

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action simply reflects already existing Federal requirement for state air pollution control agencies and existing LMWC units that are subject to the provisions of 40 CFR part 60, subpart Cb and related subpart Eb. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the section 111(d)/129 plan revision should relevant adverse or critical comments be filed. This rule will be effective June 9, 2008 without further notice unless EPA receives adverse comments by May 8, 2008. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

#### IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the 111(d)/129 plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action 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 the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *June 9, 2008*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to

enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements, Sulfur oxides, Waste treatment and disposal.

Dated: March 31, 2008.

**Donald S. Welsh,**

*Regional Administrator, Region III.*

■ 40 CFR part 62 is amended as follows:

#### PART 62—[AMENDED]

■ 1. The authority citation for Part 62 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart V—Maryland

■ 2. Section 62.5110 is amended by redesignating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

##### § 62.5110 Identification of plan.

\* \* \* \* \*

■ (b) On October 24, 2007, Maryland submitted a revised State plan (Phase II) and related COMAR 26.11.08.01, .02, and .08 amendments as required by 40 CFR part 60, subpart Cb, amended May 10, 2006.

■ 3. Section 62.5112 is amended by redesignating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

##### § 62.5112 Effective date.

\* \* \* \* \*

■ (b) The plan revision (Phase II) is effective June 9, 2008.

[FR Doc. E8-7347 Filed 4-7-08; 8:45 am]

BILLING CODE 6560-50-P

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 63, 264 and 266

[EPA-HQ-OAR-2004-0022; FRL-8549-4]

RIN 2050-AG35

#### NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Waste Combustors; Amendments

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

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing amendments to the national emission standards for hazardous air pollutants (NESHAP) for hazardous waste combustors, which

EPA promulgated on October 12, 2005. The amendments to the October 2005 final rule clarify several compliance and monitoring provisions, and also correct several omissions and typographical errors in the final rule. We are finalizing the amendments to facilitate compliance and improve understanding of the final rule requirements. This rule does not address issues for which petitioners sought reconsideration. Nor does it address issues raised in EPA's comment solicitation of September 27, 2007.

**DATES:** The final rule is effective on April 8, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2004-0022. All documents in the docket are listed on <http://www.regulations.gov> Web site.

Although listed in the index, some information is not publicly available, e.g., confidential business information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA-HQ-OAR-2004-0022, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket Center

telephone number is (202) 566-1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744. A reasonable fee may be charged for copying docket materials.

**FOR FURTHER INFORMATION CONTACT:** For more information on this rulemaking, contact Frank Behan at (703) 308-8476, or [behan.frank@epa.gov](mailto:behan.frank@epa.gov), Office of Solid Waste (MC: 5302P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:**

*Entities Potentially Affected by This Rule.* Categories and entities potentially affected by this rule include:

Category	NAICS code <sup>a</sup>	Potentially affected entities
Petroleum and coal products manufacturing .....	324	Any entity that combusts hazardous waste as defined in the final rule.
Chemical manufacturing .....	325	
Cement and concrete product manufacturing .....	3273	
Other nonmetallic mineral product manufacturing .....	3279	
Waste treatment and disposal .....	5622	
Remediation and other waste management services .....	5629	

<sup>a</sup>North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this rule. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this rule, you should examine the applicability criteria in 40 CFR 63.1200. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*How Do I Obtain a Copy of This Document and Other Related Information?* In addition to being available in the docket, an electronic copy of today's rule will also be available on the on the World Wide Web. Following the Administrator's signature, a copy of this document may be posted at <http://www.epa.gov/hwcmact>. This Web site also provides other information related to the NESHAP for hazardous waste combustors including the NESHAP issued on October 12, 2005 (70 FR 59402).

*Judicial Review.* Under section 307(b)(1) of the Clean Air Act, judicial review of the final action is available only by filing a petition for review in the United States Court of Appeals for

the District of Columbia Circuit by June 9, 2008. Section 307(d)(7)(B) of the CAA provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final action may not be challenged separately in any civil or

criminal proceedings brought by EPA to enforce these requirements.

*Organization of This Document.* The information presented in this preamble is organized as follows:

- I. Background
  - A. What Is the Source of Authority for the Development of NESHAP?
  - B. How Did the Public Participate in Developing the Amendments to the Final Rule?
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    - 1. Calculating Rolling Averages
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  - A. Executive Order 12866: Regulatory Planning and Review
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  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

- G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Congressional Review

**I. Background**

*A. What Is the Source of Authority for the Development of NESHAP?*

Section 112(c) of the Clean Air Act requires EPA to list categories and subcategories of major sources and area sources of hazardous air pollutants (HAP) and to establish NESHAP for the listed source categories and subcategories. Hazardous waste combustors include incinerators, cement kilns, lightweight aggregate kilns, boilers, and hydrochloric acid production furnaces that burn hazardous waste. EPA's initial list of categories of major and area sources of HAP was published on July 16, 1992 (57 FR 31576). Hazardous waste incinerators, Portland cement manufacturing, clay products manufacturing (including lightweight

aggregate kilns), industrial/commercial/institutional boilers and process heaters, and hydrochloric acid production furnaces were among the listed categories of sources. Major sources of HAP are those sources that have the potential to emit at least 10 tons per year of any one HAP or 25 tons per year of any combination of HAP.

*B. How Did the Public Participate in Developing the Amendments to the Final Rule?*

The final rule was published on October 12, 2005 (70 FR 59402) and codified in 40 CFR part 63, subpart EEE. Following publication of the final rule, two industry trade associations identified a number of typographical errors and suggested several potential compliance and monitoring amendments and clarifications to the rule.<sup>1</sup> On September 6, 2006, we published proposed amendments (71 FR at 52639) to address these issues and sought public comment on the proposed amendments.<sup>2</sup> EPA received comments from five entities. Today's action presents EPA's responses to those comments and promulgates amendments to Subpart EEE of 40 CFR part 63.

**II. Summary of the Final Amendments**

In today's notice, we are announcing our final action on several amendments

to Subpart EEE of 40 CFR part 63. The amendments revise several compliance and monitoring provisions in response to questions and issues raised by entities affected by the rule. The revised provisions are effective immediately, and today's final rule does not change the October 14, 2008 compliance date established by the October 12, 2005 final rule. See also Section III (Time Lines for compliance activities) in today's action. Sources can readily comply with the revised provisions promulgated today within the compliance time frames established by the October 12, 2005 final rule. See § 63.1206(a).

*A. Proposed Amendments for Which No Adverse Comments Were Received*

In the September 6, 2006 proposal, we proposed several corrections and clarifications to the NESHAP for hazardous waste combustors. 71 FR at 52639–642, 52645–646. We received no adverse comments on the majority of the corrections and clarifications (see Table 1 below). Therefore, we are promulgating those provisions, as proposed, without further discussion.<sup>3</sup> The reader is referred to the September 2006 proposed rule for background on these changes.

TABLE 1.—SUMMARY OF AMENDMENTS FOR WHICH NO ADVERSE COMMENTS WERE RECEIVED

Preamble section in September 2006 proposed rule	Subject of proposed amendment	Code of Federal Register (CFR) section(s) amended
V.A .....	Sunset Provision for the Interim Standards .....	63.1203(e), 63.1204(i), 63.1205(e).
V.B .....	Operating Parameter Limits for Sources with Fabric Filters .....	63.1206(c)(9).
V.C .....	Confirmatory Performance Testing Not Required for Sources That Are Not Subject to a Numerical Dioxin/Furan Emission Standard.	63.1207(b)(3)(vi).
V.D .....	Periodic Performance Test for Phase I Sources .....	63.1207(d).
V.E .....	Performance Test Waiver for Sources Subject to Hazardous Waste Thermal Concentration Limits.	63.1207(m).
V.F .....	Averaging Method When Calculating 12-Hour Rolling Average Thermal Concentration Limits.	63.1209(n)(2)(iii).
V.I .....	Timing of the Periodic Review of Eligibility for the Health-Based Compliance Alternatives for Total Chlorine.	63.1215(h)(2)(i).
V.K .....	Mercury Standards for Cement Kilns .....	63.1220(a)(2) and (b)(2), 63.1209(l)(1)(iii).
V.L .....	Facilities Operating Under RCRA Interim Status .....	None. Interpretation of existing regulations (see 71 FR at 52642).
VII.A .....	Miscellaneous Typographical Errors .....	63.1206(a)(2) heading, 63.1206(a)(2)(ii)(A), 63.1206(b)(16), 63.1210(b), 63.1215(a)(2), 63.1215(b)(2), 63.1215(b)(3), 63.1215(b)(6)(ii)(C), 63.1215(f)(5)(ii)(A), 63.1217(a)(6)(ii), 63.1217(b)(6)(ii).

<sup>1</sup> See docket items EPA–HQ–OAR–2004–0022–0551 and 0552.

<sup>2</sup> In addition to soliciting comment on the rule amendments discussed in this action, EPA also requested comment on other issues in the September 6, 2006 proposed rule. The other issues related to our response to four petitions for reconsideration that were submitted to the Administrator pursuant to section 307(d)(7)(B) of the Clean Air Act. EPA's final response to the

petitions for reconsideration is not included in today's action. See Sections II, III, and IV of the September 2006 notice for additional information on the reconsideration proceedings. Nor does this final rule address any of the issues raised by EPA's solicitation of comment published on September 27, 2007 (72 FR 54875).

<sup>3</sup> Please note, however, that we have revised proposed § 63.1207(d)(2), which prescribes the schedule for confirmatory performance testing, to

conform with existing § 63.1207(b)(3) to clarify further that confirmatory performance testing is not required for sources that are not subject to a numerical D/F emission standard: solid fuel boilers and hydrochloric acid production furnaces; lightweight aggregate kilns that are not subject to a numerical dioxin/furan emission standard under § 63.1221; and liquid fuel boilers that are not subject to a numerical dioxin/furan emission standard under § 63.1217.

TABLE 1.—SUMMARY OF AMENDMENTS FOR WHICH NO ADVERSE COMMENTS WERE RECEIVED—Continued

Preamble section in September 2006 proposed rule	Subject of proposed amendment	Code of Federal Register (CFR) section(s) amended
VII.B .....	Citation Corrections .....	63.1206(b)(14)(iv), 63.1207(g)(2)(i) and (ii), 63.1209(n)(2)(vii), 63.1215(a)(1)(i), 264.340(b), 266.100(b)(3).
VII.C .....	Corrections to the NIC Provisions for New Units .....	63.1212(b)(1) and (b)(3).
VII.D .....	Clarification of the Applicability of Title V Permit Requirements to Phase 2 Area Sources.	None. Interpretation of existing regulations (see 71 FR at 52646).

We also received no adverse comment on the proposed amendments described in Section V.G (Calculating Rolling Averages for Averaging Periods in Excess of 12 Hours) of the September 6, 2006 preamble citation. That discussion described our intent to simplify the monitoring requirements for sources that select mercury or semivolatile metal feedrate limits averaged over periods greater than 12 hours. As described in the preamble, this would require identical changes to four paragraphs of the regulation: §§ 63.1209(n)(2)(v)(A)(2)(iv), 63.1209(n)(2)(v)(A)(3)(v), 63.1209(l)(1)(ii)(B)(5), and 63.1209(l)(1)(ii)(C)(5). However, corresponding regulatory changes to the latter three paragraphs were inadvertently omitted from the September 2006 proposed rule. In today's rule, we are correcting this oversight by promulgating the language proposed for § 63.1209(n)(2)(v)(A)(2)(iv) in all four paragraphs.

#### B. Proposed Amendments for Which Comments Were Received

##### 1. Calculating Rolling Averages

a. *Summary of the Final Action.* We are revising §§ 63.1209(n)(2)(v)(B)(1), 63.1209(n)(2)(v)(B)(2), and 63.1209(o)(1)(ii)(A)(3) as proposed on September 6, 2006. 71 FR at 52640. These changes are intended to clarify that data for demonstrating compliance with feed rate limits of up to a 12-hour rolling average must be updated each minute. In addition, § 63.1209(n)(2)(v)(B)(1)(i) is modified to confirm that the chromium feed rate limit for boilers burning liquid hazardous waste with a heating value of 10,000 Btu/lb or greater is a 12-hour rolling average limit.

##### b. *What Are the Responses to Major Comments?*

*Comment:* We received two comments on this topic. One supported the changes as proposed. The other commenter objected to updating the 12-hour average every minute rather than every hour, arguing that this

complicates data management and could require increased data storage.

*Response:* We believe that complications to data management or increases in data storage requirements, if any, are negligible. Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—have been complying with 12-hour averages updated each minute for several years without significant problems. Furthermore, data storage is not measurably affected. These continuous monitors are required to record a data point at least once each minute, regardless of the whether the rolling average value for determining compliance is updated each minute or each hour. Consequently, the amount of recorded data is not significantly affected under either approach to calculating the rolling average.

Phase I sources have been required to update their 12-hour rolling average feed rate data each minute ever since the hazardous waste combustor MACT rule was first promulgated in 1999. A “rolling average” was defined in that rule as “the average of all one-minute averages over the averaging period.” That definition has remained the same through the interim standards (for Phase I sources) and the replacement standards. We have consistently interpreted the definition to require that a new rolling average be calculated each minute. See, for example, the preamble discussion in the September 30, 1999 rule which says, while discussing how to calculate rolling averages upon initial startup, “Given that the one-hour, and 12-hour rolling averages for limits on various parameters must be updated each minute \* \* \*” 64 FR at 52924.

In the 2004 replacement standards proposed rule, we first introduced the concept of hourly updates to rolling averages, but only in the context of monitoring compliance with annual rolling average feed rate limits. See 69 FR at 21312. At no time did we discuss or propose any change to the long-standing requirement that rolling averages of 12 hours or less be updated each minute. In fact, we reiterated the

requirement for one-minute updates in discussing how compliance with the 12-hour thermal feed rate limits would be monitored. In that discussion we said that “For compliance, you would continuously monitor the feed rate of hazardous waste on a 12-hour rolling average updated each minute or, for standards based on normal emissions, on an annual rolling average updated each hour.” *Id.* at 21312.

Given that we have consistently required rolling averages of 12 hours or less to be updated each minute and we have never discussed or proposed any changes to that approach, we find ample evidence that the addition of hourly updates for these parameters in the final replacement standards were, as we asserted in the proposed rule, inadvertent. Furthermore, we find no support for the commenter's claim that data management or data storage requirements are significantly affected under either approach. Therefore, we have removed the references to hourly updates, as proposed.

##### 2. Expressing Particulate Matter Standards Using the International System of Units

a. *Summary of the Final Action.* We proposed to revise the particulate matter standards expressed in English units (gr/dscf) in §§ 63.1216 through 63.1221 by converting and expressing the standards using the International System of Units (SI). 71 FR at 52641. However, after considering the comments received in response to the proposed rule, we are not revising the standards as proposed. Thus, we are retaining the format of the particulate matter standards as promulgated in the October 12, 2005 final rule.

##### b. *What Are the Responses to Major Comments?*

*Comment:* We received three comments on this topic. One supported revising the particulate matter standards by expressing all particulate matter standards in SI units as proposed. Two other commenters opposed the proposed revisions because converting a standard from gr/dscf to mg/dscm and rounding to two significant figures can

increase (and apparently does for at least one affected source) the stringency of the standard.

*Response:* Given that the proposed conversion to SI units can increase the stringency of the promulgated standard in some instances, we are not revising the particulate matter standards as proposed. We do not believe the proposed revisions are appropriate because a source currently complying with the standard expressed in English units could find itself suddenly out of compliance if the standard were converted to SI units, after rounding the result to two significant figures. We believe this would be an inappropriate outcome for this “housekeeping” amendment.

### 3. Corrections to the Notice of Intent To Comply (NIC) Provisions for New Units

*a. Summary of the Final Action.* We proposed several corrections to the NIC regulatory provisions for new units to accurately reflect the time frames for holding the informal public meeting and submitting a final NIC. See 71 FR at 52645–646. Specifically, we made corrections to the time line (Figure 2; 71 FR at 52644), and proposed to revise § 63.1210(b)(3) and (c)(1), which are the core requirements for the informal public meeting and final NIC. We explained that it was our intent to clarify that existing units’ NIC deadlines were based upon the effective date of the rule (e.g., “\* \* \* no later than one year following the effective date \* \* \*”), whereas new units’ NIC deadlines were based upon a set number of days between NIC compliance activities (e.g., “\* \* \* or 60 days following the informal public meeting”). This was necessary because the final rule effective date has no bearing on new units. We further explained that since the public meetings for the NIC and the RCRA pre-application are to occur simultaneously for new units, we anticipate new units will plan accordingly and work with their permitting authorities to determine the most suitable time to begin the NIC compliance process.

Today we are amending § 63.1210(b)(3) and (c)(1) to accurately reflect the time frames for holding the informal public meeting and submitting a final NIC for new units. However, the amendments are not finalized as proposed, but rather were revised to

reflect a comment we received (see below). We are now further subdividing the paragraphs to explicitly differentiate between “existing units” and “new units.” Also, to further clarify that new units are subject to the same NIC requirements, we have added a new paragraph (b)(5) to § 63.1212 with respect to the final NIC. While it essentially mirrors § 63.1210(b)(3), we believe it is important to clearly indicate all applicable NIC provisions for new units in § 63.1212.

#### *b. What Are the Responses to Major Comments?*

*Comment:* One comment was received in response to the proposed amendments. The commenter noted that the proposed § 63.1210(c)(1) language retains the 10 month deadline, but also requires that the meeting must be held no later than 30 days following the notice. The 30 day advance notice language of § 63.1210(c)(3) was retained. This puts the facility in a position of having to issue the public notice precisely 30 days before the public meeting (i.e., facilities have two 30 day deadlines, one working backward from the meeting date and one working forward from the notice date). The commenter suggested that the requirements for new units and existing units be presented as two separate paragraphs to better represent the timelines for each.

*Response:* We agree with the commenter. The few words added to § 63.1210(c)(1) do not clearly differentiate between existing and new units’ NIC deadlines. The reference in § 63.1210(c)(1) to the “\* \* \* no later than 10 months after the effective date \* \* \*” was intended only for existing units and the proposed reference to “\* \* \* or 30 days following notice \* \* \*” was intended only for new units. The way the paragraph reads gives the appearance that both references may be applicable to all units. Therefore, if one reads the 30 day reference in § 63.1210(c)(1) to also apply to existing units, along with the 30 day reference which was retained in § 63.1210(c)(3), it creates the situation which the commenter correctly identifies.

We have subdivided § 63.1210(c)(1) (as well as § 63.1210(b)(3)) to clearly designate applicability for existing and new units as the commenter suggests. Section 63.1210(c)(1) is revised to

require the informal public meeting for new units to be held *no earlier than* 30 days following notice of the informal meeting, as opposed to *no later than* 30 days following the notice. Also, we have revised § 63.1212(b)(4) to state that the informal public meeting must be held *no earlier than* 30 days following notice of the meeting, so that it is consistent with § 63.1210(c)(1). Finally, as noted above, a new paragraph (b)(5) is added to § 63.1212 regarding submission of the final NIC.

#### *C. Corrections to the Startup, Shutdown, and Malfunction Plan Provisions*

This action also corrects a ministerial error by EPA that lead to inadvertent revision of § 63.1206(c)(2)(v). In a 2006 final rule amending the Part 63 general provisions, EPA made conforming changes to many individual MACT standards that merely incorporate the startup, shutdown and malfunction (SSM) requirements of the general provisions. 71 FR 20446 (April 20, 2006). In doing so, EPA inadvertently revised the SSM provisions tailored specifically for HWC facilities. Today, we are correcting that inadvertent error. Accordingly, we are revising § 63.1206(c)(2)(v)(A)(2) and (c)(2)(v)(B)(4) so that they read as they did before the April 20, 2006 revisions.

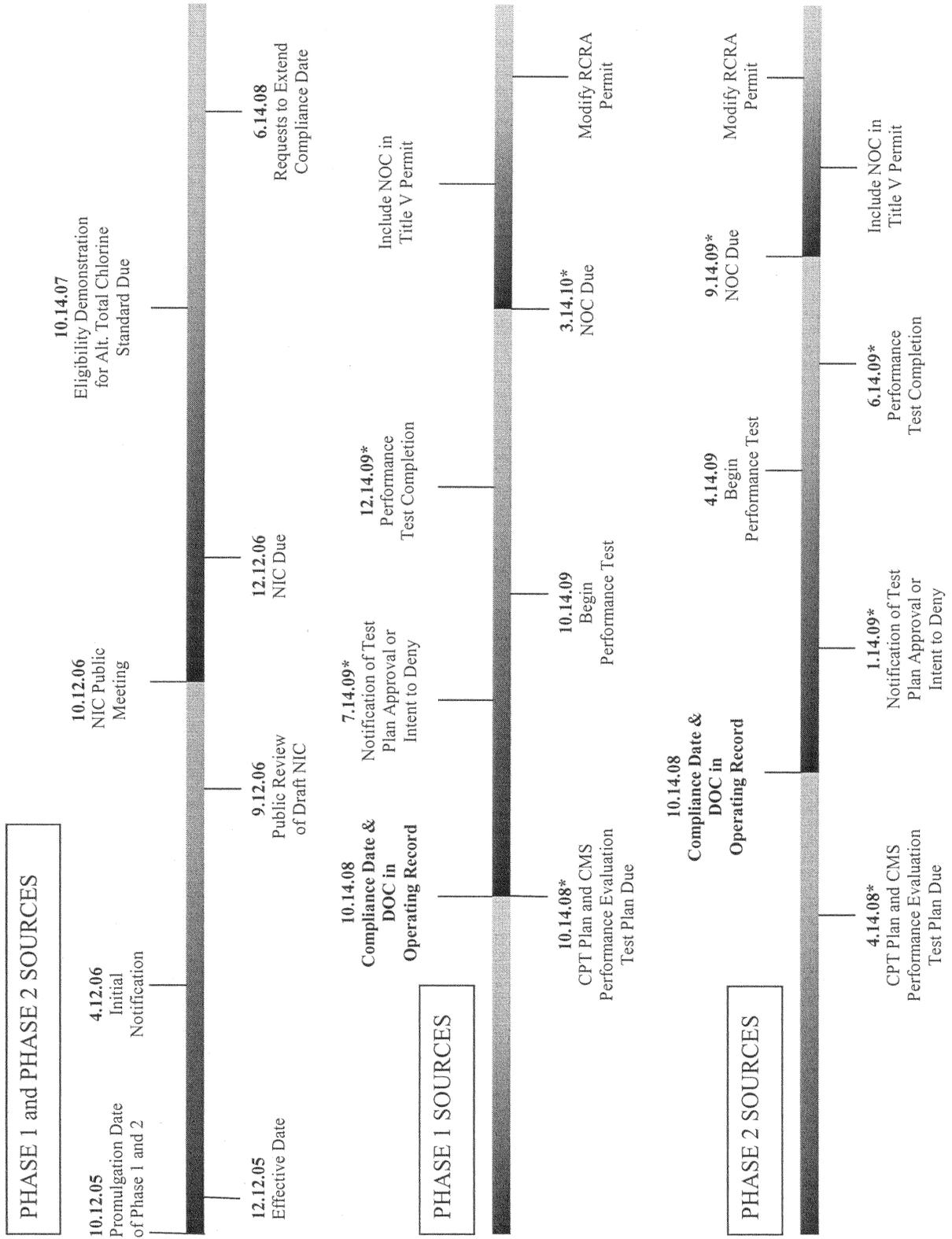
#### *D. Time Lines*

In the September 2006 proposed rule, we noted several errors in the time lines published in the October 12, 2005 final rule. See 70 FR 59524–525 and 71 FR at 52642–644. Consequently, we revised the time lines, Figures 1 and 2, to reflect the correct dates and time frames associated with compliance activities for Phase 1 (i.e., incinerators, cement kilns, and lightweight aggregate kilns) and Phase 2 sources (i.e., liquid and solid fuel boilers and hydrochloric acid production furnaces). In addition, we discussed the time line revisions and why the changes were necessary, as well as providing some clarifying remarks.

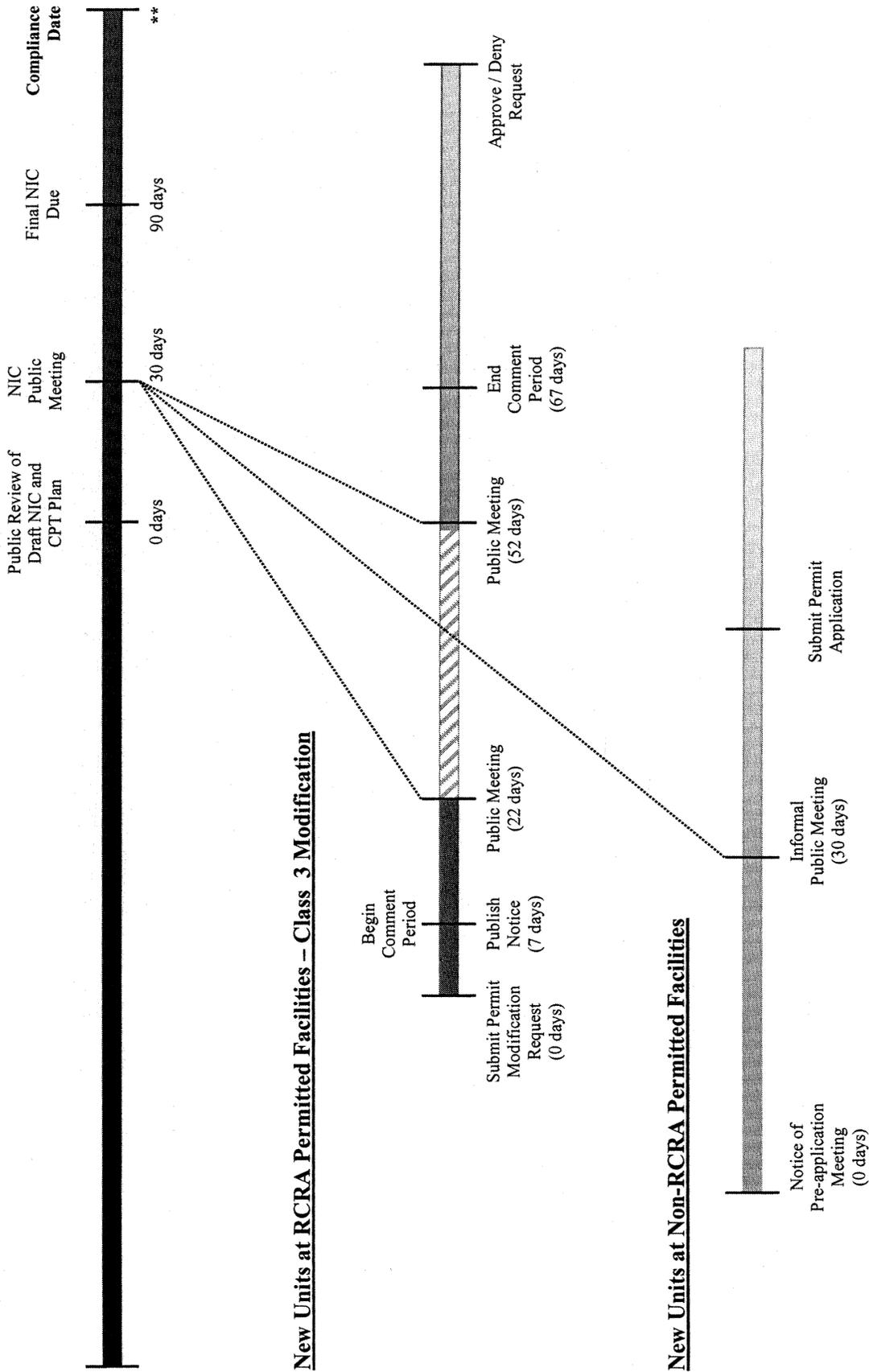
We did not receive any public comments on the revised time lines that were published in the proposed rule. For the reader’s convenience, we are publishing the time lines again in today’s final rule. Please refer to the proposal for the accompanying discussion of the time lines. 71 FR at 52642–643.

**BILLING CODE 6560–50–P**

Figure 1. Time Line for Phase 1 Replacement Standards and Phase 2 Standards – Existing Sources



**Figure 2. NIC and CPT Plan Time Line - New Units**



\*\* This is the date a new unit begins operations and places a documentation of compliance in its operating record.

### III. Impacts of the Final Rule

#### A. What facilities are affected by the final amendments?

A description of the affected source categories is discussed in the April 20, 2004 proposed rule. 69 FR at 21207–09. In the October 12, 2005 final rule, we estimated that there are a total of 267 sources subject to the rule requirements, including 116 boilers (104 liquid fuel boilers and 12 solid fuel boilers), 92 on-site incinerators, 25 cement kilns, 15 commercial incinerators, 9 lightweight aggregate kilns, and 10 hydrochloric acid production furnaces. 70 FR at 59530. While we are aware of several changes to the universe of operating hazardous waste combustors, these estimates remain a reasonable representation of existing operating sources.<sup>4</sup>

#### B. What are the impacts of the final rule?

The rule amendments do not change any of the impacts presented in the preamble to the October 12, 2005 final rule. See 70 FR at 59529–35.

### IV. Statutory and Executive Order Reviews

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

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to OMB review.

#### B. Paperwork Reduction Act

This action does not impose any new information collection burden because there is no additional burden on affected sources as a result of the final rule. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (see 40 CFR part 9) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0171, EPA ICR number 1773.08. A copy of the OMB approved Information Collection Request (ICR) may be obtained by writing to: Director, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1700.

Burden means the total time, effort, or financial resources expended by persons

to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration’s (SBA) regulations at 13 CFR 121.201; (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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. As discussed in the October 12, 2005 final rule (which today’s final rule amends), we determined that hazardous waste combustion facilities are not owned by small governmental jurisdictions or nonprofit organizations. 70 FR at 59538. Therefore, in that rule only small businesses were analyzed for small entity impacts (a small entity was defined either by the number of

employees or by the dollar amount of sales). We found that few—a total of eight out of 145 facilities—of the sources affected by the October 2005 rule were owned by small businesses. Finally, our analysis indicated that none of these facilities are likely to incur annualized compliance costs greater than one percent of gross annual corporate revenues. Cost impacts were found to range from less than 0.01 percent to 0.46 percent of annual gross corporate revenues. 70 FR at 59538.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. We note that today’s final rule does not alter the number or type of small businesses that were discussed in the October 12, 2005 final rule. Additionally today’s rule does not have any significant new regulatory requirements as compared to the requirements discussed in the October 12, 2005 final rule.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their 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 regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives 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

<sup>4</sup> Given the small size of the lightweight aggregate kiln category, it is worth mentioning that the Solite Cascade plant in Virginia has ceased operations. Prior to closure, this plant operated four kiln sources. See also 70 FR at 59426.

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.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This is because today's final rule does not add new requirements that would increase the costs of the original NESHAP for hazardous waste combustors. The NESHAP was published on September 30, 1999, and October 12, 2005, and had aggregated annualized social costs between \$50 to \$63 million (64 FR at 53022) and \$22.6 million (70 FR at 59538), respectively. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, EPA has determined that this final rule does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, this final rule is not subject to section 203 of the 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 final rule does not have federalism implications. The final rule does 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, because State and local governments do not own or operate any sources that would be subject to the requirements of the final rule and as such would not bear substantial costs of effects. Thus, Executive Order 13132 does not apply to this 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 9, 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." This final rule does not have tribal implications, as specified in Executive Order 13175, because tribal governments do not own or operate any sources subject to today's action. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under EO 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.

EPA interprets Executive Order 13045 as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it is based solely on technology performance and not on health or safety risks. Furthermore, this final rule is not considered "economically significant" as defined under EO 12866.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., 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 the Agency decides not to use available and applicable voluntary consensus standards.

This action involves technical standards. During the development of the final rule, EPA searched for voluntary consensus standards that might be applicable. EPA adopted the following standards as practical alternatives to specified EPA test methods in the final rule: (1) American Society for Testing and Materials (ASTM) D6735-01, "Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method," and (2) American Society of Mechanical Engineers (ASME) standard QHO-1-2004, "Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators."

Section 63.1208 lists the test methods to determine compliance with the emission standards in the final rule. Under § 63.7(f) of the general provisions, a source may apply to EPA for permission to use alternative test methods in place of any required testing method, performance specification, or procedure.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority

populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because the provisions contained within do not affect the level of protection to human health of the environment. The final amendments to the hazardous waste combustor NESHAP (40 CFR part 63 subpart EEE) are comprised of clarifications and revisions to current compliance and monitoring provisions that do not affect the current level of control at facilities subject to these rules.

#### K. Congressional Review

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 action 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 the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on April 8, 2008.

#### List of Subjects

##### 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

##### 40 CFR Part 264

Environmental protection, Air pollution control, Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds.

##### 40 CFR Part 266

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

Dated: March 26, 2008.

**Stephen L. Johnson,**  
Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

### PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

■ 2. Section 63.1203 is amended by adding paragraph (e) to read as follows:

**§ 63.1203 What are the standards for hazardous waste incinerators that are effective until compliance with the standards under § 63.1219?**

\* \* \* \* \*

(e) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1219 by placing a Documentation of Compliance in the operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1219 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1219 pursuant to § 63.1206 and any extensions granted there under.

■ 3. Section 63.1204 is amended by adding paragraph (i) to read as follows:

**§ 63.1204 What are the standards for hazardous waste burning cement kilns that are effective until compliance with the standards under § 63.1220?**

\* \* \* \* \*

(i) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1220 by placing a Documentation of Compliance in the operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1220 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1220 pursuant to § 63.1206 and any extensions granted there under.

■ 4. Section 63.1205 is amended by adding paragraph (e) to read as follows:

**§ 63.1205 What are the standards for hazardous waste burning lightweight aggregate kilns that are effective until compliance with the standards under § 63.1221?**

\* \* \* \* \*

(e) The provisions of this section no longer apply after any of the following dates, whichever occurs first:

(1) The date that your source begins to comply with § 63.1221 by placing a Documentation of Compliance in the

operating record pursuant to § 63.1211(c);

(2) The date that your source begins to comply with § 63.1221 by submitting a Notification of Compliance pursuant to § 63.1210(b); or

(3) The date for your source to comply with § 63.1221 pursuant to § 63.1206 and any extensions granted there under.

■ 5. Section 63.1206 is amended as follows:

■ a. By revising paragraph (a)(2) heading and the first sentence of paragraph (a)(2)(ii)(A).

■ b. By revising paragraphs (b)(14)(iv) and (b)(16) introductory text.

■ c. By revising paragraphs (c)(2)(v)(A)(2), (c)(2)(v)(B)(4), and (c)(9) introductory text.

**§ 63.1206 When and how must you comply with the standards and operating requirements?**

(a) \* \* \*

(2) *Compliance date for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces that burn hazardous waste for standards under §§ 63.1216, 63.1217, and 63.1218.*

\* \* \* \* \*

(ii) \* \* \* (A) If you commenced construction or reconstruction of your hazardous waste combustor after April 20, 2004, you must comply with the new source emission standards of this subpart by the later of October 12, 2005, or the date the source starts operations, except as provided by paragraph (a)(2)(ii)(B) of this section. \* \* \*

\* \* \* \* \*

(b) \* \* \*

(14) \* \* \*

(iv) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (b)(14)(ii) and (iii) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

\* \* \* \* \*

(16) Compliance with subcategory standards for liquid fuel boilers. You must comply with the mercury, semivolatile metals, low volatile metals, and hydrogen chloride and chlorine standards for liquid fuel boilers under § 63.1217 as follows:

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(v) \* \* \*

(A) \* \* \*

(2) Although the automatic waste feed cutoff requirements continue to apply during a malfunction, an exceedance of an emission standard monitored by a CEMS or COMS or operating limit specified under § 63.1209 is not a violation of this subpart if you take the corrective measures prescribed in the startup, shutdown, and malfunction plan.

\* \* \* \* \*

(B) \* \* \*

(4) Although the automatic waste feed cutoff requirements of this paragraph apply during startup and shutdown, an exceedance of an emission standard or operating limit is not a violation of this subpart if you comply with the operating procedures prescribed in the startup, shutdown, and malfunction plan.

\* \* \* \* \*

(9) *Particulate matter detection system requirements.* If you combustor is equipped with an electrostatic precipitator or ionizing wet scrubber and you elect not to establish under § 63.1209(m)(1)(iv) site-specific control device operating parameter limits that are linked to the automatic waste feed cutoff system under paragraph (c)(3) of this section, or your combustor is equipped with a fabric filter and you elect to use a particulate matter detection system pursuant to paragraph (c)(8)(i)(B) of this section, you must continuously operate a particulate matter detection system that meets the specifications and requirements of paragraphs (c)(9)(i) through (iii) of this section and you must comply with the corrective measures and notification requirements of paragraphs (c)(9)(iv) through (v) of this section.

\* \* \* \* \*

- 6. Section 63.1207 is amended as follows:
- a. By adding paragraph (b)(3)(vi).
- b. By revising paragraphs (d)(1), (d)(2), and (d)(4).
- c. By revising the first sentence of paragraphs (g)(2)(i) and (g)(2)(ii).
- d. By revising paragraph (m).

**§ 63.1207 What are the performance testing requirements?**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(vi) Sources that are required to perform the one-time dioxin/furan test pursuant to paragraph (b)(3) of this section are not required to perform confirmatory performance tests.

\* \* \* \* \*

(d) \* \* \*

(1) *Comprehensive performance testing.* Except as otherwise specified in

paragraph (d)(4) of this section, you must commence testing no later than 61 months after the date of commencing the previous comprehensive performance test used to show compliance with §§ 63.1216, 63.1217, 63.1218, 63.1219, 63.1220, or 63.1221. If you submit data in lieu of the initial performance test, you must commence the subsequent comprehensive performance test within 61 months of commencing the test used to provide the data in lieu of the initial performance test.

(2) *Confirmatory performance testing.* Except as otherwise specified in paragraph (d)(4) of this section, you must commence confirmatory performance testing no later than 31 months after the date of commencing the previous comprehensive performance test used to show compliance with §§ 63.1217, 63.1219, 63.1220, or 63.1221. If you submit data in lieu of the initial performance test, you must commence the initial confirmatory performance test within 31 months of the date six months after the compliance date. To ensure that the confirmatory test is conducted approximately midway between comprehensive performance tests, the Administrator will not approve a test plan that schedules testing within 18 months of commencing the previous comprehensive performance test.

\* \* \* \* \*

(4) *Applicable testing requirements under the interim standards.* (i) *Waiver of periodic comprehensive performance tests.* Except as provided by paragraph (c)(2) of this section, you must conduct only an initial comprehensive performance test under the interim standards (§§ 63.1203 through 63.1205); all subsequent comprehensive performance testing requirements are waived under the interim standards. The provisions in the introductory text to paragraph (d) and in paragraph (d)(1) of this section apply only to tests used to demonstrate compliance with the replacement standards promulgated on or after October 12, 2005.

(ii) *Waiver of confirmatory performance tests.* You are not required to conduct a confirmatory test under the interim standards (§§ 63.1203 through 63.1205). The confirmatory testing requirements in the introductory text to paragraph (d) and in paragraph (d)(2) of this section apply only after you have demonstrated compliance with the replacement standards promulgated on or after October 12, 2005.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(i) Carbon monoxide (or hydrocarbon) CEMS emissions levels must be within the range of the average value to the maximum value allowed, except as provided by paragraph (g)(2)(v) of this section. \* \* \*

(ii) Each operating limit (specified in § 63.1209) established to maintain compliance with the dioxin/furan emission standard must be held within the range of the average value over the previous 12 months and the maximum or minimum, as appropriate, that is allowed, except as provided by paragraph (g)(2)(v) of this section. \* \* \*

\* \* \* \* \*

(m) *Waiver of performance test.* You are not required to conduct performance tests to document compliance with the mercury, semivolatile metals, low volatile metals, or hydrogen chloride/chlorine gas emission standards under the conditions specified in paragraphs (m)(1) or (m)(2) of this section. The waiver provisions of this paragraph apply in addition to the provisions of § 63.7(h).

(1) *Emission standards based on exhaust gas flow rate.* (i) You are deemed to be in compliance with an emission standard based on the volumetric flow rate of exhaust gas (i.e. µg/dscm or ppmv) if the twelve-hour rolling average maximum theoretical emission concentration (MTEC) determined as specified below does not exceed the emission standard:

- (A) Determine the feedrate of mercury, semivolatile metals, low volatile metals, or total chlorine and chloride from all feedstreams;
- (B) Determine the stack gas flowrate; and
- (C) Calculate a MTEC for each standard assuming all mercury, semivolatile metals, low volatile metals, or total chlorine (organic and inorganic) from all feedstreams is emitted;

(ii) To document compliance with this provision, you must:

- (A) Monitor and record the feedrate of mercury, semivolatile metals, low volatile metals, and total chlorine and chloride from all feedstreams according to § 63.1209(c);
- (B) Monitor with a CMS and record in the operating record the gas flowrate (either directly or by monitoring a surrogate parameter that you have correlated to gas flowrate);
- (C) Continuously calculate and record in the operating record the MTEC under the procedures of paragraph (m)(1)(i) of this section; and
- (D) Interlock the MTEC calculated in paragraph (m)(1)(i)(C) of this section to the AWFCO system to stop hazardous waste burning when the MTEC exceeds the emission standard.

(iii) in lieu of the requirement in paragraphs (m)(1)(ii)(C) and (D) of this section, you may:

(A) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride from all feedstreams that ensures the MTEC as calculated in paragraph (m)(1)(i)(C) of this section is below the applicable emission standard; and

(B) Interlock the minimum gas flowrate limit and maximum feedrate limit of paragraph (m)(1)(iii)(A) of this section to the AWFCO system to stop hazardous waste burning when the gas flowrate or mercury, semivolatile metals, low volatile metals, and/or total chlorine and chloride feedrate exceeds the limits of paragraph (m)(1)(iii)(A) of this section.

(2) *Emission standards based on hazardous waste thermal concentration.*

(i) You are deemed to be in compliance with an emission standard specified on a hazardous waste thermal concentration basis (i.e., pounds emitted per million Btu of heat input) if the HAP thermal concentration in the waste feed does not exceed the allowable HAP thermal concentration emission rate.

(ii) To document compliance with this provision, you must:

(A) Monitor and record the feedrate of mercury, semivolatile metals, low volatile metals, and total chlorine and chloride from all hazardous waste feedstreams in accordance with § 63.1209(c);

(B) Determine and record the higher heating value of each hazardous waste feed;

(C) Continuously calculate and record the thermal feed rate of all hazardous waste feedstreams by summing the products of each hazardous waste feed rate multiplied by the higher heating value of that hazardous waste;

(D) Continuously calculate and record the total HAP thermal feed concentration for each constituent by dividing the HAP feedrate determined in paragraph (m)(2)(ii)(A) of this section by the thermal feed rate determined in paragraph (m)(2)(ii)(C) of this section for all hazardous waste feedstreams;

(E) Interlock the HAP thermal feed concentration for each constituent with the AWFCO to stop hazardous waste feed when the thermal feed concentration exceeds the applicable thermal emission standard.

(3) When you determine the feedrate of mercury, semivolatile metals, low volatile metals, or total chlorine and chloride for purposes of this provision, except as provided by paragraph (m)(4)

of this section, you must assume that the analyte is present at the full detection limit when the feedstream analysis determines that the analyte is not detected in the feedstream.

(4) Owners and operators of hazardous waste burning cement kilns and lightweight aggregate kilns may assume that mercury is present in raw material at half the detection limit when the raw material feedstream analysis determines that mercury is not detected.

(5) You must state in the site-specific test plan that you submit for review and approval under paragraph (e) of this section that you intend to comply with the provisions of this paragraph. You must include in the test plan documentation that any surrogate that is proposed for gas flowrate adequately correlates with the gas flowrate.

■ 7. Section 63.1209 is amended as follows:

■ a. By revising paragraphs (l)(1)(ii)(B)(5) and (l)(1)(ii)(C)(5).

■ b. By revising paragraphs (l)(1)(iii)(B) and (l)(1)(iii)(C) introductory text.

■ c. By revising paragraphs (l)(1)(iii)(D)(1), and (l)(1)(iii)(D)(2).

■ d. By revising paragraph (n)(2)(iii)(A).

■ e. By revising paragraphs (n)(2)(v)(A)(2)(iv) and (n)(2)(v)(A)(3)(v)

■ f. By revising paragraphs (n)(2)(v)(B)(1)(i), (n)(2)(v)(B)(1)(ii), and (n)(2)(v)(B)(2).

■ g. By revising the first sentence of paragraph (n)(2)(vii) introductory text.

■ h. By revising paragraph (o)(1)(ii)(A)(3).

#### § 63.1209 What are the monitoring requirements?

\* \* \* \* \*

(l) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(B) \* \* \*

(5) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section.

Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

(C) \* \* \*

(5) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must

calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section.

Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

(iii) \* \* \*

(B) When complying with the emission standards under §§ 63.1204 and 63.1220(a)(2)(ii)(A) and (b)(2)(ii)(A), you must establish a 12-hour rolling average limit for the feedrate of mercury in all feedstreams as the average of the test run averages;

(C) Except as provided by paragraph (l)(1)(iii)(D) of this section, when complying with the hazardous waste maximum theoretical emission concentration (MTEC) under § 63.1220(a)(2)(ii)(B) and (b)(2)(ii)(B), you must:

\* \* \* \* \*

(D) \* \* \*

(1) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury from all hazardous waste feedstreams that ensures the MTEC calculated in paragraph (l)(1)(iii)(C)(4) of this section is below the operating requirement under paragraphs §§ 63.1220(a)(2)(ii)(B) and (b)(2)(ii)(B); and

(2) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when either the gas flowrate or mercury feedrate exceeds the limits identified in paragraph (l)(1)(iii)(D)(1) of this section.

\* \* \* \* \*

(n) \* \* \*

(2) \* \* \*

(iii) \* \* \* (A) When complying with the emission standards under § 63.1220(a)(3)(i), (a)(4)(i), (b)(3)(i), and (b)(4)(i), you must establish 12-hour rolling average feedrate limits for semivolatile and low volatile metals as the thermal concentration of semivolatile metals or low volatile metals in all hazardous waste feedstreams. You must calculate hazardous waste thermal concentrations for semivolatile metals and low volatile metals for each run as the total mass feedrate of semivolatile metals or low volatile metals for all hazardous waste feedstreams divided by the total heat

input rate for all hazardous waste feedstreams. The 12-hour rolling average feedrate limits for semivolatile metals and low volatile metals are the average of the test run averages, calculated on a thermal concentration basis, for all hazardous waste feeds.

\* \* \* \* \*

- (v) \* \* \*
- (A) \* \* \*
- (2) \* \* \*

(iv) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

\* \* \* \* \*

- (3) \* \* \*

(v) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. Thereafter, you must calculate rolling averages using either one-minute or one-hour updates. Hourly updates shall be calculated using the average of the one-minute average data for the preceding hour. For the period beginning with initial operation under this standard until the source has operated for the full averaging period that you select, the average feedrate shall be based only on actual operation under this standard.

- (B) \* \* \*

(1) \* \* \* (i) The 12-hour rolling average feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of chromium in all hazardous waste feedstreams per million Btu of hazardous waste fed to the boiler. You must establish the 12-hour rolling average feedrate limit as the average of the test run averages.

(ii) You must comply with the hazardous waste chromium thermal concentration limit by determining the feedrate of chromium in all hazardous waste feedstreams (lb/hr) and the hazardous waste thermal feedrate (MMBtu/hr) at least once each minute as [hazardous waste chromium feedrate (lb/hr)/hazardous waste thermal feedrate (MMBtu/hr)].

(2) Boilers that feed hazardous waste with a heating value less than 10,000 Btu/lb. You must establish a 12-hour rolling average limit for the total feedrate (lb/hr) of chromium in all feedstreams as the average of the test run averages.

\* \* \* \* \*

(vii) Extrapolation of feedrate levels. In lieu of establishing feedrate limits as specified in paragraphs (n)(2)(ii) through (vi) of this section, you may request as part of the performance test plan under §§ 63.7(b) and (c) and §§ 63.1207(e) and (f) to use the semivolatile metal and low volatile metal feedrates and associated emission rates during the comprehensive performance test to extrapolate to higher allowable feedrate limits and emission rates. \* \* \*

\* \* \* \* \*

- (o) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*
- (A) \* \* \*

(3) You must comply with the feedrate limit by determining the mass feedrate of hazardous waste feedstreams (lb/hr) at least once a minute and by knowing the chlorine content (organic and inorganic, lb of chlorine/lb of hazardous waste) and heating value (Btu/lb) of hazardous waste feedstreams at all times to calculate a 1-minute average feedrate measurement as [hazardous waste chlorine content (lb of chlorine/lb of hazardous waste feed)/hazardous waste heating value (Btu/lb of hazardous waste)]. You must update the rolling average feedrate each hour with this 60-minute average feedrate measurement.

\* \* \* \* \*

■ 8. Section 63.1210 is amended by revising paragraphs (b) introductory text, (b)(3), and (c)(1) to read as follows:

**§ 63.1210 What are the notification requirements?**

\* \* \* \* \*

(b) Notification of intent to comply (NIC). These procedures apply to sources that have not previously complied with the requirements of paragraphs (b) and (c) of this section, and to sources that previously complied with the NIC requirements of §§ 63.1210 and 63.1212(a), which were in effect prior to October 11, 2000, that must make a technology change requiring a Class 1 permit modification to meet the standards of §§ 63.1219, 63.1220, and 63.1221.

\* \* \* \* \*

(3) You must submit the final NIC to the Administrator:

(i) Existing units. No later than one year following the effective date of the emission standards of this subpart; or

(ii) New units. No later than 60 days following the informal public meeting.

(c) \* \* \* (1) Prior to the submission of the NIC to the permitting agency and:

(i) Existing units. No later than 10 months after the effective date of the emission standards of this subpart, you must hold at least one informal meeting with the public to discuss the anticipated activities described in the draft NIC for achieving compliance with the emission standards of this subpart. You must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

(ii) New units. No earlier than thirty (30) days following notice of the informal public meeting, you must hold at least one informal meeting with the public to discuss the anticipated activities described in the draft NIC for achieving compliance with the emission standards of this subpart. You must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

\* \* \* \* \*

■ 9. Section 63.1212 is amended by revising paragraphs (b)(1), (b)(3), and (b)(4) and adding paragraph (b)(5) to read as follows:

**§ 63.1212 What are the other requirements pertaining to the NIC?**

\* \* \* \* \*

- (b) \* \* \*

(1) Prepare a draft NIC pursuant to § 63.1210(b) and make it available to the public upon issuance of the notice of public meeting pursuant to § 63.1210(c)(3);

\* \* \* \* \*

(3) Provide notice to the public of a pre-application meeting pursuant to § 124.31 of this chapter or notice to the public of a permit modification request pursuant to § 270.42 of this chapter;

(4) Hold an informal public meeting [pursuant to § 63.1210(c)(1) and (c)(2)] no earlier than 30 days following notice of the NIC public meeting and notice of the pre-application meeting or notice of the permit modification request to discuss anticipated activities described in the draft NIC and pre-application or permit modification request for achieving compliance with the emission standards of this subpart; and

(5) Submit a final NIC pursuant to § 63.1210(b)(3).

\* \* \* \* \*

■ 10. Section 63.1215 is amended as follows:

■ a. By revising paragraph (a)(1)(i).

- b. By revising the definitions of “1-Hour Average HCl-Equivalent Emission Rate” and “1-Hour Average HCl-Equivalent Emission Rate Limit” in paragraph (a)(2).
- c. By revising paragraphs (b)(2), (b)(3), and (b)(6)(ii)(C).
- d. By revising paragraph (f)(5)(ii)(A).
- e. By revising paragraph (h)(2)(i).

**§ 63.1215 What are health-based compliance alternatives for total chlorine?**

\* \* \* \* \*

- (a) \* \* \*
- (1) \* \* \*

(i) Identify a total chlorine emission concentration (ppmv) expressed as chloride (Cl(-)) equivalent for each on site hazardous waste combustor. You may select total chlorine emission concentrations as you choose to demonstrate eligibility for the risk-based limits under this section, except as provided by paragraph (b)(7) of this section;

\* \* \* \* \*

- (2) \* \* \*

*1-Hour Average HCl-Equivalent Emission Rate* means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using aRELS as the health risk metric for acute exposure.

*1-Hour Average HCl-Equivalent Emission Rate Limit* means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using aRELS as the health risk metric for acute exposure and which ensures that maximum 1-hour average ambient concentrations of HCl-equivalents do not exceed a Hazard Index of 1.0, rounded to the nearest tenths decimal place (0.1), at an off-site receptor location.

\* \* \* \* \*

- (b) \* \* \*

(2) *Annual average rates.* You must calculate annual average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{LTW} = ER_{HCl} + ER_{Cl_2} \times (Rf_{HCl}/Rf_{Cl_2})$$

Where:

$ER_{LTW}$  is the annual average HCl toxicity-weighted emission rate (HCl-equivalent emission rate) considering long-term exposures, lb/hr

$ER_{HCl}$  is the emission rate of HCl in lbs/hr

$ER_{Cl_2}$  is the emission rate of chlorine in lbs/hr

$Rf_{HCl}$  is the reference concentration of HCl

$Rf_{Cl_2}$  is the reference concentration of chlorine

(3) *1-hour average rates.* You must calculate 1-hour average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{STW} = ER_{HCl} + ER_{Cl_2} \times (aREL_{HCl}/aREL_{Cl_2})$$

Where:

$ER_{STW}$  is the 1-hour average HCl-toxicity-weighted emission rate (HCl-equivalent emission rate) considering 1-hour (short-term) exposures, lb/hr

$ER_{HCl}$  is the emission rate of HCl in lbs/hr

$ER_{Cl_2}$  is the emission rate of chlorine in lbs/hr

$aREL_{HCl}$  is the aREL for HCl

$aREL_{Cl_2}$  is the aREL for chlorine

- (6) \* \* \*
- (ii) \* \* \*

(C) You must calculate the 1-hour average HCl-equivalent emission rate using these HCl and Cl<sub>2</sub> emission rates and the equation in paragraph (b)(3) of this section.

\* \* \* \* \*

- (f) \* \* \*
- (5) \* \* \*
- (ii) \* \* \*

(A) You must determine your chlorine emissions to be the higher of the value measured by Method 26/26A as provided in appendix A-8, part 60 of this chapter, or an equivalent method, or the value calculated by the difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26A as provided in appendix A-8, part 60 of this chapter, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 as provided in appendix A, part 63 of this chapter, or ASTM D 6735-01 as described under § 63.1208(b)(5)(i)(C), or an equivalent method.

\* \* \* \* \*

- (h) \* \* \*
- (2) \* \* \*

(i) *Proactive review.* You must submit for review and approval with each comprehensive performance test plan either a certification that the information used in your eligibility demonstration has not changed in a manner that would decrease the annual average or 1-hour average HCl-equivalent emission rate limit, or a revised eligibility demonstration.

\* \* \* \* \*

- 11. Section 63.1217 is amended by revising paragraphs (a)(6)(ii) and (b)(6)(ii) to read as follows:

**§ 63.1217 What are the standards for liquid fuel boilers that burn hazardous waste?**

- (a) \* \* \*
- (6) \* \* \*

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of  $5.1 \times 10^{-2}$  lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per

million Btu heat input from the hazardous waste;

\* \* \* \* \*

- (b) \* \* \*
- (6) \* \* \*

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of  $5.1 \times 10^{-2}$  lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per million Btu heat input from the hazardous waste;

\* \* \* \* \*

- 12. Section 63.1220 is amended by revising paragraphs (a)(2)(ii) and (b)(2)(ii) to read as follows:

**§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?**

- (a) \* \* \*
- (2) \* \* \*

(ii) Either:

(A) Emissions in excess of 120 µg/dscm, corrected to 7 percent oxygen, or  
 (B) A hazardous waste feed maximum theoretical emission concentration (MTEC) in excess of 120 µg/dscm;

\* \* \* \* \*

- (b) \* \* \*
- (2) \* \* \*

(ii) Either:

(A) Emissions in excess of 120 µg/dscm, corrected to 7 percent oxygen, or  
 (B) A hazardous waste feed maximum theoretical emission concentration (MTEC) in excess of 120 µg/dscm;

\* \* \* \* \*

**PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES**

- 13. The authority citation for part 264 continues to read as follows:

**Authority:** 42 U.S.C. 6905, 6912(a), 6924 and 6925.

- 14. Section 264.340 is amended as follows:

- a. By revising the first sentence of paragraph (b)(1) and paragraph (b)(3).
- b. By removing paragraph (b)(5).

**§ 264.340 Applicability.**

\* \* \* \* \*

- (b) \* \* \*

(1) Except as provided by paragraphs (b)(2) through (b)(4) of this section, the standards of this part do not apply to a new hazardous waste incineration unit that becomes subject to RCRA permit requirements after October 12, 2005; or no longer apply when an owner or operator of an existing hazardous waste incineration unit demonstrates

compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter. \* \* \*

(3) The particulate matter standard of § 264.343(c) remains in effect for incinerators that elect to comply with the alternative to the particulate matter standard under §§ 63.1206(b)(14) and 63.1219(e) of this chapter.

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

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

**Authority:** 42 U.S.C. 1006, 2002(a), 3001–3009, 3014, 6905, 6906, 6912, 6921, 6922, 6924–6927, 6934, and 6937.

#### **§ 266.100 [Amended]**

■ 16. Section 266.100 is amended by redesignating the second paragraph (b)(3)(ii) as (b)(3)(iii).

[FR Doc. E8–6667 Filed 4–7–08; 8:45 am]

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### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 223**

[Docket No. 071030628–8482–02]

RIN 0648–AV84

#### **Endangered and Threatened Wildlife; Sea Turtle Conservation**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to clarify the existing sea turtle conservation requirements for sea scallop dredge vessels entering waters south of 41°9.0' N. latitude from May 1 through November 30 each year and to add a transiting provision to the requirements. Any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery

permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0' N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone (EEZ) must have a chain mat on each dredge, unless the terms of the transiting provision are met. The chain-mat modified dredge is necessary to help reduce mortality and injury to endangered and threatened sea turtles in scallop dredge gear and to conserve sea turtles listed under the Endangered Species Act (ESA). This current action addresses a procedural error in the original rulemaking to require chain mats on scallop dredge gear, clarifies the existing requirements, and adds a transiting provision to the regulations. Any incidental take of threatened sea turtles in sea scallop dredge gear in compliance with this gear modification requirement and all other applicable requirements will be exempted from the ESA's take prohibition.

**DATES:** Effective May 8, 2008.

**ADDRESSES:** Copies of the Environmental Assessment (EA) and Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) prepared for this final rule may be obtained by writing to Ellen Keane, NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930.  
**FOR FURTHER INFORMATION CONTACT:** Ellen Keane (ph. 978–281–9300 x6526, fax 978–281–9394, e-mail [ellen.keane@noaa.gov](mailto:ellen.keane@noaa.gov)) or Barbara Schroeder (ph. 301–713–2322, fax 301–427–2522, e-mail [barbara.schroeder@noaa.gov](mailto:barbara.schroeder@noaa.gov)).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico that are listed as endangered. Due to the inability to distinguish between these populations of green turtles away from the nesting beach, NMFS considers green sea turtles endangered wherever they occur in U.S. waters. Kemp's ridley, hawksbill, loggerhead, and green sea turtles are hard-shelled sea turtles. The incidental take, both lethal and non-lethal, of loggerhead, Kemp's ridley, and unidentified hard-shelled

sea turtles has been documented in the sea scallop dredge fishery, as well as a non-lethal take of a green sea turtle (NEFSC FSB, Observer Database). In addition, an unconfirmed take of a leatherback sea turtle was reported during the experimental fishery to test the chain-mat modified dredge gear (DuPaul *et al.*, 2004).

This action is being taken under the ESA provisions authorizing the issuance of regulations to conserve threatened species and for enforcement purposes (sections 4(d) and 11(f), respectively). The requirement to use chain-mat modified dredge gear is necessary to provide for the conservation of threatened loggerhead sea turtles, and will have ancillary benefits for other sea turtle species that have been taken in the sea scallop dredge fishery, albeit to a lesser extent than loggerheads. Under the ESA and its implementing regulations, taking endangered sea turtles—even incidentally—is prohibited. The incidental take of endangered species may only legally be exempted by an incidental take statement (ITS) or an incidental take permit issued pursuant to section 7 or 10 the ESA, respectively. Existing sea turtle conservation regulations at 50 CFR 223.206(d) exempt fishing activities and scientific research from the prohibition on takes of threatened species under certain conditions. Any incidental take of threatened loggerhead sea turtles in sea scallop dredge gear in compliance with this gear modification requirement and other applicable requirements is exempted from the prohibition against takes.

The chain-mat modified dredge is expected to benefit sea turtles following an interaction in the water column. Based on the available information, NMFS has determined that the use of a chain-mat modified dredge will prevent most captures of sea turtles in the dredge bag as well as any ensuing injuries as a result of such capture (e.g., crushing in the dredge bag, crushing on deck, etc.). However, NMFS has made the conservative assumption that a turtle in a bottom interaction sustains significant injuries on the bottom, so, under this conservative assumption, there would not be a benefit from the chain mat for bottom interactions. This assumption, however, may be too conservative in that it is possible (although not likely) that turtles in a bottom interaction only receive minor injuries. In the unlikely scenario of a turtle receiving only minor injuries following a bottom interaction, the chain mat modification would prevent significant injuries that result from capture in the dredge bag (i.e., injuries