government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, 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 rule 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. Thus, Executive Order 13175 does not apply to this rule.

VIII. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: December 26, 2001.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346(a) and 371.

§ 180.480 [Amended]

2. In § 180.480(a)(1) is amended by revising the ''Expiration/Revocation Date'' in the table ''12/31/01'' to read ''12/31/04.'' for the entries ''bananas (whole fruit)''; ''pecans''; and ''stone fruit crop group (except plums and prunes)''.

[FR Doc. 02–962 Filed 1–14–02; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW–FRL–7125–1]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA (also, ''the Agency'' or ''we'' in this preamble) is granting a delisting to Heritage Environmental Services, LLC (Heritage) to exclude treated Electric Arc Furnace Dust (EAFD) produced at Nucor Steel, Division of Nucor Corporation (Nucor) located in Crawfordsville, Indiana from the lists of hazardous wastes.

After careful analysis, the EPA has concluded that the petitioned waste is not a hazardous waste when disposed of in a Subtitle D landfill. Today's action conditionally excludes the petitioned waste from the requirements of the hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) only if the waste is disposed of in a Subtitle D landfill which is permitted, licensed, or registered by a State to manage industrial solid waste.

EFFECTIVE DATE: This rule is effective on January 15, 2002.

ADDRESSES: The RCRA regulatory docket for this final rule is located at the U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, and is available for viewing from 8:00 a.m. to 4:00 p.m., Monday through Friday, excluding federal holidays. Call Todd Ramaly at (312) 353–9317 for appointments. The public may copy material from the regulatory docket at $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For technical information concerning this document, contact Todd Ramaly at the address above or at (312) 353–9317.

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Background

A. What Is a Delisting Petition?

A delisting petition is a request from to exclude waste from the list of hazardous wastes under RCRA regulations. In a delisting petition, the petitioner must show that waste generated at a particular facility does not meet any of the criteria for which EPA listed the waste as set forth in 40 CFR 261.11 and the background document for the waste. In addition, a petitioner must demonstrate that the waste does not exhibit any of the hazardous waste characteristics (that is, ignitability, reactivity, corrosivity, and toxicity) and must present sufficient information for us to decide whether factors other than those for which the waste was listed warrant retaining it as a hazardous waste.

A petitioner remains obligated under RCRA to confirm that the waste remains nonhazardous based on the hazardous waste characteristics even if EPA has ''delisted'' the waste.

B. What Regulations Allow a Waste To Be Delisted?

Under 40 CFR 260.20 and 260.22, a person may petition the EPA to remove

waste at a particular generating facility from hazardous waste control by excluding the waste from the lists of hazardous wastes contained in §§ 261.31 and 261.32. Specifically, § 260.20 allows any person to petition the EPA to modify or revoke any provision of parts 260 through 266, 268, and 273 of Title 40 of the Code of Federal Regulations. Section 260.22 provides a person the opportunity to petition the EPA to exclude a waste on a ''generator specific'' basis from the hazardous waste lists.

II. Heritage's Delisting Petition

A. What Waste Did Heritage Petition EPA to Delist?

On August 3, 1999, Heritage petitioned EPA to exclude an annual volume of 30,000 cubic yards of K061 EAFD generated at Nucor Steel Corporation located in Crawfordsville, Indiana from the list of hazardous wastes contained in 40 CFR 261.32. K061 is defined as ''emission control dust/sludge from the primary production of steel in electric arc furnaces.''

B. What Information Must the Petitionor Supply?

Petitioners must provide sufficient information to allow the EPA to determine that the waste does not meet any of the criteria for which it was listed as a hazardous waste. In addition, where there is a reasonable basis to believe that factors other than those for which the waste was listed (including additional constituents) could cause the waste to be hazardous, the EPA must determine that such factors do not warrant retaining the waste as hazardous.

C. What Information Did Heritage Submit To Support This Petition?

To support its petition, Heritage submitted descriptions and schematic diagrams of the EAFD treatment system; and detailed chemical and physical analyses of the treated EAFD.

III. EPA's Evaluation and Final Rule

A. What Decision Is EPA Finalizing and Why?

Today the EPA is finalizing an exclusion to Heritage for a 30,000 cubic yards annual volume of K061 EAFD generated at the Nucor Steel facility in Crawfordsville, Indiana and treated by Heritage from the list of hazardous wastes.

Heritage petitioned EPA to exclude, or delist, the treated EAFD because Heritage believes that the petitioned waste does not meet the RCRA criteria for which it was listed and that there are no additional constituents or factors which could cause the waste to be hazardous. Review of this petition included consideration of the original listing criteria, as well as the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA). See section 222 of HSWA, 42 United States Code (U.S.C.) 6921(f), and 40 CFR 260.22 (d)(2)–(4).

On December 5, 2000, EPA proposed to exclude or delist Heritage's treated EAFD from the list of hazardous wastes in 40 CFR 261.32 and accepted public comment on the proposed rule (65 FR 75897). EPA considered all comments received, and for reasons stated in both the proposal and this document, we believe that the treated waste generated at the Nucor facility should be excluded from hazardous waste control.

B. What Are the Terms of This Exclusion?

Heritage must dispose of the treated EAFD in a Subtitle D landfill which has groundwater monitoring and which is permitted, licensed, or registered by a state to manage industrial waste. This exclusion is valid for a maximum annual rate of 30,000 cubic yards per year. Any amount exceeding this volume is not delisted under this exclusion. This exclusion is effective only if all conditions contained in today's rule are satisfied.

C. When Is the Delisting Effective?

This rule is effective January 15, 2002. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA to allow rules to become effective in less than six months when the regulated community does not need the six-month period to come into compliance. This rule reduces rather than increases the existing requirements and, therefore, is effective immediately upon publication under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d).

D. How Does This Action Affect the States?

Because EPA is issuing today's exclusion under the federal RCRA delisting program, only states subject to federal RCRA delisting provisions would be affected. This exclusion may not be effective in states having a dual system that includes federal RCRA requirements and their own requirements, or in states which have received our authorization to make their own delisting decisions.

EPA allows states to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA. These more stringent requirements may include a provision that prohibits a federally issued exclusion from taking effect in the state. Because a dual system (that is, both federal (RCRA) and state (non-RCRA programs) may regulate a petitioner's waste, we urge petitioners to contact the state regulatory authority to establish the status of their wastes under the state law.

EPA has also authorized some states to administer a delisting program in place of the federal program, that is, to make state delisting decisions. Therefore, this exclusion does not apply in those authorized states. If Heritage transports the petitioned waste to or manages the waste in any state with delisting authorization, Heritage must obtain a delisting from that state before it can manage the waste as nonhazardous in the state.

IV. Public Comments Received on the Proposed Exclusion

A. Comments and Responses From EPA

Comment: The DRAS is a more realistic model than any of its predecessors.

Response: EPA agrees with the comment.

Comment: EPA has stated that it believes the CML model is appropriate when evaluating whether to delist a waste, and has used the CML model as recently as the proposed delisting of August 8, 2000 and the final delisting of May 16, 2000.

Response: Region 5 believes that the delisting risk assessment software (DRAS) is a more sophisticated and more appropriate model and is now applying this model to all petitions currently under review.

Comment: The September 27, 2000 and December 5, 2000 **Federal Registers** did not indicate that the DRAS has been adopted by all EPA Regions, nor that it would be used in the future.

Response: At this time all Regions are using the DRAS model.

Comment: The model should be peer reviewed and the public should have the opportunity to provide adequate and meaningful comment.

Response: The model has been peer reviewed. The public has the opportunity to submit comments on the DRAS model during the comment period each time a delisting is proposed which is based on the DRAS model.

Comment: EPA is continuing to use the model before completing its own review of comments received. The DRAS may not be appropriate since it is currently being commented upon & revised.

Response: The Agency is continually striving to improve the tools available

for assessing risk. The Agency believes that at this time the DRAS model is the best available tool for estimating risk. Revisions and improvements to the model are always possible in the future.

Comment: The DRAS model assumes that the landfill is unlined and that leaching occurs from the beginning, which is counter to the use of liners, covers & slurry walls. The assumption of no liner is not consistent with CMTP which assumes a liner. The DRAS model should allow for the option of including a liner and should use Subtitle D landfill characteristics.

Response: There are existing solid waste landfills which have no liner. Over time, liners may fail and delistings currently have no expiration date. Therefore it is reasonable to consider scenarios for liner failure or to assume that no liner exists.

Comment: The DRAS model assumption of minimal cover increases estimates of volatilization and particulate emissions, which may not be reasonable.

Response: We must consider the worst case scenario of minimal requirements for daily cover. Regulations requiring daily cover on municipal landfills do not necessarily apply to industrial solid waste landfills.

Comment: The DRAS model is inflexible because site specific factors like hydrogeology, climate, ecology, and population density cannot be incorporated. The model should be modified to allow for the input of site and contaminant specific criteria. State or regional modeling criteria may be more stringent than the CMTP and have been ignored.

Response: At this time the Agency is not able to consider such site specific factors. The DRAS model is based on national averages of these factors and is intended to model a reasonable worst case. A State may always impose more stringent requirements based on site-specific factors.

Comment: DRAS is complex and EPA must explain the models and risk processes used in establishing regulatory limits including the assumptions, methodologies, pathways and variables used in the DRAS model.

Response: The DRAS Technical Support Document (DTSD) explains the risk algorithms used in the model including the methodologies, variables, pathways and assumptions. The DTSD is available on line at *http://www.epa.gov/earth1r6/6pd/rcra__c/pd-o/dtsd.htm.*

Comment: Several assumptions used in the DRAS model are unlikely and unreasonable: (1) A receptor lives and works at a single location 100 m downgradient and is exposed 350 days/yr; (2) individuals are exposed to the 90th percentile level for all paths; (3) all media flow toward the receptor; (4) the landfill volume and conditions from 1987 are still valid; (5) the waste is placed uniformly at great depth over the whole landfill; (6) only the most sensitive pathway for each constituent is selected which is an unlikely scenario; (7) first order decay applies although processes of oxidation, hydrolysis and biodegredation are not considered separately; (8) transformation rate may not be reasonable for biological processes; (9) fate and leaching estimates should include parameter estimates including Kow, pKa, Henry's Law and potential for biological transformation; (10) all streams are fishable and representative; and (11) nickel has a fish BCF of 307 which is unsupported by peer review publications and EPA's own documents.

Response: (1,2) The DRAS employs standard risk assessment default parameters that are accepted throughout the Agency in risk analyses (i.e., residential exposure 350 days/yr, and selection of the 90th percentile). The Agency has no way of knowing that this situation will not occur and therefore deems it prudent to protect for this condition by adding risks. (3) The Agency has no way of knowing the direction of media flow and must assume that all media flow may move toward the receptor. (4) The Agency has no data to indicate that the landfill volume data and other data from the 1987 landfill survey report are not valid. When updated data are available, they will be incorporated into the analyses. (5) To maximize the impact of the waste, the model assumes uniform placement of the waste. (6) The DRAS does employ a conservative approach to exposure assessment by assuming the receptor may be exposed to both the most sensitive groundwater pathway and the most sensitive surface exposure pathway and selects the most sensitive pathway for each constituent. (7,8) The groundwater fate and transport model used by the Agency to determine first order decay is EPA's Composite Model for Leachate Migration with Transformation Products (CMTP). The information used to develop the first order decay rate for different chemicals in CMTP is based on studies in which the separate processes of oxidation, biodegradation and hydrolysis could not be further isolated. The transformation rates cannot be easily adjusted because they are based on these empirical studies rather than on theoretical modeling in which variables can be altered at will. This model has been peer reviewed and received an excellent review from the Science Advisory Board (SAB). The Agency will continue to support the use of EPACMTP until a better assessment tool becomes available. (9) The Kow and pKa (octonal water partition coefficient and ionization constant) are not used in the development of leaching estimates because the DRAS relies on test data from leach testing to estimate the leaching potential of the waste. The Henry's law constant, although used in other aspects of the DRAS, is not used in the estimate of leaching and fate in groundwater. At this time, the CMTP does not account for volatilization of constituents from the groundwater as it moves through the subsurface.

(10) EPA assumed that all streams of sufficient size are fishable. This assumption is conservative, but not unreasonable as the final landfill location is not known. (11) The bioconcentration factor (BCF) for nickel has been revised from 307 to 78. The revised nickel BCF will be incorporated into the upcoming DRAS version 2.0.

Comment: Current science suggests that the skin and respiratory tract are targets for soluble nickel salts, yet the model literature states that the critical effects are decreased organ and/or body weights.

Response: The oral Reference Dose (RfD) is based on the assumption that thresholds exist for certain toxic effects such as cellular necrosis. It is expressed in units of mg/kg/day. Ambrose et al. (1976) reported the results of a 2-year feeding study using rats given 0, 100, 1000 or 2500 ppm nickel (estimated as 0, 5, 50 and 125 mg Ni/kg/day) in the diet. Clinical signs of toxicity, such as lethargy, ataxia, irregular breathing, cool body temperature, salivation and discolored extremities, were seen primarily in the 100 mg/kg/day group; these signs were less severe in the 35 mg/kg/day group. Based on the results obtained in this study, the 5 mg/kg/day nickel dose was a no observable adverse effects level (NOAEL), whereas 35 mg/kg/day was a lowest observable adverse effects level (LOAEL) for decreased body and organ weights. For further information, please refer to the Agency's IRIS database.

Comment: The bioconcentration factor (BCF) of 307 for nickel in fish is unsupported in EPA's own documents. Literature values are much less. BCF should not be used for predicting chronic toxicity. Some organs can regulate internal concentrations. Nickel has a low order of toxicity. Nickel does not bioaccumulate due to incomplete adsorption and rapid excretion. It is

Ni^{+2}, not the parent, that is persistent and bioavailable and determines toxicity.

Response: The BCF for nickel has been revised to 78 and will be incorporated into DRAS version 2.0. This value is based on the geometric mean of 3 laboratory values (100, 100, 47). The studies used to derive the BCF for nickel are based on soluble nickel, which is present as the Ni^{+2} ion. The nickel concentration in the waste was assumed to be present as the Ni^{+2}. The assumption is conservative, but not unreasonable since the nickel from the waste could be present as the Ni^{+2} ion at the point of exposure.

Comment: In aquatic environs, much of the nickel is present as both ionic and stable organic complexes. Hence much of the nickel is insoluble with minimal bioavailability. Also, soil which contains high organic matter will adsorb nickel and limit its mobility.

Response: The Agency agrees that some nickel may be insoluble, and have minimal bioavailability, since its mobility is dependent on the organic content of the soil. However, in delisting analyses, site specific characteristics (beyond waste constituent concentration and volume) are not incorporated into analyses. Default values are given for many parameters used in risk analyses including the organic content of fishable waters. The Agency has no way of knowing what streams may be impacted and, therefore, has established a conservative estimate of pertinent variables.

Comment: MINTEQA2 has been reported to contain outdated and inaccurate thermodynamic estimates (e.g., for complexation of metals like cadmium that are dependent on disolved oxygen content (DOC and pH). Hence the model may not reasonably estimate speciation and mobility. EPA should confirm stoichiometry, speciation charge, formula weight, equilibrium and enthalpy estimates with regard to metal and organic ligands as risks from metal ion concentrations may be overestimated.

Response: The Agency continues to review chemical-specific parameter data. Where appropriate, these data will be incorporated into the DRAS analyses.

Comment: The model may estimate fate and transport concentrations that exceed water solubility.

Response: If waste concentration exceeds soil saturation, free form conditions may occur and the assumptions of the EPACMTP may be compromised. Therefore, soil saturation values have been incorporated into DRAS and the program will notify the user if waste concentrations exceed soil saturation concentrations. Ambient water concentrations may be influenced by more than chemical solubility (e.g., organic content).

Comment: The use of the NOAEL in Rfd calculations has been challenged by the SAB. The dose response relationship and the consistency in response level are not identified. Use of the NOAEL for regulatory limits is based more on experimental exposure design than on biological relevance.

Response: The EPA still uses the NOAEL in Rfd. The SAB did not review the entire DRAS. The EPA risk assessors who peer reviewed the DRAS did not question the use of the NOAEL in Rfd. Until such time that the Agency redefines RfD methodology, the delisting program will continue to determine hazards based on RfDs recommended by EPA's IRIS database. The Agency continues to use RfDs in delisting determinations in a manner consistent with EPA risk assessment methodology. The EPA risk assessors and EPA ORD scientists who have peer reviewed the DRAS have not questioned the method in which RfDs are employed in the DRAS analyses.

Comment: Terms should be more clearly defined. Does the term Cw for waste contamination account for the total mass of contamination in the waste or only that portion that may enter the aqueous phase and be transported into the unsaturated zone and/or the leachable portion?

Response: No occurrences of Cw could be found in the DTSD or in the proposed exclusion. The term Cwaste is used twice in Chapter 4 of the DTSD to refer both to the total constituent concentration in a solid matrix in a landfill and to the total constituent concentration in a liquid in a surface impoundment.

Comment: USEPA cited various regulatory and statutory sections such as §§ 261.11(a)(3)(i) thru (xi) describing factors to consider in listing/delisting waste, but there was very little analysis of those factors. This prompts the conclusion that the USEPA is arbitrarily proposing to grant the HES petition.

Response: All criteria in 40 CFR 261.11(a)(3) were considered in accordance with § 260.22(d). The DRAS program was developed in consideration of all of the factors presented in 40 CFR 261.11(a)(3). Consitituent specific toxicology, chemical, and physical data are in the database used in the DRAS software as are appropriate models for evaluating migration and exposure. The DRAS is not currently capable of evaluating degradation products as described in 40 CFR 261.11(a)(3)(iii) through (vi) and the risk posed by degradation products would typically be evaluated independently. The petitioned waste, however, did not contain any chemicals which have known degradation products and therefore this additional analysis was not necessary. EPA considered plausible types of improper management in accordance with § 261.11(a)(3)(vii) when it assumed that contaminants will migrate from the landfill to a receptor well, uncontrolled erosion of exposed wastes will migrate into a stream, and long-term absence of daily cover will expose the waste to the atmosphere. Operating a facility in this manner is considered improper management as it violates the proper management standards and requirements promulgated for licensed Subtitle D landfills set forth in 40 CFR parts 257 and 258.

Comment: DRAS does not evaluate important ecological receptors which may significantly impact the back calculated maximum permissible waste concentrations derived from DRAS.

Response: The DRAS model does include consideration of ecological impacts. A complete description of the screening for ecological impact is in Chapter 4 of the DTSD available on the internet at <*http://www.epa.gov/earth1r6/6pd/ rcra—c/pd-o/dtsd.htm.*> The maximum observed lead and zinc in the petitioned waste exceeded the surface water screening values, indicating the need to examine the possible ecological impact more closely. The DRAS model does not account for the fact that some of the constituents in the eroded waste will not be dissolved. Since water quality criteria used for lead and zinc are based on dissolved concentrations, the total water concentration predicted by DRAS was conservative. Using conservative values published by EPA's Office of Water to convert total water concentrations to dissolved concentrations (30% for zinc and 20 % for lead), the surface water quality criteria were not exceeded.

Comment: How does the model distinguish metals that are important for some animals?

Response: If the commenter is referring to metals as micronutrients, delisting levels for metals far exceed any micronutrient levels.

Comment: What criteria determine whether the allowable leachate concentration is set by the Safe Drinking Water Act (SDWA) Maximum Contaminant Level (MCL), DRAS calculation, treatment technology or toxicity characteristic level?

Response: The allowable level is the most conservative of the DRAS

calculations, a calculation based on the SDWA MCL or the toxicity characteristic level. The exception to this is the level for arsenic which is frequently calculated based on the concentration allowed by the MCL.

Comment: Does EPA policy require that MCL or surface water criteria be met? Does this policy apply at all downgradient distances or just those corresponding to the DAF?

Response: Groundwater must meet MCL criteria but not surface water criteria. The DAF is used to calculate the concentration in the groundwater at a well a set distance downgradient. This distance was based on the results of a survey which identified the distance to the closest drinking water wells located near solid waste landfills throughout the country.

Comment: Are maximum permissible levels set below background? Background levels for nickel are approximately 3.3 ppb freshwater; 2.1 ppb groundwater; 4 to 30 mg/kg soil.

Response: The Agency does not usually consider background levels when establishing delisting levels. The maximum allowable levels of nickel in the waste and in the TCLP leachate are not less than the values mentioned in the comment.

Comment: The pH of landfill leachate is generally higher than the pH of the extraction fluid used in the TCLP which affects the leachability of the metals.

Response: The leachability of this waste was measured using three different extraction fluids with pH values of 2.88, 6.5, and 12.0 to evaluate whether the waste leachability will be affected by the pH of various environments.

Comment: The duration of leaching 18 minutes or 18 hours may over or underestimate the leachability of some constituents. TCLP does not account for variations in time to equilibrium for different species. The TCLP under predicts the maximum concentation of some anions and does not account for a variety of processes that can affect leachate quality, quantity and migration.

Response: It is impossible to determine the optimum time or other factors necessary to maximize the leaching of each constituent in every matrix in any environmental condition. A considerable amount of time and effort went into the development of the TCLP and the Agency believes that it is a reasonable laboratory test and that the TCLP results generally correlate well with environmental measurements.

Comment: Does the TCLP account for DOC? DOC in the leachate affects the mobility of metals in the aquifer.

Response: The TCLP does not account for DOC. However, in performing the TCLP procedure using alternative extraction fluids, Heritage took steps to remove dissolved oxygen from the neutral and basic extraction fluids. See proposed rule, 65 FR 75900, December 5, 2000.

Comment: It may be appropriate for the Agency to consider data from the SPLP.

Response: The Agency would consider any additional data that the petitioner chooses to submit. At this time the Agency requires leach testing for stabilized waste using the TCLP procedure at three different pHs. The Agency also evaluates data from the multiple extraction procedure. During the development of the sampling and analysis plan for a delisting petition, the Agency and petitioner discuss which analytical methods are appropriate for characterizing the waste.

Comment: For chemicals not previously modeled with the EPACMTP, what is the effect of assuming a DAF of 18?

Response: The Dilution Attenuation Factor (DAF) of 18 is a conservative value determined by the EPACMTP fate and transport model for the landfill waste management scenario. The DAF of 18 represents the class of organic chemicals with non-degrading, non-sorbing, characteristics. When creating a chemical to add to the DRAS chemical library for use in DRAS analyses, we recommend using a conservative value.

Comment: What is the effect of using one half detection level or zero for non detects?

Response: The use of one half the detection level is a compromise between the use of zero and the use of the detection limit. Using one half of the detection level protects against inappropriately high detection levels.

Comment: The model does not account for the uncertainty or sensitivity estimate. Without a sensitivity analysis it is impossible to determine if a single pathway or a small number of pathways dominate the risk estimate. If data for most sensitive parameter is uncertain or limited, confidence in the result will be poor.

Response: The DRAS provides the forward-calculated risk level and back-calculated allowable waste concentration for each exposure pathway. The user is thereby able to determine which pathway or pathways dominate the estimate of risk for each chemical. These analyses are currently provided on the Chemical-Specific Results screen.

Comment: The model determines that ground concentrations and a theoretical drinking water well that is 90th percentile of all predicted concentrations from Monte Carlo analysis. What is the sensitivity of using the 50th percentile on release and risk estimates?

Response: The DRAS assessment always defaults to high-end values from the 90th percentile. The model was not run using the 50th percentile, so it is not possible to determine the sensitivity at the 50th percentile.

Comment: Does a hazard index (HI) of greater than one mean that the waste cannot be delisted, or does it indicate that the model is overly conservative?

Response: An HI of one does not mean that the waste cannot be delisted, but a more thorough evaluation of the waste will be necessary. In cases where the HI of the waste exceeds one, the Agency will evaluate the target organ for the critical effect of those chemicals contributing to the total HI. In some cases, the hazards associated with various chemicals in the waste result from effects to the same target organ, and are indeed additive. In other cases, the hazards of different chemicals impact different target organs, and are not additive, in which case the HI is lowered accordingly. The DRAS automatically assumes the conservative approach, summing all hazards to calculate the HI.

Comment: EPA has rationalized the exceedance of its own delisting program target risk level of 1×10^{-6} by reference to the cancer risk range of 1×10^{-4} to 1×10^{-6} acceptable in other programs. Although this risk range may be appropriate in the context of corrective action, it may not be warranted in the delisting program where the waste is yet to be generated and placed into the environment.

Response: This risk is within the target risk range in the delisting program of 1×10^{-4} to 1×10^{-6}. The commentor is referred to chapter 4 of the DRAS DTSD which states that the target risk range is 1×10^{-4} to 1×10^{-6}. Attachment A of the RCRA Delisting Program Guidance Manual for the Petitioner also states that the target risk range is 1×10^{-4} to 1×10^{-6}.

Comment: Definition of the criteria used to determine de minimis risk levels and risk estimates should be provided. De minimis risk is usually considered to be a risk of less than 10^{-6} or 1 in a million.

Response: The term de minimis risk is used to refer to a risk that is sufficiently low that it need not be considered. The commentor is correct that a de minimis risk is usually considered by regulatory agencies to be a risk at or below 10^{-6} over a 70 year life time.

Comment: Long term variation, waste characterization procedures used by Heritage, and specific information used in the fate & transport model are lacking.

Response: Temporal variability and waste characterization procedures used by Heritage were evaluated. The fate and transport data used by the delisting risk assessment model is based on national averages for a reasonable worst case scenario, not on site specific information.

Comment: It may be more appropriate to set standards using statistical procedures from empirical data from TCLP analyses rather than generic risk assessment and fate and transport.

Response: Empirical data is not a reliable predictor of future risk. We believe that the DRAS model is a more appropriate tool than empirical data for determining acceptable levels based on risk.

Comment: Is 30,000 cubic yards the untreated or the treated K061? Will any amount over 30,000 cubic yards be regulated as K061? What information was provided to determine annual volume?

Response: The proposed delisting is for 30,000 cubic yards of treated waste. Any treated K061 in excess of 30,000 yds is not delisted. The Agency accepts the facility's assessment and certification of data submitted.

Comment: What is a mixing device?

Response: A mixing device is a unit in which mixing occurs.

Comment: Much of the relevant information was confidential business information, such as what treatment reagents were used or specifications of a mixing device.

Response: Heritage has claimed information which it submitted on equipment, reagents, and process as confidential. Heritage believes that such information in the public domain could be injurious.

Comment: No details were given on and what dust characteristics were evaluated.

Response: Information on dust characteristics of the treated dust is provided in section 3.0 of the petition.

Comment: Are the larger particles that are removed in the dropout chamber ever reintroduced into the EAFD for treatment? Would these larger particles meet the definition of K061? Are the silos in which EAFD is accumulated considered accumulation tanks since the exclusion is only for EAFD that has been treated.

Response: The material in the dropout box is not K061 and is not reintroduced into the EAFD for treatment. The silos are part of the production unit and not RCRA regulated tanks. Baghouse silos that are directly connected via piping to the baghouse are an integral part of the EAFD emission control system. Furthermore, the waste is accumulated in the silos for less than 90 days, and the silos are part of the treatment equipment. The point of generation does not occur until the treatment is complete and the waste exits the unit. Therefore, the silos are not accumulation tanks and are not subject to RCRA.

Comment: US EPA should re-evaluate the waste treatment process and QA criteria to assure variations in the treated EAFD are minimized.

Response: If future verification samples indicate excessive variations, the waste will be re-evaluated.

Comment: There are no details on the fingerprinting procedures or the quality control measures used to assure proper and consistent treatment of the waste.

Response: The sampling strategy addressed the waste exiting the unit. Fingerprinting would not be appropriate since the waste does not undergo further treatment after it exits. The quality control measures are set forth in the sampling and analysis plan. The required verification sampling is intended to assure that the treated waste remains within acceptable limits. Verification samples which exceed the delisting levels set forth in this rule may invalidate this delisting.

Comment: The composite sampling procedure in the initial month may not be sufficient to describe the variation of metals from different mixes of scrap steel. No comparison of the variability of the metals is given. EPA should adopt statistical sampling and analytical procedures from process and quality control engineering methodology. The limited amount of sampling does not provide for waste variability.

Response: A statistical approach based on extensive data would be welcomed in future petitions. Since the K061 dust is generated at a single facility, the Agency believes that the samples taken represent a reasonable range of both spacial and temporal varibility. Some confidential data was submitted demonstrating waste variability at this site.

Comment: The presence of VOCs, SVOCs and PCBs is considered unlikely. However, one sample is insufficient to determine the presence or absence of these compounds. Verification should require that a limited number of samples be analyzed for these constituents.

Response: Based on an understanding of the process, the Agency believes that these constituents are not likely to be present in the waste. Generator knowledge also supports the absence of these constituents in the waste. In this case, a single sample is considered sufficient to verify the absence of these compounds.

Comment: The commenter recommends that split samples should be taken by EPA.

Response: EPA does not sample wastes in support of delisting petitions. The signed certification is accepted as proof that all analyses were done properly and the results are reported correctly.

Comment: Listed waste needs to meet technology based LDRs prior to disposal. The delisting level for lead has been set at 2.4 mg/L TCLP which is above the LDR standard of .75 mg/L TCLP. Why weren't LDRs considered in setting the delisting standard?

Response: The proposed exclusion for this waste would be effective at the point of generation. Since LDRs attach at the point of generation this waste would not be considered hazardous and therefore is not subject to LDRs.

Comment: There are no criteria listed for what constitutes a significant change to the treatment process or a change in the chemicals used.

Response: A change either to the treatment process or in the chemicals used is significant if it results in a change in the composition of the waste.

Comment: In most cases where samples are required to support decision-making under RCRA, grab samples are required. Samples taken in support of this petition were composite samples. EPA should explain why results based on composite sampling were allowed and accepted and why these samples do not render the decision to grant the HES petition inappropriate due to inconsistent information.

Response: In the delisting program, composite samples are preferred, except in the case of volatile constituents. Multiple composite samples provide a better profile of the waste.

Comment: There should be recognition that a single grab sample taken by a regulating authority would be sufficient for a determination of legitimacy of the exclusion. The proposed delisting seems to indicate that only the monthly sampling done by Heritage could cause the exclusion to be suspended.

Response: The Agency always has the right to take samples to verify compliance. Such samples taken by the Agency could provide a basis for revoking a delisting.

Comment: A more rigorous initial sample was used to characterize the

variability for EAFD at USX Steel Corporation in Gary Indiana. Is it appropriate to have two different standards for USX and Heritage?

Response: All delisting decisions, including the initial sampling for delisting proposals are site specific. There will be variations.

Comment: In the ANPRM, 65 FR 37932, June 19, 2000, EPA has reservations about the effectiveness of using stabilization to immobilize metal wastes. Stabilization has not been scientifically proven to be reliable over the long term for disposal of such wastes. Allowing this waste to be placed in general purpose landfills which have fewer engineered features to prevent leaching and migration of heavy metals into groundwater ignores sound science. EPA needs to explain why disposing of a hazardous waste in this less protective manner should be allowed, absent any evidence confirming that it will work.

Response: At this time, stabilization is considered to be the best available treatment for metal bearing wastes. We have no evidence that constituents of concern have ever leached from this stabilized waste. To assure that the waste continues to meet the levels established here, we are requiring periodic testing of the waste and placement of the waste in a solid waste landfill which has ground water monitoring.

Comment: A similar process used in Ohio has caused concern because of possible leaching of substances which were supposedly stabilized. EPA cited Envirosafe Services in Ohio as having high leachate levels of various metals.

Response: Envirosafe Services in Ohio was not cited by US EPA for high levels of metals in the leachate. The facility was cited by Ohio EPA for excessive volume of leachate, although this citation may be attributed to be an error in measurement. Although the commentor did not define what constitutes high levels of metals in the leachate, the leachate must be treated as necessary to meet regulated standards before disposal. In addition, the concentrations of metals in the groundwater are monitored and regulated. While EPA may consider the experiences at other locations, petitioned wastes are evaluated on a site specific basis. The petitioned waste meets the criteria for delisting when the levels set forth in the notice are met.

Comment: EPA has concluded that over the long term, the actual leachate concentrations suggest that significant groundwater contamination may result after the eventual failure of liner and other contaminant controls.

Response: The DRAS model calculates risk assuming a worst case scenario of no liner at all. Under this scenario, the waste can be delisted.

Comment: An independent engineering expert has warned that the massive weight of stabilized K061 on the liner could produce hundreds of high pressure points which will burst and result in leakage of the liner and seepage of groundwater into and through the cell. The problem of groundwater leaching out the heavy metals in a Class C landfill cannot be ignored, but EPA did not analyze it.

Response: Currently a liner is the best available technology for landfills, regardless of whether it is a hazardous waste landfill (Subtitle C) or a solid waste landfill (Subtitle D). However, the model used to assess the risk of a delisted waste assumes that no liner is present.

Comment: It is scientifically established that lead can actively affect hydration of the concrete ingredients of the stabilization process. Lead tends to locate near the surface of cement-like materials and is easily leached into water. This is a concern in a less-secure Class C landfill which is not built to withstand the immense weight of stabilized K061.

Response: There is no evidence that lead has leached from this waste in the past and therefore we cannot assume that it will do so in the future. Since the model assumes no liner, the weight of the stabilized K061 and its possible effect on a liner is not relevant. It is assumed that the commentor is concerned about disposal in a Subtitle D landfill, since a Subtitle C landfill which the commentor referred to is more secure, not less secure as stated in the comment.

Comment: Arsenic and cadmium have been most frequently found in hazardous concentrations on both a total and dissolved constituent basis.

Response: Only very low concentrations of these constituents leach from the petitioned waste in a TCLP analysis. EPA believes that at these low concentrations, these constituents do not pose a risk.

Comment: EPA has expressed concern over migration of metals from stabilized waste to groundwater, yet EPA proposed to grant the Heritage petition without reviewing any groundwater monitoring information. In fact, Heritage submitted no groundwater monitoring information.

Response: HES has submitted groundwater monitoring data for their Subtitle C landfill where the waste is currently being disposed. The data does not indicate the presence of any constituent above health based levels.

V. Regulatory Impact

Under Executive Order 12866, EPA must conduct an ''assessment of the potential costs and benefits'' for all ''significant'' regulatory actions.

The proposal to grant an exclusion is not significant, since its effect, if promulgated, would be to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction would be achieved by excluding waste generated at a specific facility from EPA's lists of hazardous wastes, thus enabling a facility to manage its waste as nonhazardous.

Because there is no additional impact from today's final rule, this proposal would not be a significant regulation, and no cost/benefit assessment is required. The Office of Management and Budget (OMB) has also exempted this rule from the requirement for OMB review under section (6) of Executive Order 12866.

VI. Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability. Section 804 exempts from section 801 the following types of rules: rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non agency parties (5 U.S.C. 804(3)). This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will become effective on the date of publication in the **Federal Register**.

VII. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of

their concerns, copies of written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.'' Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: December 12, 2001.

Gerald Phillips,

Acting Director, Waste, Pesticides and Toxics Division.

For the reasons set out in the preamble, 40 CFR part 261 is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

2. In Table 2 of appendix IX of part 261 add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Wastes Excluded Under §§ 260.20 and 260.22.

* * * * *

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * *
Heritage Environmental Services, LLC., at the Nucor Steel facility.	Crawfordsville, Indiana.	Electric arc furnace dust (EAFD) that has been generated by Nucor Steel at its Crawfordsville, Indiana facility and treated on site by Heritage Environmental Services, LLC (Heritage) at a maximum annual rate of 30,000 cubic yards per year and disposed of in a Subtitle D landfill which has groundwater monitoring, after January 15, 2002. (1) *Delisting Levels:* (A) The constituent concentrations measured in either of the extracts specified in Paragraph (2) may not exceed the following levels (mg/L): Antimony—0.206; Arsenic—0.0936; Barium—55.7; Beryllium—0.416; Cadmium—0.15; Chromium (total)—1.55; Lead—5.0; Mercury—0.149; Nickel—28.30; Selenium—0.58; Silver—3.84; Thallium—0.088; Vanadium—21.1; Zinc—280.0. (B) Total mercury may not exceed 1 mg/kg. (2) *Verification Testing:* On a monthly basis, Heritage or Nucor must analyze two samples of the waste using the TCLP method, the TCLP procedure with an extraction fluid of pH 12 ± 0.05 standard units and SW–846 Method 7470 for mercury. The constituent concentrations measured must be less than the delisting levels established in Paragraph (1). (3) *Changes in Operating Conditions:* If Nucor significantly changes the manufacturing process or chemicals used in the manufacturing process or Heritage significantly changes the treatment process or the chemicals used in the treatment process, Heritage or Nucor must notify the EPA of the changes in writing. Heritage and Nucor must handle wastes generated after the process change as hazardous until Heritage or Nucor has demonstrated that the wastes continue to meet the delisting levels set forth in Paragraph (1) and that no new hazardous constituents listed in Appendix VIII of Part 261 have been introduced and Heritage and Nucor have received written approval from EPA. (4) *Data Submittals:* Heritage must submit the data obtained through monthly verification testing or as required by other conditions of this rule to U.S. EPA Region 5, Waste Management Branch (DW–8J), 77 W. Jackson Blvd., Chicago, IL 60604 by February 1 of each calendar year for the prior calendar year. Heritage or Nucor must compile, summarize, and maintain on site for a minimum of five years records of operating conditions and analytical data. Heritage or Nucor must make these records available for inspection. All data must be accompanied by a signed copy of the certification statement in 40 CFR 260.22(i)(12). (5) *Reopener Language*—(A) If, anytime after disposal of the delisted waste, Heritage or Nucor possesses or is otherwise made aware of any data (including but not limited to leachate data or groundwater monitoring data) relevant to the delisted waste indicating that any constituent identified in Paragraph (1) is at a level in the leachate higher than the delisting level established in Paragraph (1), or is at a level in the groundwater higher than the maximum allowable point of exposure concentration predicted by the CMTP model, then Heritage or Nucor must report such data, in writing, to the Regional Administrator within 10 days of first possessing or being made aware of that data. (B) Based on the information described in paragraph (5)(A) and any other information received from any source, the Regional Administrator will make a preliminary determination as to whether the reported information requires Agency action to protect human health or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (C) If the Regional Administrator determines that the reported information does require Agency action, the Regional Administrator will notify Heritage and Nucor in writing of the actions the Regional Administrator believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing Heritage and Nucor with an opportunity to present information as to why the proposed Agency action is not necessary or to suggest an alternative action. Heritage and Nucor shall have 30 days from the date of the Regional Administrator's notice to present the information.

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		(D) If after 30 days Heritage or Nucor presents no further information, the Regional Administrator will issue a final written determination describing the Agency actions that are necessary to protect human health or the environment. Any required action described in the Regional Administrator's determination shall become effective immediately, unless the Regional Administrator provides otherwise.
*	*	* * * * * *

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW–FRL–7124–9]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA (also, ''the Agency'' or ''we'' in this preamble) is granting a petition submitted by USG Corporation (USG), Chicago, Illinois, to exclude (or ''delist''), on a one-time basis, certain solid wastes that are interred at an on-site landfill at its American Metals Corporation (AMC) facility in Westlake, Ohio from the lists of hazardous wastes. This landfill was used exclusively by Donn Corporation, the original site owner, for disposal of its wastewater treatment plant (WWTP) sludge from 1968 to 1978.

After careful analysis, the EPA has concluded that the petitioned waste is not a hazardous waste when disposed of in a Subtitle D landfill. Today's action conditionally excludes the petitioned waste from the requirements of the hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) only if the waste is disposed of in a Subtitle D landfill which is permitted, licensed, or registered by a State to manage industrial solid waste.

EFFECTIVE DATE: This rule is effective on January 15, 2002.

ADDRESSES: The RCRA regulatory docket for this final rule is located at the U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, and is available for viewing from 8:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call Todd Ramaly at (312) 353–9317 for appointments. The public may copy material from the regulatory docket at $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For technical information concerning this document, contact Todd Ramaly at the address above or at (312) 353–9317.

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Background

A. What Is a Delisting Petition?

A delisting petition is a request from a petitioner to exclude waste from the list of hazardous wastes under RCRA regulations. In a delisting petition, the petitioner must show that waste generated at a particular facility does not meet any of the criteria for which EPA listed the waste as set forth in 40 CFR 261.11 and the background document for the waste. In addition, a petitioner must demonstrate that the waste does not exhibit any of the hazardous waste characteristics (that is, ignitability, reactivity, corrosivity, and toxicity) and must present sufficient information for EPA to decide whether factors other than those for which the waste was listed warrant retaining it as a hazardous waste.

Petitioners remain obligated under RCRA to confirm that their waste remains nonhazardous based on the hazardous waste characteristics even if EPA has ''delisted'' the wastes.

B. What Regulations Allow a Waste To Be Delisted?

Under 40 CFR 260.20 and 260.22, facilities may petition the EPA to remove their wastes from hazardous waste control by excluding it from the lists of hazardous wastes contained in §§ 261.31 and 261.32. Specifically, § 260.20 allows any person to petition the Administrator to modify or revoke any provision of parts 260 through 266, 268, and 273 of Title 40 of the Code of Federal Regulations. Section 260.22 provides any person with the opportunity to petition the Administrator to exclude a waste at a particular generating facility from the hazardous waste lists.

II. USG's Delisting Petition

A. What Waste Did USG Petition EPA To Delist?

On May 22,1997, USG petitioned EPA to exclude 12,400 cubic yards of previously disposed WWTP sludge from the list of hazardous wastes contained in 40 CFR 261.31. The WWTP sludge is a mixture of EPA Hazardous Waste Number F019 wastewater treatment sludge from the conversion coating of aluminum and other nonhazardous wastes.

B. What Information Must the Petitioner Supply?

A petitioner must provide sufficient information to allow the EPA to determine that the waste does not meet any of the criteria for which it was listed as a hazardous waste. In addition, where there is a reasonable basis to believe that factors other than those for which the waste was listed (including additional constituents) could cause the waste to be hazardous, the Administrator must determine that such factors do not warrant retaining the waste as hazardous.

C. What Information Did USG Submit To Support This Petition?

To support its petition, USG submitted (1) descriptions and schematic diagrams of its manufacturing and wastewater treatment processes, including historical information on past