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 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 January 18, 2005.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 5, 2004.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(321)(i)(C) and (c)(332)(i)(B) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(321) * * *

(i) * * *

(C) Great Basin Air Pollution Control District.

(*1*) Rule 101, adopted on September 24, 2003.

* * * * *

(332) * * *

(i) * * *

(B) Ventura County Air Pollution Control District.

(*1*) Rule 2, adopted on October 22, 1968, and amended on April 13, 2004.

[FR Doc. 04–25625 Filed 11–18–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[RCRA–2004–0009; FRL–7839–3]

Land Disposal Restrictions: Site-Specific Treatment Standard Variance for Selenium Waste for Chemical Waste Management, Chemical Services, LLC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is today granting a site-specific treatment standard variance from the Land Disposal Restrictions (LDR) treatment standards for a selenium-bearing hazardous waste generated by the glass manufacturing industry. EPA is granting this variance because the chemical properties of the waste differ significantly from those of the waste used to establish the current LDR treatment standard for selenium (5.7 mg/L, as measured by the Toxicity Characteristic Leaching Procedure (TCLP)), and the petition has adequately demonstrated that the waste cannot be treated to meet this treatment standard.

EPA is granting this variance to CWM Chemical Services LLC (CWM (Model City, NY)) to stabilize a selenium-bearing hazardous waste generated by Guardian Industries Corp. (Guardian) at their RCRA permitted facility in Model City, New York. With promulgation of this final rule, CWM may treat the Guardian waste to an alternate treatment standard of 28 mg/L, as measured by the TCLP. CWM (Model City, NY) may dispose of the treated waste in a RCRA Subtitle C landfill, provided they meet the applicable LDR treatment standard for any other hazardous constituents in the waste.

EPA is also modifying the existing alternative treatment standard for the Guardian selenium waste that EPA had previously granted to Heritage Environmental Services LLC (69 FR 6567, February 11, 2004) to be consistent with the levels that CWM has demonstrated as best demonstrated achievable technology (BDAT) for this selenium waste.

DATES: This final rule is effective on January 3, 2005 without further notice, unless EPA receives adverse comment by December 20, 2004. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: EPA has established a docket for this action under Docket ID No. RCRA–2004–0009. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Correspondence to the docket should be addressed to: EPA Docket Center, OSWER Docket (5305T), 1200 Pennsylvania Ave NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Call Center at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412–9810 or TDD (703) 412–3323. For more detailed information on specific aspects of this rulemaking, contact Juan Parra at (703) 308–0478 or *parra.juan@epa.gov,* Office of Solid Waste (MC 5302 W), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

EPA is publishing this rule without prior proposal because we view it as a noncontroversial action. We anticipate no significant adverse comments, because, to our knowledge, no new treatment options have become available to treat this high-concentration selenium waste more effectively. Having said this, in the ''Proposed Rules'' section of today's **Federal Register** publication, we are publishing a separate document that could serve as a proposal to grant a site-specific treatment standard variance to CWM (Model City, NY), if significant adverse comments are filed. See the **SUPPLEMENTARY INFORMATION** section in that notice on how to submit comments.

This direct final rule will be effective on January 3, 2005 without further notice unless we receive adverse comment on the proposed rule by December 20, 2004. If we receive adverse comment on the direct final rule, we will withdraw the direct final action and the treatment standard variance for CWM (Model City, NY). We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action.

Any parties interested in commenting on this direct final rule must do so at this time.

Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy documents may be viewed at the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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, and the telephone number for the OSWER Docket is (202) 566–0272.

An electronic version of the public docket is available through EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Publicly available docket materials that are not available electronically may be viewed at the docket facility identified above. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Table of Contents

I. Background

A. What Is the Basis for LDR Treatment Standard Variances?

Under section 3004(m) of the Resource Conservation and Recovery Act (RCRA), EPA is required to set ''levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.'' EPA interprets this language to authorize treatment standards based on the performance of best demonstrated available technology (BDAT). This interpretation was upheld by the DC Circuit in *Hazardous Waste Treatment Council* v. *EPA,* 886 F.2d 355 (D.C. Cir. 1989).

The Agency recognizes that there may be wastes that cannot be treated to levels specified in the regulations because an individual waste can be substantially more difficult to treat than those wastes the Agency evaluated in establishing the treatment standard. For such wastes, EPA has a process by which a generator or treater may seek a treatment standard variance (see 40 CFR 268.44). If granted, the terms of the variance establish an alternative treatment standard for the particular waste at issue.

B. What Is the Basis of the Current Selenium Treatment Standard?

Treatment of selenium poses special difficulties. In particular, it can be technically challenging to treat wastes containing selenium and other metals, *e.g.*, cadmium, lead or chromium, because of their different chemical properties and solubility curves (62 FR 26041, May 12, 1997).

The current treatment standard for wastes exhibiting the toxicity characteristic for selenium is based upon the performance of stabilization treatment technologies on selenium-bearing wastes with low concentrations. When the Agency developed these treatment standards for selenium, EPA believed that wastes containing high concentrations of selenium were rarely generated and land disposed (59 FR 47980, September 19, 1994). The Agency also stated that it believed that, for most wastes containing high concentrations of selenium, recovery of the selenium would be feasible using recovery technologies currently employed by copper smelters and copper refining operations (Id.). The Agency further stated in 1994 that it did not have any performance data for selenium recovery, but available information indicated that some recovery of elemental selenium out of certain types of scrap material and other types of waste was practiced in the United States. In 2004, there is no domestic production of secondary selenium.[1] Primary selenium is recovered, as a co-product with copper, from anode slimes generated in the electrolytic refining of copper.

In 1994, the Agency used performance data from the stabilization of mineral processing waste that was characteristically hazardous for selenium (waste code D010) to set the national treatment standard for selenium. At that time, we determined that this was the most difficult to treat selenium waste. This untreated waste contained up to 700 ppm total selenium and 3.74 mg/L selenium in the TCLP leachate. The resulting post-treatment levels of selenium in the TCLP leachate were between 0.154 mg/L and 1.80 mg/L, which (after considering the range of treatment process variability) led to EPA establishing a national treatment standard of 5.7 mg/L for D010 selenium non-wastewaters. This D010 mineral processing waste also contained toxic metals (*i.e.*, arsenic, cadmium, and lead) above characteristic levels. The treatment technology used to establish the selenium levels also resulted in meeting the LDR treatment standards for these non-selenium metals. The reagent to waste ratios varied from 1.3 to 2.7 (62 FR 26041, May 12, 1997).

In the Phase IV final rule, the Agency determined that a treatment standard of 5.7 mg/L, as measured by the TCLP, continued to be appropriate for D010 non-wastewaters (63 FR 28556, May 26, 1998). The Agency also changed the universal treatment standard (UTS) for selenium nonwastewaters from 0.16 mg/L to 5.7 mg/L.

[1] ''Selenium'' U.S. Geological Survey—Minerals Yearbook 2004.

C. Previously Approved Variances for Selenium Wastes

When EPA established the treatment standards for metal wastes and mineral processing wastes (63 FR 28555, May 26, 1998), we noted that we received comments from one company, Chemical Waste Management Inc. (CWM (Kettleman City, CA)), indicating that it was attempting to stabilize selenium-bearing wastes with concentrations much higher than those EPA had examined when it established the national treatment standard for wastes exhibiting the toxicity characteristic for selenium. In response, EPA proposed and subsequently granted variances for two high-level selenium waste streams. EPA granted these variances for three years, and required CWM (Kettleman City, CA) to conduct studies on approaches to further reduce the leachability of such treated wastes (63 FR 56886, May 26, 1999). EPA also required the company to investigate alternative treatment technologies that might provide more effective treatment, report annually on these investigations, and provide any analytical data from the treatment studies.[2] The annual reports include stabilization recipes that were used to meet the alternative treatment standards, the selenium concentrations in the untreated wastes, and the analytical results from leach testing of the treated wastes. EPA renewed this variance for another three year term, and continued to require CWM (Kettleman City, CA) to report on its treatability studies and to investigate whether more effective treatment is available (67 FR 36849, May 28, 2002). In 2004, EPA permanently established the two site-specific variances from the Land Disposal Restrictions treatment standards for Chemical Waste Management Inc., at their Kettleman Hills facility in Kettleman City, California, for these two selenium-bearing hazardous wastes (69 FR 6567, February 11, 2004).

On May 14, 2003, Heritage Environmental Services LLC (Heritage) submitted a site-specific treatment standard variance petition to EPA for their RCRA permitted facility in Indianapolis, Indiana. The petition requested a treatment standard variance for a selenium-bearing hazardous waste generated by Guardian Industries Corp. Heritage demonstrated that, because the physical and chemical properties of the waste differ significantly from the waste analyzed in developing the treatment standard, the waste cannot be treated to the specified levels or by the specified methods. EPA determined that stabilization of selenium with cement kiln dust, along with the addition of ferrous sulfate as a reagent for hexavalent chromium, was the best demonstrated available technology for the Guardian waste. EPA granted the site-specific treatment standard variance from the D010 treatment standards for the Guardian waste stream on February 11, 2004 (69 FR 6567).

D. Reasons for Lack of Secondary Selenium Recovery Capacity

Primary selenium [3] is a co-product in the mining of copper ores. The principal markets for selenium are in electronics (30%), glass manufacturing (20%), pigments (19%), metallurgical additives (14%) and agricultural/biological applications (6%).[4] In glass manufacturing, selenium is used to color container glass and other soda-lime silica glasses and to reduce solar heat transmission in architectural plate and automotive glass.

Because selenium is a non-renewable resource, and because the wastes in question contain high selenium concentrations, EPA's preference, rather than stabilization and land disposal, would be to recover the selenium in an environmentally sound manner. However, there was no recorded domestic production of secondary selenium in 2004.[5] All potential secondary selenium recovery technologies being considered have remained pilot projects and none of them have been shown to be economically viable. These factors suggest that development of an environmentally protective secondary selenium recovery system in the U.S. is not reasonably expected in the near future, and stabilization remains the best available treatment technology.

II. Basis for CWM (Model City, NY) Variance Petition

Under 40 CFR 268.44(h), facilities can apply for a site-specific variance in cases where a waste that is generated under conditions specific to only one site cannot be treated to the specified levels. In such cases, the generator or treatment facility may apply to the Administrator, or to EPA's delegated representative, for a site-specific variance from a treatment standard. The applicant for a site-specific variance must demonstrate that, because the physical or chemical properties of the waste differ significantly from the waste analyzed in developing the treatment standard, the waste cannot be treated to the specified levels or by the specified methods. There are other grounds for obtaining treatment standard variances, but this is the only provision relevant to this action.

On April 9, 2004, Chemical Waste Management-Chemical Services L.L.C. (CWM (Model City, NY)) submitted their petition for a treatment standard variance to EPA. All information and data used in the development of this treatment standard variance can be found in the RCRA docket (RCRA–2004–0009) for this rulemaking.

A. Waste Characteristics

Guardian Industries Corp., in Jefferson Hills, Pennsylvania, is a specialty glass manufacturing facility. Emissions from its glass furnace are first subjected to lime injection, and subsequently captured in an electrostatic precipitator. Lime is added to remove sulphur compounds and selenium from the glass furnace gases. This waste stream consists of lime with 100–70,000 mg/kg selenium (0.1%–7%), 50–1000 mg/kg of chromium, 0–50 mg/kg of lead and 1–100 mg/kg of cobalt. The dust is a D010 characteristic waste because the selenium concentration exceeds 1.0 mg/L, as measured by the TCLP.[6] The waste is a dry powder with a bulk density of about 0.4 g/cm^3, and contains no free liquids or organic constituents. The calcium content is high, approximately 30%, since the waste contains lime injected to the furnace exhaust. The rate of variation in the amount of waste is related to the manufacturing demand, and ranges from 20–50 tons/month.

The Land Disposal Restrictions found in 40 CFR 268.40(e) require most characteristic wastes to meet the universal treatment standards (UTS) in 40 CFR 268.48 for all underlying hazardous constituents (UHCs) before the waste can be land disposed. Analytical data on the raw Guardian waste indicate that the only underlying hazardous constituent present above UTS levels is chromium; occasionally the dust is also a D007 waste because the chromium exceeds the hazardous waste characteristic level of 5 mg/L, as

[2] All four of CWM's annual reports are in the docket ID No. RCRA 2003–0025.

[3] ''Selenium is found in 75 different mineral species; however, pure selenium does not exist as an ore. For this reason, primary selenium is recovered from anode slimes generated in the electrolytic refining of copper.'' U.S. EPA (F–96–PH4A–S0001): Identification and Description of Mineral Processing Sectors and Waste Streams.

[4] ''Canadian Mineral Yearbook'' 1995.

[5] ''Selenium'' U.S. Geological Survey—Minerals Yearbook—2004.

[6] This waste currently has an LDR treatment variance based on a petition submitted by Heritage (see 69 FR 6567, February 11, 2004).

[7] In the Phase IV Land Disposal Restrictions rule, the Agency did not generally use stabilization data with reagent to waste ratios greater than 1. ''Final

measured by the TCLP. The universal treatment standard for chromium is 0.6 mg/L, as measured by the TCLP. As an underlying hazardous constituent, chromium must be treated to below the 0.6 mg/L universal treatment standard for the waste to be properly land disposed (58 FR 29560, May 24, 1993 and 63 FR 28556, May 26, 1998). Once the Guardian waste has been stabilized for selenium and treated for any underlying constituents, the waste can be disposed in a hazardous waste landfill.

B. Chemical Properties of the Guardian Waste and Results of CWM Treatment

An approach to immobilize the selenium in the Guardian waste and to reduce its exposure to leaching agents is to stabilize it with cement. The solid matrix chemically binds the metals in the waste and substantially lowers the surface area potentially exposed to leaching from that of untreated dust. As a result, the solidified waste should have a lower leaching potential after the waste is disposed in a hazardous waste landfill.

As mentioned above, analytical data on the raw Guardian waste indicate that the only underlying hazardous constituent present is chromium. CWM (Model City, NY) conducted treatability studies demonstrating that the addition of cement kiln dust alone is not sufficient to reduce the chromium levels to below the 0.6 mg/L treatment standard. To further treat the chromium in the waste, the hexavalent chromium ion must be reduced to the trivalent state so that precipitation can occur. CWM (Model City, NY) used ferrous sulfate for this purpose.

CWM (Model City, NY) conducted several rounds of testing using different stabilization recipes, which had varied amounts of Portland cement, cement kiln dust, ferrous sulfate, hydroxylamine hydrochloride, quick lime and polysulfide. Collectively, the TCLP tests on treated Guardian waste samples indicate a significant reduction in leachability. This reduction, however, is not enough to meet the LDR treatment standard of 5.7 mg/L, as measured by the TCLP.

EPA has determined, in analyzing the data from the preliminary tests, that the most effective stabilization recipe for this waste consists of 0.20 parts ferrous sulfate combined with 1.0 part cement kiln dust, resulting in a reagent to waste ratio of 1.20. Water is also added to make a thick paste, that upon curing, solidifies into a hard, cemented material. This optimized stabilization recipe reduces the leachable selenium and minimizes the amount of reagent that must be used to achieve this result.

Table I shows the results of leaching, as measured by the TCLP, of Guardian's waste treated using the optimized stabilization recipe. CWM (Model City, NY) stabilized the samples with reagent to waste ratios of 1.20. Treated selenium concentrations for the ten samples ranged from 15.09 mg/L to 24.5 mg/L, as measured by the TCLP.

SUMMARY OF TREATABILITY STUDIES OF THE GUARDIAN SELENIUM WASTE

20% $FESO_4$+ 100% cement kiln dust	
Guardian sample ID	Se waste TCLP (mg/L)
0408138–01	[1] 90.9
0408138–02	19.3
0408138–03	21.49
0408138–04	24.5
0408138–05	22.9
0408138–06	23.4
0408096–04	19
0408096–03	18.14
0408096–02	15.12
0408096–01	15.6
0407946–14	15.09

[1] (Untreated).

C. Alternative Treatment Standard for CWM To Treat the Guardian Selenium Waste

When the Agency developed the current national treatment standard of 5.7 mg/L, as measured by the TCLP, for D010 selenium non-wastewaters, as discussed earlier, data with reagent to waste ratios that varied from 1.3 to 2.7 were used to calculate the treatment standard.[7] The Heritage selenium variance that was previously granted for the Guardian waste reflected a reagent to waste ratio of 2.35 (69 FR 6567, February 11, 2004). CWM (Model City, NY), treating the same Guardian waste, achieved a reagent to waste ratio of 1.2. CWM's (Model City, NY) reagent to waste ratio is significantly lower than the ratio reflected in the Heritage variance. The Agency notes that, by keeping the reagent to waste ratio to minimal levels, CWM (Model City, NY) is minimizing the amount of treated waste to be disposed in the hazardous landfill. The Agency recommends that CWM (Model City, NY) use a reagent to waste ratio of 1.2 as an upper limit.

Using the BDAT methodology,[8] the Agency has calculated an alternative treatment standard of 28 mg/L, as measured by the TCLP, based on ten data points (15.09, 15.6, 15.12, 18.14, 19, 19.3, 21.49, 24.5, 22.9, and 23.4 from Table I) that were the result of stabilization treatment using a reagent to waste ratio of 1.2 for the waste generated by Guardian Industries Corp.

D. What Is the Basis for EPA's Approval of CWM's Request for an Alternative D010 Treatment Standard?

After careful review of the data and petition submitted by CWM (Model City, NY), we conclude that CWM (Model City, NY) has adequately demonstrated that the wastes satisfy the requirements for a treatment standard variance under 40 CFR 268.44(h)(1). CWM (Model City, NY) has demonstrated that Guardian's glass manufacturing waste differs significantly in chemical composition from the waste used to establish the original selenium treatment standard. Selenium TCLP concentrations in the untreated waste are one or two orders of magnitude higher than TCLP concentrations in the waste used to develop the treatment standard for D010 hazardous wastes. Data from CWM (Model City, NY) demonstrate that wastes containing high concentrations of selenium are not easily treated. Furthermore, CWM (Model City, NY) is using stabilization as the treatment technology, which is consistent with EPA's determination that stabilization is the best available treatment technology for this waste, and the process is well-designed and well-operated.

In addition, CWM (Model City, NY) intends to minimize potential leaching in the landfill by restricting the placement of the waste in the cell. The stabilized waste will not be placed directly on the operation layer on the floor of the landfill, nor in the area of a stand pipe or leachate sump pump. EPA is supportive of this approach.

Therefore, EPA is today granting a site-specific treatment standard variance from the D010 treatment standards for the Guardian waste stream in question. Today's alternative treatment standard will provide sufficient latitude for CWM (Model City, NY) to treat the other metal present in the waste (chromium) to LDR treatment standards and, by raising the selenium treatment standard, will avoid the difficulty posed by the different metal solubility curves. EPA is amending 40 CFR 268.44 to include a

[7] In the Phase IV Land Disposal Restrictions rule, the Agency did not generally use stabilization data with reagent to waste ratios greater than 1. ''Final Draft Site Visit Report for the August 20–21 Site Visit to Rollins Environmental's Highway 36 Commercial Waste Treatment Facility Located in Deer Trail, Colorado,'' November 21, 1996, and the economic analysis supporting the Phase IV final rule.

[8] BDAT Background Document for Quality Assurance/Quality Control Procedures and Methodology, October 23, 1991.

selenium treatment standard of 28 mg/L, as measured by the TCLP, for the Guardian waste it treats.

E. What Are the Terms and Conditions of the Variance?

Since this rule approves a variance from a numerical treatment standard, CWM (Model City, NY) may vary the reagent recipe it uses to best meet the alternative numerical standard. The Agency notes that, to avoid questions of impermissible dilution, CWM (Model City, NY) will need to keep the reagent to waste ratios within acceptable bounds. No specific ratios are being established in today's rule because the Agency does not desire to prevent further optimization of the treatment process. However, the Agency recommends that CWM (Model City, NY) use a reagent to waste ratio of 1.2 as an upper limit. This is the ratio used in the treated waste that formed the basis for establishing today's alternative treatment standard.

The treated waste, provided it meets applicable LDR treatment standards for any other hazardous constituents in the waste,[9] will be disposed in a RCRA Subtitle C landfill.

III. New Best Demonstrated Available Technology Determination for Guardian Selenium Waste

In today's notice, EPA has determined, in analyzing the CWM (Model City, NY) and Heritage data (69 CFR 6568, February 11, 2004) from the tests on the Guardian Waste, that the most effective stabilization recipe for this waste consists of 0.20 parts ferrous sulfate combined with 1.0 part cement kiln dust, resulting in a reagent to waste ratio of 1.20 to 1. This optimized stabilization recipe from CWM (Model City, NY) reduces the leachable selenium and minimizes the amount of reagent that must be used to achieve this result. As explained previously, we have calculated an alternative treatment standard, based on the performance of their treatment data, of 28 mg/L, as measured by the TCLP.

As described above, on February 11, 2004, EPA granted a site-specific variance from the D010 treatment standard for the same Guardian waste. This variance was granted to Heritage Environmental Services, LLC. The treatment standard that EPA approved in this variance, 39.4 mg/L, as measured by the TCLP, and the reagent to waste ratio (2.35 to 1 as an upper limit) used to achieve this level, are both higher than those achieved by CWM (Model City, NY) for the source waste. These results are obviously higher than the alternative treatment standard for the same waste. After careful study, EPA sees no reason that the treatment standard for the same waste cannot be duplicated elsewhere. EPA has determined in today's rule that the treatment results achieved by CWM (Model City, NY) reflect the best demonstrated available treatment for the Guardian selenium waste stream. The alternative treatment standard will provide sufficient latitude for CWM (Model City, NY) to treat the chromium present to meet universal treatment standards (UTS). We also find (obviously) that since the treatment standard is above the characteristic level for selenium, that treatment is not being required to a level below which threats to human health and the environment are minimized, and that treatment of selenium to the lower level established further minimizes threats posed by the waste's land disposal. Therefore, in addition to granting a site-specific variance to CWM (Model City, NY), EPA is modifying the Heritage alternative treatment standard for the Guardian selenium waste that EPA had previously granted so that it is consistent with the level that CWM (Model City, NY) has demonstrated as BDAT for this selenium waste.

[9] Note that disposal in a Subtitle C landfill is required because the treated wastes are still characteristic for selenium (*i.e.*, the waste has TCLP values above the toxicity characteristic level for selenium of 1.9 mg/L).

IV. Statutory and Executive Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether a regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because this rule does not create any new regulatory requirements, it is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. This variance only changes the treatment standard applicable to a D010 waste stream that is treated at the CWM Chemical Services, LLC facility in Model City, New York and at the Heritage Environmental Services LLC facility in Indianapolis, Indiana.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This site-specific treatment standard variance does not impose information collection burden on CWM (Model City) given their petition contains the information needed to determine effectiveness of treatment. All information and data used in the development of this treatment standard variance can be found in the RCRA docket (RCRA–2004–0009) for this rulemaking. This action also does not change in any way the paperwork requirements already applicable to this waste. Therefore, it does not affect the requirements under the Paperwork Reduction Act.

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.

This final rule is not subject to notice and comment requirements under the APA or any other statute because the rule will not have a significant economic impact on a substantial number of small entities. This treatment standard variance does not create any new regulatory requirements. Rather, it establishes an alternative treatment standard for a specific waste stream, and it applies to two facilities; the CWM Chemical Services, LLC facility in Model City, New York and the Heritage Environmental Services LLC facility in Indianapolis, Indiana.

After considering the economic impacts of today's direct final rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. This direct final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of 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 affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector, and it does not impose any Federal mandate on State, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995. This rule also does not create new regulatory requirements; rather, it merely establishes an alternative treatment standard for a specific waste that replaces a standard already in effect. 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. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

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. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. 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. 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. Today's final rule does not significantly or uniquely affect the communities of Indian tribal governments. This rule issues a variance from the LDR treatment standards for a specific characteristic selenium waste. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 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.

Today's final rule is not subject to E.O. 13045 because it does not meet either of these criteria. The waste described in this treatment standard variance will be treated by CWM Chemical Services, LLC and Heritage Environmental Services LLC, and then be disposed of in a RCRA Subtitle C landfill, ensuring that there will be no risks that may disproportionately affect children.

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

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

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. 104–113, section 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 does not involve technical standards based on new methodologies. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

EPA is committed to addressing environmental justice concerns and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities, and that all people live in clean and sustainable communities. In response to Executive Order 12898 and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). Today's variance applies to a characteristically hazardous waste stream at the CWM Chemical Services, LLC facility in Model City, New York and at the Heritage Environmental Services LLC facility in Indianapolis, Indiana. The selenium waste will be disposed of in a RCRA Subtitle C landfill, after appropriate treatment, ensuring protection to human health and the environment. Therefore, the Agency does not believe that today's rule will result in any disproportionately negative impacts on minority or low-income communities relative to affluent or non-minority communities.

K. 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 the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) 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). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability, applying only to a specific waste type at two facilities under particular circumstances.

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 rule will be effective January 3, 2005.

List of Subjects in 40 CFR Part 268

Environmental Protection, Hazardous waste, Variance, Selenium.

Dated: November 10, 2004.

Thomas P. Dunne,

Assistant Administrator, Office of Solid Waste and Emergency Response.

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

PART 268—LAND DISPOSAL RESTRICTIONS

■ 1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

■ 2. Section 268.44, the table in paragraph (o) is amended by:

■ A. Revising the entry for ''Guardian Industries Corp.''

■ B. Adding footnote number 12.

The revisions and additions read as follows:

§ 268.44 Variance from a treatment standard.

* * * * *

(o) * * *

TABLE.—WASTES EXCLUDED FROM THE TREATMENT STANDARDS UNDER § 268.40

Facility name [1] and address	Waste code	See also	Regulated hazardous constituent	Wastewaters		Nonwaste waters	
				Concentration (mg/L)	Notes	Concentration (mg/kg)	Notes
*	*	*	*	*	*	*	
Guardian Industries Corp., Jefferson Hills, PA [6 11 12].	D010	Standards under 268.40.	Selenium	NA	NA	28 mg/L TCLP	NA
*	*	*	*	*	*	*	

[1] A facility may certify compliance with these treatment standards according to provisions in 40 CFR 268.7.

* * * * *

[6] Alternative D010 selenium standard only applies to electrostatic precipitator dust generated during glass manufacturing operations.

* * * * *

[11] D010 waste generated by this facility may be treated by Heritage Environmental Services, LLC. at their treatment facility in Indianapolis, Indiana.

[12] D010 waste generated by this facility may be treated by Chemical Waste Management, Chemical Services, LLC. at their treatment facility in Model City, New York.

Note: NA means Not Applicable.

[FR Doc. 04–25716 Filed 11–18–04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA 2004–19625]

RIN 2127–AH96

Federal Motor Vehicle Safety Standards—Motor Vehicle Brake Fluids

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule.

SUMMARY: This document amends our standard on brake fluids by removing the evaporation test and modifying the corrosion test. We are removing the evaporation test because we have concluded that it is unnecessary, given changes in brake system designs and in brake fluid formulations since the test was developed. We are modifying the corrosion test to improve test repeatability and reproducibility.

DATES: *Effective Date:* The effective date of this final rule is: November 21, 2005, except for the removal of S5.1.8, S6.8, S6.8.1, S6.8.2, S6.8.3, and S6.8.4 from § 571.116, which will be effective January 18, 2005. *Petitions for reconsideration:* Petitions for reconsideration of this final rule must be received not later than: January 3, 2005.

ADDRESSES: Petitions for reconsideration of this final rule must refer to the docket and notice number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

For legal issues: Ms. Dorothy Nakama, Office of the Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 (202–366–2992). Ms. Nakama's fax number is: (202) 366–3820.

For other issues: Mr. Sam Daniel, Office of Crash Avoidance Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 (202–366–4921). Mr. Daniel's fax number is: (202) 366–7002.

SUPPLEMENTARY INFORMATION:

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I. Proposed Rule

Federal Motor Vehicle Safety Standard (FMVSS) No. 116, *Motor Vehicle Brake Fluids,* specifies requirements for fluids for use in hydraulic brake systems of motor vehicles, containers for these fluids, and labeling of the containers. The purpose of the standard is to reduce failures in the hydraulic braking systems of motor vehicles that may occur because of the manufacture or use of improper or contaminated fluid.

On January 16, 2001, we published in the **Federal Register** (66 FR 3527) [1] a notice of proposed rulemaking (NPRM) to make technical modifications in two of the standard's tests, the evaporation test and the corrosion test. We believed the proposed modifications would improve repeatability and reproducibility [2] of the tests, and thus improve the enforceability of the standard. We also requested comments concerning the retention of the evaporation test.

A. Evaporation Test

FMVSS No. 116 specifies various performance requirements relating to evaporation that must be met when brake fluid is tested according to a specified procedure that involves heating the brake fluid in an oven for an extended period of time. Among other things, the loss by evaporation must not exceed 80 percent by weight. See S5.1.8 and S6.8 of the standard.

In the NPRM, we stated that for a number of years, we have been concerned that the evaporation test may allow too much variability in test results. Because of this, we sponsored a study titled ''Evaporation Test Variability Study,'' which was published in May 1993. The study sought to identify and evaluate parameters of the brake fluid evaporation test procedure of FMVSS No. 116 that influence the high variability of results between laboratories. It also sought to develop procedural improvements to increase the precision and reproducibility of brake fluid evaporation measurements. This included validating procedural modifications through conducting an interlaboratory round robin program using four designated brake fluids.

The study identified four means by which test result variability could be reduced: (1) Using a rotating shelf in the oven with a 6 rpm sample rotation, (2) specifying the location of the shelf supporting the sample within the oven, (3) controlling the oven temperature monitoring point, and (4) using oven calibration fluid for purposes of oven standardization. A copy of the study is available in the docket at NHTSA–2001–8633–2.

After we published the study, the Society of Automotive Engineers (SAE) committee on brake fluids initiated work to consider revising its evaporation test procedure to address these points. The SAE evaporation test procedure is set forth as part of Motor Vehicle Brake Fluid—SAE J1703 JAN95. The SAE committee developed a draft procedure that uses a rotating shelf oven, defines shelf placement, and includes temperature monitoring. The committee did not reach agreement on an oven calibration fluid because of concerns about lot variability.

[1] Docket No. NHTSA 00–8633.

[2] In order for a test to have good repeatability, there must not be undue variability in results when the same test is replicated at the same site. In order for a test to have good reproducibility, there must not be undue variability in results when the same test is replicated at different sites.