

### VI. Availability of Designated Items

EPA has developed lists of manufacturers and vendors of the items designated in today’s rule. In addition, EPA has updated the lists of manufacturers and vendors of the 24 items designated in the original CPG. These lists have been placed in the RCRA docket for this action and will be updated periodically as new sources are identified and product information changes. These lists will also be available through EPA’s web site on the Internet. (See section VIII below for Internet access information.) Procuring agencies should contact the manufacturers/vendors directly to discuss their specific needs and to

obtain detailed information on the availability and price of recycled products meeting those needs.

Other information is available from the GSA, the Defense Logistics Agency (DLA), State and local recycling offices, private corporations, and trade associations. Refer to Section XV of the document, "Final CPG II/RMAN II Background Document" for more detailed information on these other sources of information.

State and local recycling programs are also a potential source of information on local distributors and availability. In addition, state and local government purchasing officials that are contracting for recycled content products may have relative price information. A current list of state purchasing/procurement officials has been placed in the docket for the final CPG II. Also included in the public docket is a list of states with recycled content products purchasing programs, current as of April 1994. Information is also available from trade associations whose members manufacture or distribute products containing recovered materials. These trade associations are included in the updated lists of product manufacturers and vendors described above.

Additionally, Environmental Newsletters, Inc., publisher of *Waste Reduction Tips*, prepared a directory of recycled product directories. EPA has placed the "1996 Directory of Recycled Product Directories," from Environmental Newsletters' *Recycled Products Business Letter*, in the public docket for the final CPG II. Environmental Newsletters, Inc. can be reached at 703 758-8436 for further information.

Finally, EPA is considering mechanisms to increase the electronic dissemination of information about the items designated in the CPG, such as a buy-recycled home page on the Internet. If the Agency decides to implement such mechanisms, we will provide public notice in the **Federal Register** in concert with future revisions to the CPG.

**VII. Economic Impact Analysis**

*A. Requirements of Executive Order 12866*

Executive Order 12866 requires agencies to determine whether a regulatory action is "significant." The Order defines a "significant" regulatory action as one that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA estimates that the costs associated with today's rule is well below the \$100 million threshold. To enable the Agency to evaluate the potential impact of today's action, EPA

has prepared an Economic Impact Analysis (EIA), as discussed below. For more information on the estimated economic impact of today's rule, see the "Economic Impact Analysis for the Final Comprehensive Procurement Guideline II."

1. Summary of Costs

EPA estimated that the annualized costs of the proposed rule to designate 13 items would fall in the range of \$4.8 to \$8.7 million. Because today's final rule designates 12 items, rather than 13 items, EPA revised the economic impact analysis to reflect the fact that fewer items are being designated than originally proposed.

As shown in Table 2 below, EPA estimates that the annualized costs of today's rule will range from \$4.5 to \$8.4 million, with costs being spread across all procuring agencies (i.e., Federal agencies, State and local agencies that use appropriated Federal funds to procure designated items, and government contractors). These costs are annualized over a 10-year period at a three percent discount rate. Because there is considerable uncertainty regarding several of the parameters that drive the costs, EPA conducted sensitivity analyses to identify the range of potential costs of today's rule. Thus, high-end and low-end estimates are presented along with the best estimate. The primary parameter affecting the range of cost estimates is the number of products each procuring agency is assumed to procure each year. Details of the costs associated with today's final rule are provided in the Economic Impact Analysis for this rule.

TABLE 2.—SUMMARY OF ANNUALIZED COSTS OF CPG II AMENDMENTS TO ALL PROCURING AGENCIES

Procuring agency	Total annualized costs (\$1000)	Best estimate total annualized costs (\$1000)
Federal Agencies .....	5,008-2,584	5,008
States .....	926-520	926
Local Governments .....	2,337-1,324	1,700
Contractors .....	81-27	54
Total .....	8,352-4,455	8,352

As a result of today's action, procuring agencies will be required to perform certain activities pursuant to RCRA section 6002, including rule review and implementation; estimation, certification, and verification of designated item procurement; and for Federal agencies, reporting and recordkeeping. The costs shown in Table 2 represent the estimated annualized costs associated with these

activities. Table 2 also includes estimates for Federal agencies that will incur costs for specification revisions and affirmative procurement program modification. More details of the costs associated with today's rule are included in the Economic Impact Analysis.

With regard to possible impacts to business, including small businesses, there may be both positive and negative

impacts to individual businesses. EPA anticipates that today's final rule will provide additional opportunities for recycling businesses to begin supplying recovered materials to manufacturers and products made from recovered materials to procuring agencies. In addition, other businesses, including small businesses, that do not directly contract with procuring agencies may be affected positively by the increased

demand for recovered materials. These include businesses involved in materials recovery programs and materials recycling. Municipalities that run recycling programs are also expected to benefit from increased demand for certain materials recovered from municipal solid waste.

EPA is unable to determine the number of businesses, including small businesses, that may be adversely impacted by today's final rule. It is possible that if a business that currently supplies products to a procuring agency uses virgin materials only, the amendments to the CPG may reduce its ability to compete for future contracts. However, the amendments to the CPG will not affect existing purchase orders, nor will it preclude businesses from adapting their product lines to meet new specifications or solicitation requirements for products containing recovered materials. Thus, many businesses, including small businesses, that market to procuring agencies have the option to adapt their product lines to meet specifications.

## 2. Product Cost

Another potential cost of today's action is the possible price differential between an item made with recovered materials and an equivalent item manufactured using virgin materials. The relative prices of recycled content products compared to prices of comparable virgin products vary. In many cases, recycled content products are less expensive than their virgin counterparts. In other cases, virgin products have lower prices than recycled content products. Many factors can affect the price of various products. For example, temporary fluctuations in the overall economy can create oversupplies of virgin products, leading to a decrease in prices for these items. Under RCRA section 6002(c), procuring agencies are not required to purchase a product containing recovered materials if it is only available at an unreasonable price. However, the decision to pay more or less for such a product is left to the procuring agency.

## 3. Summary of Benefits

EPA anticipates that today's final rule will result in increased opportunities for recycling and waste prevention (e.g., from reinking ribbons or repairing pallets). Waste prevention can reduce the nation's reliance on natural resources by reducing the amount of materials used in making products. Less raw materials use results in a commensurate reduction in energy use and a reduction in the generation and release of air and water pollutants

associated with manufacturing. Additionally, waste prevention leads to a reduction in the environmental impacts of mining, harvesting, and other extraction processes.

Recycling can effect the more efficient use of natural resources. For many products, the use of recovered materials in manufacturing can result in significantly lower energy and material input costs than when virgin raw materials are used; reduce the generation and release of air and water pollutants often associated with manufacturing; and reduce the environmental impacts of mining, harvesting, and other extraction of natural resources. For example, according to information published by the Steel Recycling Institute, recycling one ton of steel saves nearly 11 million Btus of energy; 2,500 lbs. of ore; 1,000 lbs. of coal; and 40 lbs. of limestone. Recycling can also reduce greenhouse gas emissions associated with manufacturing new products. When compared to landfilling, recycling one ton of high density polyethylene, low density polyethylene, or polyethylene terephthalate plastic can reduce greenhouse gas emissions by up to 0.64 metric tons of carbon equivalent (MTCE). In addition to conserving non-renewable resources and reducing the environmental impacts associated with resource extraction and processing, recycling can also divert large amounts of materials from landfills, conserving increasingly valuable space for the management of materials that truly require disposal.

By purchasing products made from recovered materials, government agencies can increase opportunities for realizing these benefits. On a national and regional level, today's final rule can result in expanding and strengthening markets for materials diverted or recovered through public and private collection programs. Also, since many State and local governments, as well as private companies, reference EPA guidelines when purchasing designated items, this rule can result in increased purchase of recycled products, locally, regionally, and nationally and provide opportunities for businesses engaged in recycling activities.

### *B. Unfunded Mandates Reform Act of 1995 and Consultation with State, Local, and Tribal Governments*

Under section 202 of the Unfunded Mandates Reform Act of 1995 (the Act), P.L. 104-4, which was signed into law on March 22, 1995, EPA generally must prepare a written statement for rules with Federal mandates that may result in estimated costs to State, local, or

tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is required for EPA rules, under section 205 of the Act EPA must identify and consider alternatives, including the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. EPA must select that alternative, unless the Administrator explains in the final rule why it was not selected or it is inconsistent with law. Before EPA establishes regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must develop under section 203 of the Act a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

EPA has determined that today's final rule does not include a Federal mandate that may result in estimated annualized costs of \$100 million or more to either State or local governments in the aggregate, or to the private sector. To the extent enforceable duties arise as a result of this rule on State and local governments, they are exempt from inclusion as Federal inter-governmental mandates if such duties are conditions of Federal assistance. Even if they are not conditions of Federal assistance, such enforceable duties do not result in a significant regulatory action being imposed upon State and local governments since the estimated aggregate cost of compliance for them are not expected to exceed, at the maximum, \$2.6 million annually. The cost of enforceable duties which may arise as a result of today's rule on the private sector are estimated not to exceed \$54,000 annually. Thus, today's rule is not subject to the written statement requirement in sections 202 and 205 of the Act.

The newly designated items included in the CPG may give rise to additional obligations under section 6002(i) (requiring procuring agencies to adopt affirmative procurement program and to amend their specifications) for state and local governments. As noted above, the expense associated with any additional costs is not expected to exceed, at the maximum, \$2.6 million annually. In compliance with E.O. 12875, which requires the involvement of State and local governments in the development of certain Federal regulatory actions,

EPA conducts a wide outreach effort and actively seeks the input of representatives of state and local governments in the process of developing its guidelines.

When EPA proposes to designate items in the CPG, information about the proposal is distributed to governmental organizations so that they can inform their members about the proposals and solicit their comments. These organizations include the U.S. Conference of Mayors, the National Association of Counties, the National Association of Towns and Townships, the National Association of State Purchasing Officials, and the American Association of State Highway and Transportation Officials. EPA also provides information to potentially affected entities through relevant recycling, solid waste, environmental, and industry publications. In addition, EPA's regional offices sponsor and participate in regional and state meetings at which information about proposed and final designations of items in the CPG is presented. Finally, EPA has sponsored buy-recycled education and outreach activities by organizations such as the U.S. Conference of Mayors, the Northeast Recycling Council, the Environmental Defense Fund, Keep America Beautiful, and the California Local Government Commission, whose target audience includes small governmental entities.

The requirements do not significantly affect small governments because they are subject to the same requirements as other entities whose duties result from today's rule. As discussed above, the expense associated with any additional costs to State and local governments, is not expected to exceed, at the maximum, \$2.6 million annually. The requirements do not uniquely affect small governments because they have the same ability to purchase these designated items as other entities whose duties result from today's rule. Additionally, use of designated items affects small governments in the same manner as other such entities. Thus, any applicable requirements of section 203 have been satisfied.

### C. Impacted Entities

RCRA section 6002 applies to procuring agencies that use at least a portion of Federal funds to procure over \$10,000 worth of a designated product in a given year. EPA estimates that this rule would apply to 35 Federal agencies, all 56 states and territories and 1,900 local governments. EPA calculated the number of local entities that would be impacted based on information regarding the amount of Federal funds

that are dispersed to specific counties. In addition, EPA assumed that 1,000 contractors may be affected. A description of this information is provided in the Economic Impact Analysis for today's rule.

### D. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act, provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, after being required by that section or any other law to public a general notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis (FRFA). The agency must prepare an FRFA for a final rule unless the head of the agency certifies that it will not have a significant economic impact on a substantial number of small entities. The Administrator is today certifying, pursuant to section 605(b) of the RFA, that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, the Agency did not prepare an FRFA.

The final rule will not have a significant economic impact on a substantial number of small entities for the following reasons. The RFA defines "small entity" to mean a small business, small organization or small governmental jurisdiction. EPA's action today in designating 12 new items that are or may be produced with recovered materials content may establish requirements applicable, in some cases, to small governmental jurisdictions and small businesses.

In the case of small entities which are small governmental jurisdictions, EPA has concluded that the rule will not have a significant economic impact. EPA concluded that no small government with a population of less than 50,000 is likely to incur costs associated with the designation of the 12 items because it is improbable that such jurisdictions will purchase more than \$10,000 of any designated item. Consequently, section 6002 would not apply to their purchases of designated items. Moreover, there is no evidence that complying with the requirements of section 6002 would impose significant additional costs on the small governmental entity to comply in the event that a small governmental jurisdiction purchased more than \$10,000 worth of a designated item. This is the case because in many instances items with recovered materials content may be less expensive

than items produced from virgin material.

Similarly, EPA has concluded that the economic impact on small entities that are small businesses would not be significant. The CPG applies to small businesses that are "procuring agencies." The potential economic impact of the CPG on small businesses that are "procuring agencies" is minimal.

RCRA section 6002 applies to a contractor with a Federal agency (or a state or local agency that is a procuring agency under Section 6002) when the contractor is purchasing a designated item, is using Federal money to do so, and exceeds the \$10,000 threshold. There is an exception for purchases that are "incidental to" the purposes of the contract, i.e., not the direct result of the funds disbursement. For example, a courier service contractor is not required to purchase re-refined oil and retread tires for its fleets because purchases of these items are incidental to the purpose of the contract. Therefore, as a practical matter, there would be very limited circumstances when a contractor's status as a "procuring agency" for section 6002 purposes would impose additional costs on the contractor. Thus, for example, if the State or Federal agency is contracting with a supplier to obtain a designated item, then the cost of the designated item (and any associated costs of meeting section 6002 requirements) to the supplier presumably will be fully recovered in the contract price. Any costs to small businesses that are "procuring agencies" (and subject to section 6002) are likely to be insubstantial. Even if a small business is required to purchase other items with recovered materials content, such items may be less expensive than items with virgin content.

Therefore, EPA provides the following certification under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act. Pursuant to the provision at 5 U.S.C. § 605(b), I hereby certify that today's designations will not have a significant economic impact on a substantial number of small entities. Because today's action does not impose significant new burdens on small entities, this rule does not require a final regulatory flexibility analysis.

The basis for EPA's conclusions that today's rule will not have a significant impact on a substantial number of small entities is described in greater detail in the "Economic Impact Analysis" for the rule which is located in the RCRA public docket.

While not a factor relevant to determining whether the rule will have a significant impact for RFA purposes, EPA believes that the effect of today's rule would be to provide positive opportunities to businesses engaged in recycling and the manufacture of recycled products. Purchase and use of recycled products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies. Technological innovation associated with the use of recovered materials can translate into economic growth and increased industry competitiveness worldwide, thereby, creating opportunities for small entities.

**VIII. Supporting Information and Accessing Internet**

The index of supporting materials for today's final CPG II is available in the RCRA Information Center (RIC) and on the Internet. The address and telephone number of the RIC are provided in ADDRESSES above. The index and the following supporting materials are available in the RIC and on the Internet:

"Final CPG II/RMAN II Background Document," U.S. EPA, Office of Solid Waste and Emergency Response, September 1997.

Copies of the following supporting materials are available for viewing at the RIC only:

"Economic Impact Analysis for the Final Comprehensive Procurement Guideline II," U.S. Environmental Protection Agency, August 1997.

"Ex Parte Meeting Notes, Meeting Between U.S. Environmental Protection Agency and National Paint & Coatings Association, June 17, 1997."

"Letter to Dana F. Arnold, U.S. Environmental Protection Agency, from National Paint & Coatings Association, July 28, 1997."

"Telephone Notes, Testing of Reprocessed/consolidated Latex Paint, Between Dana Arnold, U.S. Environmental Protection Agency and Sue Drozdz, Army Corps of Engineers, May 19, 1997."

"National Association of State Purchasing Officials, 1996-1997 Membership Roster."

Follow these instructions to access the information electronically:  
 WWW: <http://www.epa.gov/epaoswer/non-hw/index.htm#procure>.  
 FTP: [ftp.epa.gov](ftp://ftp.epa.gov)  
 Login: anonymous  
 Password: your Internet address  
 Files are located in /pub/epaoswer.

**IX. Submission to Congress and the General Accounting Office**

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 247**

Environmental protection, Channelizers, Consolidated latex paint, Construction products, Delineators, Flexible delineators, Garden hose, Garden edging, Government procurement, Laminated paperboard, Landscaping products, Latex paint, Lawn edging, Office products, Pallets, Park and recreation products, Parking stops, Plastic fencing, Printer ribbons, Procurement guidelines, Recycling, Reprocessed latex paint, Restroom dividers/partitions, Shower dividers/partitions, Soaker hose, Structural fiberboard, Temporary traffic control devices, Transportation products.

Dated: October 8, 1997.

**Carol M. Browner,**  
*Administrator.*

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations, part 247, is amended as set forth below.

**PART 247—COMPREHENSIVE PROCUREMENT GUIDELINE FOR PRODUCTS CONTAINING RECOVERED MATERIALS**

1. The authority citation for part 247 continues to read as follows:

**Authority:** 24 U.S.C. 6912(a) and 6962; E.O. 12873, 58 FR 54911.

2. In § 247.2, paragraph (d) is added to read as follows:

**§ 247.2 Applicability.**

(d) RCRA section 6002(c)(1) requires procuring agencies to procure designated items composed of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, considering such guidelines. Procuring agencies may decide not to procure such items if they are not reasonably available in a reasonable period of time; fail to meet reasonable performance standards; or are only available at an unreasonable price.

3. In § 247.3, the following definitions are added alphabetically:

**§247.3 Definitions.**

\* \* \* \* \*

*Channelizers* means highly visible barrels or drums that can be positioned to direct traffic through detours;

*Delineator* means a highly visible pavement marker that can be positioned to direct traffic or define boundaries;

\* \* \* \* \*

*Flexible delineator* means a highly visible marker that can be positioned to direct traffic or define boundaries and that will flex if struck by a vehicle to prevent damage to the vehicle or the delineator;

\* \* \* \* \*

*Garden hose* means a flexible tubing that conducts water to a specific location;

\* \* \* \* \*

*Latex paint* means a water-based decorative or protective covering having a latex binder;

*Lawn edging* means a barrier used between lawns and landscaped areas or garden beds to prevent grass roots or weeds from spreading to the landscaped areas;

\* \* \* \* \*

*Pallet* means a portable platform for storing or moving cargo or freight;

\* \* \* \* \*

*Parking stop* means a barrier used to mark parking spaces and keep parked vehicles from rolling beyond a designated parking area;

\* \* \* \* \*

*Plastic fencing* means a barrier with an open-weave pattern that can be used to control drifting snow or sand by restricting the force of wind and to provide a warning or barrier in construction and other areas;

\* \* \* \* \*

*Printer ribbon* means a nylon fabric designed to hold ink and used in dot matrix and other types of impact printers;

\* \* \* \* \*

*Restroom divider/partition* means a barrier used to provide privacy in public restroom facilities;

\* \* \* \* \*

*Shower divider/partition* means a water-proof barrier used to provide privacy in public shower facilities;

*Soaker hose* means a perforated flexible tubing that is used to deliver gentle irrigation to plants;

\* \* \* \* \*

4. Section 247.12 is amended by adding new paragraphs (f) and (g) to read as follows:

**§ 247.12 Construction products.**

\* \* \* \* \*

(f) Shower and restroom dividers/partitions containing recovered plastic or steel.

(g)(1) Consolidated latex paint used for covering graffiti; and

(2) Reprocessed latex paint used for interior and exterior architectural applications such as wallboard, ceilings, and trim; gutter boards; and concrete, stucco, masonry, wood, and metal surfaces.

5. Section 247.13 is amended by redesignating the existing text as paragraph (a) and by adding new paragraphs (b), (c), (d), and (e) to read as follows:

**§ 247.13 Transportation products.**

\* \* \* \* \*

(b) Parking stops made from concrete or containing recovered plastic or rubber.

(c) Channelizers containing recovered plastic or rubber.

(d) Delineators containing recovered plastic, rubber, or steel.

(e) Flexible delineators containing recovered plastic.

6. Section 247.14 is amended by redesignating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

**§ 247.14 Park and recreation products.**

\* \* \* \* \*

(b) Plastic fencing containing recovered plastic for use in controlling snow or sand drifting and as a warning/safety barrier in construction or other applications.

7. In § 247.15, new paragraphs (c) and (d) are added to read as follows:

**§ 247.15 Landscaping products.**

\* \* \* \* \*

(c) Garden and soaker hoses containing recovered plastic or rubber.

(d) Lawn and garden edging containing recovered plastic or rubber.

8. In § 247.16, new paragraphs (f) and (g) are added to read as follows:

**§ 247.16 Non-paper office products.**

\* \* \* \* \*

(f) Printer ribbons.

(g) Plastic envelopes.

9. Section 247.17 is revised to read as follows:

**§ 247.17 Miscellaneous products.**

(a) Pallets containing recovered wood, plastic, or paperboard.

(b) (Reserved)

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