

adjudication regulations in part 3 of title 38, Code of Federal Regulations. This proposed rule is part of a series of proposed revisions to those regulations.

#### Unfunded Mandates

The Unfunded Mandates Reform Act, Public Law 104-4, March 22, 1995, requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This proposed rule will have no consequential effect on State, local, or tribal governments.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3520).

#### Regulatory Flexibility Act

The Secretary certifies that the adoption of the proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule does not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance Program Numbers

The catalog of Federal Domestic Assistance program numbers for this proposal are 64.100, 64.101, 64.104, 64.105, 64.109, 64.110, and 64.127.

#### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: October 12, 2001.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 3 as follows:

### PART 3—ADJUDICATION

#### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

#### § 3.104 [Removed]

2. Section 3.104 is removed.

#### Subpart D—Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of This Title

3. The authority citation for part 3, subpart D, continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

4. New § 3.2120 is added to read as follows:

#### § 3.2120 When do VA benefit decisions become binding?

(a) When a claim is decided, and the Veterans Service Center sends the claimant written notification of that decision along with information about appeal rights, the decision is binding on all Veterans Service Centers and cannot be changed, based on the evidence in file at the time the Center notified the claimant, except:

(1) Through an appellate decision by the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, or the U.S. Supreme Court; or

(2) Under § 3.105, Revision of decisions; or

(3) Under § 3.2600, Review of benefit claims decisions.

(Authority: 38 U.S.C. 502, 511, 5104, 5109A)

(b) Types of decisions made by both Veterans Service Centers and the Insurance Center are listed in paragraphs (b)(1) through (b)(7) of this section. A decision of a Veterans Service Center or the Insurance Center on one of these issues is binding on all other Centers, unless the decision was the result of clear and unmistakable error. Absent such error, the issues decided cannot be reconsidered by a Veterans Service Center or the Insurance Center, if the later decision would require application of the same instructions or criteria and would be based on the same facts. The types of issues to which this paragraph (b) applies are:

- (1) Line of duty;
- (2) Character of discharge;
- (3) Relationship;
- (4) Dependency;
- (5) Domestic relations issues such as marriage, divorce, adoption and child custody and support;
- (6) Homicide; and
- (7) Findings of fact of death or presumption of death.

(Authority: 38 U.S.C. 511)

[FR Doc. 01-26558 Filed 10-22-01; 8:45 am]

**BILLING CODE 8320-01-P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 257 and 258

[FRL-7076-5]

RIN 2050-AE86

#### Criteria for Classification of Solid Waste Disposal Facilities and Practices and Criteria for Municipal Solid Waste Landfills: Disposal of Residential Lead-Based Paint Waste

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** In order to help accelerate the pace of lead-based paint removal from residences, and thereby reduce exposure to children and adults from the health risks associated with lead, EPA is proposing to revise the definition of "municipal solid waste landfill unit" in both the Criteria for Classification of Solid Waste Disposal Facilities and Practices and the Criteria for Municipal Solid Waste Landfills. EPA is also proposing to add two new definitions for "construction and demolition (C&D) landfill" and "residential lead-based paint waste." This rule would expressly allow residential lead-based paint waste to be disposed of in construction and demolition landfills by clearly stating that a construction and demolition landfill accepting residential lead-based paint waste, and no other household waste, is not a municipal solid waste landfill unit. Today's action would not prevent a municipal solid waste landfill unit from continuing to receive residential lead-based paint waste.

In the "Rules and Regulations" section of the **Federal Register**, we are approving these definitions as a direct final rule without prior proposal because we view this rule as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this approval in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

**DATES:** Written comments must be received by November 23, 2001.

**ADDRESSES:** Commenters must send an original and two copies of their comments referencing docket number

F-2001-LBPP-FFFFF to: (1) If using regular US Postal Service mail: RCRA Docket Information Center, Office of Solid Waste (5305G), U.S. Environmental Protection Agency Headquarters (EPA, HQ), Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460-0002, or (2) if using special delivery, such as overnight express service: RCRA Docket Information Center (RIC), Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA 22202. Comments may also be submitted electronically through the Internet to: [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov). Comments in electronic format should also be identified by the docket number F-2001-LBPP-FFFFF and must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

Commenters should not submit electronically any confidential business information (CBI). An original and two copies of CBI must be submitted under separate cover to: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460-0002.

Public comments and supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway,

Arlington, VA. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding 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 the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the RCRA Hotline at (800) 424-9346 or TDD (800) 553-7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412-9810 or TDD (703) 412-3323.

For information on specific aspects of this rule, contact Sue Nogas, Office of Solid Waste (mail code 5306W), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; (703) 308-7251, [nogas.sue@epa.gov](mailto:nogas.sue@epa.gov).

**SUPPLEMENTARY INFORMATION:** The index and some supporting materials are available on the Internet. You can find these materials at <http://www.epa.gov/epaoswer/non-hw/muncpl/landfill/pb-paint.htm>.

The official record for this action will be kept in paper form. Accordingly, EPA will transfer all comments received

electronically into paper form and place them in the official record, which will also include all comments submitted directly in writing. The official record is the paper record maintained at the address in **ADDRESSES** at the beginning of this document.

EPA responses to comments, whether the comments are written or electronic, will be in a notice in the **Federal Register** or in a response to comments document placed in the official record for this rulemaking. EPA will not immediately reply to commenters electronically other than to seek clarification of electronic comments that may be garbled in transmission or during conversion to paper form, as discussed above.

**Affected Entities**

You may be potentially affected by this proposed rule if you generate residential lead-based paint (LBP) waste as a result of LBP activities (including abatement, rehabilitation, renovation and remodeling) in homes, residences, and other households. By "households," we mean single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas.

Affected categories and entities would include:

Category	Examples of affected entities
Individuals and firms who generate residential LBP waste .....	Contractors and do-it-yourselfers who generate and dispose of residential LBP waste as a result of abatement, rehabilitation, renovation and remodeling activities in homes, residences, and other household.
Construction and demolition waste disposal firms .....	Owners or operators of construction and demolition landfills that accept residential LBP waste for disposal.

This table is not intended to be exhaustive, but rather lists the types of entities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in this table could also be affected. (Please see Sections X.A. and X.B. of this preamble for further discussion of affected entities. Also, in the docket for today's rule, see "Economic Analysis of EPA's Direct Final Rule Amending 40 CFR part 257 and 258.") If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**Acronyms**

Acronym	Definition
CDC .....	Centers of Disease Control and Prevention.
C&D .....	Construction and Demolition.

Acronym	Definition
CFR .....	Code of Federal Regulations.
EA .....	Economic Analysis.
EPA .....	Environmental Protection Agency.
FR .....	Federal Register.
HUD .....	U.S. Department of Housing and Urban Development.
IQ .....	Intelligence Quotient.
LBP .....	Lead-Based Paint.
MSWLF	Municipal Solid Waste Landfill.
OMB .....	Office of Management and Budget.
OPPTS	Office of Prevention, Pesticides, and Toxic Substances.
OSWER	Office of Solid Waste and Emergency Response.
RCRA ...	Resource Conservation Recovery Act.
RIC .....	RCRA Docket Information Center.
TC .....	Toxicity Characteristic.
TSCA ...	Toxic Substances Control Act.
USEPA	United States Environmental Protection Agency.

**Outline**

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  - H. National Technology Transfer and Advancement Act of 1995
  - I. Executive Order 12898: Environmental Justice Strategy
  - J. Executive Order 13211: Energy Effects

### I. Legal Authority

EPA is proposing this rule pursuant to section 1008(a)(3), 2002(a), 4004(a) and 4010(c) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6907(a), 6912(a), 6944(a), 6949a(c). We are also proposing to correct a typographical error in the existing statement of authority in part 257 by amending the citation to 42 U.S.C. 6949(c) to read “6949a(c).”

### II. Why Are Lead and Lead-Based Paint a Concern?

The Centers for Disease Control and Prevention (CDC) have estimated that approximately 900,000 children, or about 4.4% of children under the age of 6 years old, may have unacceptably high levels of lead in their blood. (See: “Update: Blood Lead Levels—United States, 1991–1994.” *Morbidity and Mortality Weekly Report*, Vol. 46, No. 7, February 21, 1997. CDC, U.S. Department of Health and Human Services.) Children are more susceptible than adults to the toxic effects of lead because their nervous systems are still developing and their bodies more readily absorb lead once exposed to it. (For a fuller discussion of this issue, see 66 FR 1206–1240, January 5, 2001). The most common sources of residential lead exposure include contaminated dust and paint chips from deteriorated lead-based paint (LBP) in older homes, activities that disturb LBP (such as abatement, deleading, home renovation and remodeling), lead-contaminated drinking water, and lead-contaminated soil around homes and play areas. It is estimated that approximately 38 million homes in the United States contain interior LBP. (See “Economic Analysis of EPA’s Direct Final Rule Amending 40 CFR Part 257 and 258,” p. 31.

### III. Congressional Response to Lead Hazards: Title X

In response to this health threat, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992 (hereinafter referred to as Title X of the Housing and Community Development Act of 1992, or as Title X). Among other provisions, Title X amended the Toxic Substances Control Act (TSCA) and directed the Environmental Protection Agency (EPA) to develop and finalize standards governing: (1) the training and certification of individuals engaged in LBP activities; (2) the accreditation of training programs; and (3) the process by which LBP activities are conducted by certified individuals. Congress also directed EPA to identify by regulation LBP hazards, lead-contaminated dust, and lead-contaminated soil. As a result of the enactment of Title X, there is an increasing effort to reduce the hazards posed by LBP (especially to children) in residential housing and other buildings.

### IV. RCRA as a Barrier to Cost-Effective LBP Abatements, and Stakeholders’ Requests for Regulatory Relief From EPA

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to address management of solid waste, including industrial and municipal wastes. Subtitle C of RCRA governs the generation, transportation, treatment, storage and disposal of hazardous waste. A solid waste is a “hazardous waste” if it exhibits one or more of the characteristics of hazardous waste pursuant to 40 CFR part 261, subpart C (toxicity, ignitability, corrosivity, and reactivity) or if it is listed as a hazardous waste in part 261 subpart D. Subtitle D of RCRA addresses the management of nonhazardous solid waste (including municipal and nonmunicipal waste). Subtitle D was amended in 1984 to address two classes of hazardous wastes exempt from Subtitle C hazardous waste requirements: conditionally exempt small quantity generator (CESQG) waste and household hazardous waste. Household waste is defined in 40 CFR 258.2 as “any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas).” Household waste is excluded from RCRA hazardous waste regulations at 40 CFR 261.4(b)(1).

Abatements, renovations, and remodeling activities in housing units with LBP can generate large quantities of residential LBP waste. In cases where the waste exhibits the toxicity characteristic for lead, the waste would be classified as a hazardous waste subject to the comprehensive “cradle to grave” hazardous waste management regulations of RCRA Subtitle C, unless they qualify for an exemption. Lead abatement contractors and public housing agencies argued that the application of these hazardous waste rules to residential LBP waste poses a barrier to the cost-effective abatement of lead hazards. EPA and HUD met to review the disposal requirements for lead-based paint waste and to consider regulatory relief from the applicability of RCRA Subtitle C to waste generated from residential LBP activities. Additionally, several States and advocacy groups (such as the Alliance to End Childhood Lead Poisoning) expressed concern that the RCRA requirements were considerably reducing the number of residential LBP abatements by imposing significant waste disposal costs. They argued that the benefits of handling lead-based paint waste as a hazardous waste were outweighed by the potential risk to children resulting from the disincentive the RCRA regulations created for lead-based paint abatement. They requested that EPA consider ways to minimize management and disposal costs and provide an appropriate regulatory framework that would both accelerate the pace of lead abatements (by lowering costs) and ensure that waste from such activities be managed and disposed of reliably, effectively, and in a manner which protects human health and the environment. They further contended that any regulatory relief that would avoid the cost of managing LBP waste as a hazardous waste would allow public housing authorities to use cost savings to perform additional abatements, thus reducing current and future exposure of children to residential lead-based paint.

### V. EPA’s Implementation of Title X and Response to Stakeholders’ Requests

#### A. 1998 Proposed Rules

In order to facilitate efforts to address lead-based paint hazards to children and respond to stakeholders’ requests for regulatory relief, EPA analyzed waste characterization, laboratory leachate, and the risk and cost of disposal for lead-based paint debris. Based on those analyses, EPA published two proposals on December 18, 1998—the TSCA Proposed Rule (“Management

and Disposal of Lead-Based Paint Debris”), and the RCRA Proposed Rule (“Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris”). The Agency believed that these rules, if finalized, would help reduce the costs associated with the management and disposal of LBP debris, increasing the number of LBP abatements, while continuing to protect human health and the environment.

#### 1. TSCA Proposal (“Management and Disposal of Lead-Based Paint Debris”)

Under the mandate of Title X of TSCA, we proposed new TSCA management and disposal standards for LBP debris generated by contractors from pre-1978 homes and public and commercial buildings (63 FR 70190–70233, December 18, 1998). These standards would allow the disposal of contractor-generated LBP debris in a variety of facilities, including construction and demolition (C&D) landfills. EPA based the C&D landfill disposal option on the results of the groundwater risk analysis performed to support the proposal. The results showed that the potential impact to groundwater resources from the disposal of LBP debris in C&D landfills would be negligible. (For further details, see “USEPA. June 1998, Groundwater Pathway Analysis for Lead-Based Paint (LBP) Architectural Debris; Background Document” in the docket for today’s rule. Also, see Section VII of this preamble.) The TSCA proposal has not been finalized.

The preamble to the proposed TSCA rule also clarified that the RCRA Subtitle C household waste exclusion in 40 CFR 261.4(b)(1) applies to residential LBP waste generated by do-it-yourselfers in their homes (see 63 FR 70241–70242). This clarification remains in place.

#### 2. RCRA Proposal (“Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris”)

In 1998, EPA proposed to temporarily suspend the applicability of the Toxicity Characteristic (TC) rule to contractor-generated LBP debris that would be subject to the TSCA management and disposal standards cited above. The Agency proposed this suspension in order to avoid duplication with other statutes implemented by EPA as mandated under RCRA Section 1006(b)(1).

#### B. Contractor-Generated Residential Lead-Based Paint Memorandum

On July 31, 2000, EPA issued a memorandum clarifying the regulatory status of waste generated as a result of LBP activities (including abatement, renovation and remodeling, and rehabilitation) in homes and other residences.

Specifically, the memorandum clarified that contractors can manage residential LBP waste as household waste and thus are not subject to RCRA Subtitle C requirements. This means contractors can dispose residential LBP waste as household waste in municipal solid waste landfills or municipal solid waste combustors, according to State and local requirements. Dumping and open burning of residential LBP waste are not allowed. (See RCRA Sections 1008 and 4004.)

By interpreting residential LBP waste as a household waste under 40 CFR 261.4(b)(1), the July 2000 memorandum could be construed as allowing land disposal of LBP waste only in municipal solid waste landfill units complying with the requirements of 40 CFR part 258. This is because a “municipal solid waste landfill unit” is defined in 40 CFR 258.2 as receiving “household waste.” Therefore, under section 258.2, a C&D landfill that receives residential LBP waste could be deemed to be receiving household waste and may need to comply with EPA’s Municipal Solid Waste Landfill Criteria found in 40 CFR part 258. Today’s rule is designed to expressly state that C&D landfills can receive residential LBP waste without becoming subject to the requirements for a MSWLF in part 258.

Please note that the memorandum does not affect the regulatory status of nonresidential LBP waste, such as that generated during the abatement or renovation and remodeling of a commercial building. In addition, the memorandum does not cover residential demolition and deconstruction. EPA does not consider demolition and deconstruction waste to be household waste, since it is not similar to those wastes generated by a consumer in the home in the course of daily living. (For more information visit, <http://www.epa.gov/lead/hhwmemo-july00fnl.pdf> for a direct link to the memorandum. See “Regulatory Status of Waste Generated by Contractors and Residents from Lead-Based Paint Activities Conducted in Households” by visiting <http://www.epa.gov/lead/fslbp.htm>, or call the RCRA Hotline at 1–800–424–9346.)

The Agency evaluated if and how to finalize the 1998 RCRA and TSCA

proposals. EPA decided to use alternative policy and regulatory vehicles (*i.e.*, the July 31, 2000 policy memorandum and today’s rule) in order to expeditiously accomplish some of the same goals of the 1998 proposals for certain key noncontroversial aspects. The Agency has no further plans to finalize the 1998 RCRA proposal.

#### VI. What Would Today’s Proposed Rule Do?

##### A. Revision to the Definition of a Municipal Solid Waste Landfill Unit

Today’s rule would expressly allow construction and demolition landfills to receive residential lead-based paint waste, by adding a statement to the definition of MSWLF unit. The definition of MSWLF unit in 40 CFR 257.2 and 258.2 would be amended by inserting at the end of the definition, the sentence, “A construction and demolition landfill that receives residential lead-based paint waste and does not receive any other household waste is not a MSWLF unit.” As previously explained, the existing definition of a MSWLF unit includes language which states that a disposal unit “that receives household waste” is a municipal solid waste landfill unit. This language can be construed to prohibit the disposal of any household waste into a facility that is not designed and operated in conformance with 40 CFR part 258 regulations. Today, we are proposing to amend the definition of MSWLF unit, in order to distinguish residential lead-based paint waste, which has been determined to be a household waste, from other types of household waste, for purposes of disposal.

The amended definition would read, “Municipal solid waste landfill (MSWLF) unit means a discrete area of land or an excavation that receives household waste, and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined in this section. A MSWLF unit also may continue to receive other types of RCRA Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, and industrial solid waste. Such a landfill may be publicly or privately-owned. A MSWLF unit may be a new MSWLF unit, an existing MSWLF unit or a lateral expansion. A construction and demolition landfill that receives residential lead-based paint waste and does not receive any other household waste is not a MSWLF unit.”

It is important to understand that today’s proposed change to the definition of a municipal solid waste

landfill unit would not in any way affect these disposal units. This change would simply distinguish residential lead-based paint waste from other household wastes. Today's amendment would not alter what a MSWLF can or cannot receive. MSWLFs can continue to receive residential LBP waste as household waste. The proposed rule would expressly provide an additional land-based waste disposal option for residential LBP waste. Furthermore, this rule would in no way affect or change the operation and design requirements for municipal solid waste landfills or any other MSWLF criteria.

#### *B. Addition of Construction and Demolition Landfill Definition*

As stated above, the revised definition of "municipal solid waste landfill unit" would allow a subset of household waste—residential LBP waste—to be disposed of in construction and demolition landfills as well as MSWLF units. Today's proposed rule would also add a definition of a construction and demolition landfill in order to expressly allow only C&D landfills, and no other types of land disposal units that meet the criteria of 40 CFR part 257 to receive this subset of household waste.

Based on a groundwater risk analysis used to support the TSCA proposal, we believe that the disposal of residential LBP debris in C&D landfills is appropriate and would not pose adverse health risks to residents living near C&D landfills. (For more information, see Section VII of this preamble.)

A C&D landfill would be defined in 40 CFR part 257 as follows: "Construction and demolition (C&D) landfill means a solid waste disposal facility subject to the requirements of subparts A or B of this part that receives construction and demolition waste and does not receive hazardous waste (defined in § 261.3 of this chapter) other than conditionally exempt small quantity generator waste (defined in § 261.5 of this chapter), or industrial solid waste (defined in § 258.2 of this chapter). A C&D landfill typically receives any one or more of the following types of solid wastes: roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste." A parallel definition would also be added to 40 CFR part 258.

EPA proposed a similar definition of C&D landfill in the TSCA proposal, and received no germane comments on the definition during the public comment period.

#### *C. Addition of Residential Lead-Based Paint Waste Definition*

Today's proposed rule would also add a definition of "residential lead-based paint waste" in order to clarify the scope of the waste stream addressed by today's rule. The proposed definition of residential lead-based paint waste states: "Residential lead-based paint waste means waste generated as a result of lead-based paint activities (including abatement, rehabilitation, renovation and remodeling) in homes and other residences. The term residential lead-based paint waste includes, but is not limited to, lead-based paint debris, chips, dust, and sludges." Not included in the proposed definition of residential LBP waste are residential LBP demolition and deconstruction waste, and LBP waste from nonresidential structures such as public and commercial buildings, warehouses, bridges, water towers, and transmission towers.

In drafting this definition, we included these particular LBP activities because they are those limited to residences and that could pose lead hazards to occupants, especially to children. We included these particular waste types (*i.e.*, debris, chips, dust, and sludges) because they are those that are typically generated during the named LBP activities.

#### **VII. Analytic Basis for Today's Proposed Rule**

The technical basis for today's proposal is the analytical data and groundwater risk analysis used to support the 1998 TSCA proposal. (See "USEPA. June 1998, Groundwater Pathway Analysis for Lead-Based Paint (LBP) Architectural Debris; Background Document" in the docket for today's rule.) Based on that data and analysis, EPA has concluded that residential LBP waste is not hazardous household waste when disposed of in C&D landfills. What follows is a discussion of that data and analysis and how they support today's proposed rule.

In the groundwater risk analysis used to support the 1998 TSCA proposal, we assumed that all lead-based paint from the entire pre-1978 U.S. housing stock would be disposed of in C&D landfills, and that the LBP would be removed from housing while it was still attached to architectural (*i.e.*, building) components that are removed during LBP activities. Examples of architectural components are doors, window frames, moldings, painted plaster boards, concrete, and bricks. We assumed that the components would be removed with intact LBP because we believed that

component removal, if cost-effective, would be preferred over paint scraping and other paint removal options, since the latter pose worker and occupant exposure concerns. This assumption was necessary due to the lack of data indicating what portion of pre-1978 housing would undergo paint removal vs. component removal and what types and quantities of LBP waste are generated at what frequency from various residential LBP activities. Also, in the groundwater analysis, we used the term "LBP debris" to refer to architectural components with intact LBP.

To estimate lead loading from residential LBP debris in C&D landfills around the country, we relied upon the 1990 Report to Congress prepared by the U.S. Department of Housing and Urban Development (HUD). The Report estimated total quantities of building components from pre-1978 homes in the U.S. From the amount of painted surfaces per housing unit reported in the HUD Report, we estimated the total quantities of building materials with LBP that would be disposed of in the landfills.

Then, in our groundwater risk analysis, we used leachate data, calculated the potential lead concentration in groundwater, and estimated risks from the disposal of LBP debris in C&D landfills. We also assumed that all of the lead from the LBP debris (which in this analysis meant the equivalent of all of the lead in all of the lead-based paint from the entire pre-1978 U.S. housing stock) would eventually end up in the leachate. The lead concentration in C&D landfill leachate varied depending on the landfill size. These lead concentrations served as inputs to the groundwater modeling we conducted to simulate the subsurface movement of landfill leachate and the resultant potential contamination of groundwater with lead.

The results from this analysis show that the lead concentration in groundwater would potentially exceed the drinking water action level of 0.015 mg/L for lead in less than 1% of the receptor wells in the vicinity of C&D landfills receiving LBP debris during the first 2,000 years after disposal. During the first 10,000 years after disposal of LBP debris, the drinking water action level would be exceeded in fewer than 5% of the receptor wells.

Based on these groundwater modeling results and the general geochemical behavior of lead in a subsurface environment, the Agency concluded that, on a national scale, the disposal of LBP debris in C&D landfills would, in

general, be protective of human health and the environment at the 95th percentile protection level. This level of protectiveness is at the high end (*i.e.*, most protective) of the levels that the Agency has used in regulating hazardous wastes under the RCRA program. (See 63 FR 70203, December 18, 1998.) When deciding whether to regulate industrial solid wastes as hazardous wastes, the Agency has considered a 90th percentile or higher level as the appropriate protection level and so has not regulated wastes satisfying this level of protection as hazardous wastes. Thus, in the 1998 TSCA proposal, we concluded that the disposal of LBP debris in C&D landfills is appropriate and would not pose adverse health risks to residents living near C&D landfills. Note that the Agency received many public comments addressing various aspects of the groundwater risk analysis. The comments were generally supportive of the proposed provision to allow LBP debris to be disposed of in C&D landfills and provided no data supporting a contrary decision.<sup>1</sup>

EPA believes that the technical basis for the 1998 TSCA proposal, as discussed above, also supports today's proposed rule. This is because our groundwater risk analysis assumed that the total mass of lead-based paint from pre-1978 U.S. housing was disposed of in C&D landfills, and that all of the lead from that lead-based paint ended up in the C&D landfill leachate. Hence, it was irrelevant to the results of the analysis whether or not the LBP entered the C&D landfills by being attached to architectural components (*i.e.*, as LBP debris), or rather did so in the form of other types of LBP waste, such as chips, dusts, and sludges.

In conclusion, we have determined that residential LBP waste from abatement, rehabilitation, renovation and remodeling activities does not pose a substantial hazard to human health and the environment when disposed of in C&D landfills. The disposal of residential LBP waste in C&D landfills is therefore an appropriate and legal disposal option.

<sup>1</sup> All comments and data received in response to the 1998 TSCA proposal may be accessed via Docket Control OPPTS-62160, located in the TSCA Nonconfidential Information Center, Rm. NE-B607, 401 M St., SW, Washington, DC 20460. The TSCA Nonconfidential Information Center telephone number is 202-260-7099. For a summary of the comments, especially those related to the groundwater risk analysis, see "Summary of Comments on: Management and Disposal of Lead-Based Paint Debris; Proposed Rule, and Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris; Proposed Rule" in the docket for today's rule.

### VIII. Other Applicable Federal, State, Tribal, and Local Requirements

Today's proposed rule would not alter the authority of State, local and Tribal governments to regulate LBP waste more stringently than does EPA. Generators of residential LBP waste should contact State environmental agencies to determine if there are additional or more stringent disposal requirements for residential LBP waste. Also, generators should comply with applicable HUD and/or TSCA regulations when addressing residential LBP hazards.

### IX. How Would States and Tribes Implement This Proposed Rule?

Because today's proposed rule would be less stringent than existing federal criteria, States would not be required to amend permit programs which have been determined to be adequate under 40 CFR Part 239. States would have the option to amend statutory or regulatory definitions pursuant to today's proposed rule. If a state chooses to amend its permit program pursuant to today's action, the State would be required to notify the Regional Administrator of the modification as provided by 40 CFR 239.12.

Today's proposed amendments would be directly applicable to landfills in States without an approved permit program under Part 239 and in Indian Country. We would also encourage Tribes to adopt today's proposed amendments into their programs in order to promote lead-based paint abatement activities in homes and other residences in Indian Country.

### X. How Would This Proposed Rule Comply With Applicable Statutes and Executive Orders?

#### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, EPA must determine whether a regulatory action is significant and therefore subject to Office of Management and Budget (OMB) review and the other provisions of the Executive Order. 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 a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan

programs or rights and obligations or recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

EPA has performed a full economic analysis, "Economic Analysis of EPA's Direct Final Rule Amending 40 CFR parts 257 and 258," which is available in the docket for today's rule. The EA concludes that this rule will impose no additional costs to parties, but may result in cost savings and incremental public health benefits. The rule authorizes the disposal of residential LBP waste in C&D landfills, where previously, under the July 31, 2000 policy memorandum, disposal was authorized only in MSWLFs. As a result, EPA believes that, in those parts of the country where it is cheaper to transport and dispose of residential LBP waste in C&D landfills compared to MSWLFs, some residential LBP waste will be diverted from MSWLFs to C&D landfills. Where this occurs, generators will benefit from lower waste management and disposal costs.

EPA assumes that only residential LBP waste generators in the Midwest, Northeast, and South regions will shift disposal from MSWLFs to C&D landfills, based on an analysis of the relative costs of MSWLF and C&D landfill disposal by region. EPA further assumes that the percentage of residential LBP waste that is affected is proportional to the share of these three regions in the number of housing units with LBP, which is 84.4 percent. Under these assumptions, an estimated 0.87 million tons of residential LBP waste will be diverted from MSWLFs to C&D landfills annually. This represents 0.73 percent of the total volume of all waste disposed of in MSWLFs annually. This shift in disposal would save residential LBP waste generators in the Midwest, Northeast, and South regions up to an estimated \$16.76 million annually. The savings accruing to generators of residential LBP abatement waste is estimated at \$0.79 million per year, while the savings accruing to generators of residential renovation and remodeling waste is \$15.98 million per year.

EPA estimates that of the \$0.79 million in savings that could accrue to generators of residential LBP abatement waste, an estimated 39.7 percent, or \$0.31 million, will be generated annually in the public housing sector.

EPA assumes that in the public sector, any savings in residential LBP waste management and disposal costs will be used to conduct additional LBP abatements. Given an average cost for LBP abatement in public housing units of \$3,650, the \$0.31 million in annual savings would fund an additional 86 abatements each year. This ensuing increase in LBP abatement projects would result in a more rapid reduction in the potential for exposure to the hazards of LBP, especially for children. These hazards include decreased intelligence (i.e., lower IQ), behavioral problems, reduced physical stature and growth, and impaired hearing.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards established for industries as described in the North American Industry Classification System (*see* <http://www.sba.gov/size/NAICS-cover-page.html>); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any new requirements on small entities. The rule will provide an additional non-mandatory option for the disposal of residential LBP waste.

#### C. Paperwork Reduction Act

Today's proposed rule is in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This proposed rule does not require the

collection of information from the States, Federal Agencies, or industry. Therefore, we do not need to prepare an Information Collection Request.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of regulatory actions on State, local, and Tribal governments, and the private sector. Under Section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, Section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objective of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law. Moreover, Section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under Section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. This proposed rule would impose no enforceable duty on any State, local or tribal governments or the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10,

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

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As explained in Section IX of this preamble, none of today's proposed revisions are more stringent or broaden the scope of the existing Federal requirements. Therefore, States are not required to adopt the revision to the definition of MSWLF unit nor the additional definitions of construction and demolition (C&D) landfill and residential lead-based paint waste in today's rule. Thus, Executive Order 13132 does not apply to this proposed rule.

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

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

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's proposed rule would expressly provide an additional option for

disposal of certain waste applicable in Indian Country, but would not create any mandate on Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

*G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks*

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

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866. However, this rule will affect decisions involving the environmental health or safety risks to children. It will benefit children by allowing environmentally protective disposal of residential lead-based paint waste in C&D landfills, which is less costly than disposal in MSWLFs in certain areas of the U.S., therefore reducing the cost of lead abatements. Reducing the cost of LBP abatements will also reduce the amount of time needed to complete abatements in public housing. Lower abatement costs may increase the amount of private homes undergoing abatements. By reducing costs associated with the disposal of LBP waste, the Agency believes that the number of abatements may marginally increase, thus resulting in a reduction of the number of children exposed to LBP.

*H. National Technology Transfer and Advancement Act of 1995*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. No. 104-113, § 12(d) (15 U.S.C. 272 note) directs us to use voluntary consensus standards in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards

bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. Today's proposed rule does not involve technical standards, voluntary or otherwise. Therefore, the NTTAA does not apply to today's proposed rule.

*I. Executive Order 12898: Environmental Justice Strategy*

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," as well as through EPA's April 1995, "Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report," and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities.

Today's proposed rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities versus non-minority or affluent communities. On the contrary, since the rule will reduce the cost of performing LBP abatements in certain regions of the U.S., EPA assumes that the savings will afford public housing authorities, in particular, the opportunity to conduct additional abatements of LBP hazards in affected housing units. Tenants of public housing units are possibly more likely to be minority and lower-income households, and the rule should have the effect of providing a differential benefit to such populations.

*J. Executive Order 13211: Energy Effects*

This proposed rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 Fed. Reg. 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

**List of Subjects**

*40 CFR Part 257*

Waste treatment and disposal.

*40 CFR Part 258*

Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: September 28, 2001.

**Christine Todd Whitman,**  
Administrator.

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to Revise Critical Habitat for the Cape Sable Seaside Sparrow**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 12-month petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to revise critical habitat for the Cape Sable seaside sparrow (*Ammodramus maritimus mirabilis*), under the Endangered Species Act of 1973, as amended (Act). After review of all available scientific and commercial information, we find that revision of critical habitat is warranted. Currently, most of our listing budget must be directed to complying with numerous court orders, settlement agreements, litigation related activities, and due and overdue final listing determinations. We will proceed with a proposal to revise critical habitat for the Cape Sable seaside sparrow as soon as feasible, considering our workload priorities and available funding. We continue to address habitat needs of the sparrow through coordination with agencies that manage land and water in South Florida.

**ADDRESSES:** The complete file for this finding, including comments and information submitted, is available for public inspection, by appointment, during normal business hours at the South Florida Ecological Services Office, U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, FL 32960-3559.

**FOR FURTHER INFORMATION CONTACT:** David Martin (see **ADDRESSES** section), telephone 561/562-3909, extension 230.