

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 268 and 271

[FRL-7390-7; Docket Number: RCRA-2002-0027]

RIN 2050-AE99

### Land Disposal Restrictions: National Treatment Variance To Designate New Treatment Subcategories for Radioactively Contaminated Cadmium-, Mercury-, and Silver-Containing Batteries

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to grant a national treatability variance from the Land Disposal Restrictions (LDR) treatment standards for radioactively contaminated cadmium-, mercury-, and silver-containing batteries by designating new treatment subcategories for these wastes in response to a rulemaking petition from the Department of Energy. The current treatment standards of thermal recovery for cadmium batteries and of roasting and retorting for mercury batteries are technically inappropriate, because any recovered metals would likely contain residual radioactive contamination and not be usable. The current numerical treatment standard for silver batteries is also inappropriate because of the potential increase in radiation exposure to workers associated with manually segregating silver-containing batteries for the purpose of treatment. Macroencapsulation in accordance with the provisions for treatment standards for hazardous debris is designated as the required treatment prior to land disposal for the new waste subcategories. This will allow safe disposal of these radioactively contaminated materials.

**DATES:** This rule is effective on November 21, 2002 without further notice, unless EPA receives adverse comment by November 6, 2002. 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:** Comments may be submitted electronically, by mail, or through hand/delivery/courier. You must send an original and two copies of the comments referencing Docket Number RCRA-2002-0027 to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460-0002. Follow

the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section I. D. below.

**FOR FURTHER INFORMATION CONTACT:** For general information, call the RCRA Call Center at 1-800-424-9346 or TDD 1-800-553-7672 (hearing impaired). Callers within the Washington Metropolitan Area must dial 703-412-9810 or TDD 703-412-3323 (hearing impaired). The RCRA Call Center is open Monday-Friday, 9 a.m. to 4 p.m., Eastern Standard Time. For more information on specific aspects of this direct final rule, contact Mr. John Austin at 703-308-0436, [austin.john@epa.gov](mailto:austin.john@epa.gov), or write him at the Office of Solid Waste, 5302W, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

#### SUPPLEMENTARY INFORMATION:

The contents of the preamble to this final are listed in the following outline:

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## I. General Information

### A. Regulated Entities

Entities potentially regulated by this action are those which generate, treat, and dispose radioactive batteries.

Regulated categories and entities include:

|                                 |  |
|---------------------------------|--|
| Category .....                  | Radioactively contaminated cadmium-, mercury-, and silver-containing batteries.              |
| Industry .....                  | Nuclear waste generators, and treatment and disposal facilities.                             |
| Examples of regulated entities. | Envirocare of Utah, Inc.; Nevada Test Site; and the Hanford Nuclear Reservation, Washington. |
| Federal Agencies .....          | Department of Energy.  |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### B. Direct Final Action

EPA is publishing this rule without a prior proposal because we view it as a noncontroversial action. We anticipate no adverse comment because of the limited nature of this action. Having said this, in the "Proposed Rules" section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to grant the designation of a new treatment subcategory if adverse comments are filed. This direct final rule will be effective on November 21, 2002 without further notice unless we receive adverse comment by November 6, 2002. If we receive significant adverse comment on this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating that this direct final rule action is being withdrawn due to adverse comment. We will then address all public comments, as appropriate. We will not institute a second comment period on this action. Any parties interested in commenting on this rulemaking must do so at this time.

### *C. How Can I Get Copies of This Document and Other Related Information?*

1. **Docket.** EPA has established an official public docket for this action under Docket ID No. RCRA-2002-0027. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460-0002. The EPA/DC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. To review file materials, we recommend that you make an appointment by calling (202) 566-0270. You may copy a maximum of 100 pages from any file maintained at the RCRA Docket at no charge. Additional copies cost \$0.15 per page.

2. **Electronic Access.** You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or 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. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket.

Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials at the EPA/DC.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

### *D. How and to Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. **Electronically.** If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs

further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. **EPA Dockets.** Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket/>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. RCRA-2002-0027. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. **E-mail.** Comments may be sent by electronic mail (e-mail) to [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov), Attention Docket ID No. RCRA-2002-0027. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. **Disk or CD ROM.** You may submit comments on a disk or CD ROM that you mail to the mailing address identified in the following section. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. **By Mail.** You must send an original and two copies of the comments referencing Docket Number RCRA-2002-0027 to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460-0002.

3. **By Hand Delivery or Courier.** Deliver your comments to: EPA Docket Center (EPA/DC), B102, EPA West, 1301 Constitution Ave. NW, Washington, DC 20460-0002, Attention Docket ID No. RCRA-2002-0027. Deliveries are only

accepted during the Docket's normal hours of operation 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

#### *E. How Should I Submit CBI to the Agency?*

Do not submit information electronically that you consider to be CBI through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention Docket ID No. RCRA-2002-0027. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

#### *F. What Should I Consider as I Prepare My Comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

## **II. Background**

### *What Is the Basis for LDR Treatment 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 *D.C. Circuit in Hazardous Waste Treatment Council vs. 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 (see 40 CFR 268.40) because an individual waste matrix or concentration can be substantially more difficult to treat than those wastes the Agency evaluated in establishing the treatment standard (51 FR 40576, November 7, 1986), or that it may be inappropriate to require the waste to be treated to the level specified or by the method specified, even though such treatment is technically possible. For such wastes, EPA has a process by which a generator or treater may seek a treatment variance (see 40 CFR 268.44). Treatment variances may be generic (under 40 CFR 268.44(a)) or site-specific (under 40 CFR 268.44(h)). A generic variance can result in the establishment of a new treatability group and a corresponding treatment standard that applies to all wastes that meet the criteria of the new waste treatability group (55 FR 22526, June 1, 1990). A site-specific variance applies only to a specific waste from a specific facility.

On June 13, 2002, the Department of Energy (DOE) petitioned EPA pursuant to 40 CFR 268.44 for a generic treatability variance for mercury-, cadmium-, and silver-containing batteries that are contaminated with radioactive materials. The petition is available in the docket for this rulemaking.

## **III. Why Are the Existing Standards Inappropriate?**

### *A. What Are the Wastes That Require a Treatment Variance?*

Batteries are used in a variety of ways across the DOE complex. For example, nickel-cadmium (NiCd) rechargeable batteries are commonly found in cellular and cordless telephones, 2-way radios, video cameras, portable power tools, laptop computers, and radiological monitoring equipment. Mercury-containing and silver-containing batteries have been widely used in watches, calculators, and cameras. When these batteries reach end of life, they are typically classified as radioactive waste if they were used in a radioactively contaminated area, unless through decontamination and/or radiological surveys they can be cleared for management as non-radiological waste. Sometimes because of cracks, fissures, holes or uneven surfaces in the battery casings, a reasonable confidence level that the batteries are free of radioactive contamination cannot be achieved. In other cases, radioactive contamination is found that cannot be easily removed. In either case, there will always be some batteries that are deemed to be radioactively contaminated.

Based on input from individual facilities, DOE estimates that 2,653 kg of radioactively contaminated waste cadmium-containing batteries, and 247 kg of radioactively contaminated waste mercury-containing batteries are in storage across the complex. No estimate is available for silver-containing batteries. Projected generation rates are 23 kg/yr for radioactively contaminated waste cadmium batteries and 4 kg/yr for radioactively contaminated waste mercury batteries.

The cadmium-containing waste batteries are almost all NiCd batteries, although other types of cadmium-containing waste batteries such as mercury-cadmium and silver-cadmium may be present as well. At a minimum, all of the cadmium-containing waste batteries exhibit the toxicity characteristic for cadmium and carry a D006 hazardous waste code.

Detail on the specific types of mercury-containing waste batteries present is limited, but it is assumed that this waste stream includes both mercury-zinc and mercury-cadmium batteries. At a minimum, these batteries exhibit the toxicity characteristic for mercury and carry a D009 hazardous waste code. Detail on specific types of silver-containing waste batteries is also limited. They may be silver-cadmium or of other composition. At a minimum,

these batteries exhibit the toxicity characteristic for silver and carry a D011 hazardous waste code.

While not representing a large volume of waste, radioactively contaminated cadmium-, mercury-, and silver-containing batteries, which must be managed as mixed waste (*i.e.*, RCRA hazardous and radioactive), present an ongoing waste disposal problem for several sites in the DOE complex. This situation has developed because the existing applicable LDR treatment standards are inappropriate, as explained below. Moreover, neither EPA nor DOE is aware of any commercial metals recovery facility that currently accepts radioactively contaminated cadmium-, or mercury-containing waste batteries for treatment.

#### *B. What Are the New Treatment Standards?*

Under existing land disposal restriction (LDR) treatment standards, cadmium-containing waste batteries are classified as D006 Cadmium Containing Batteries Subcategory waste. As such, they are subject to the specified technology of RTHRM (thermal recovery of metals). Most mercury-containing waste batteries are classified as D009 High Mercury-Inorganic Subcategory waste because they are inorganic, exhibit the toxicity characteristic for mercury (under 40 CFR 261.24(b)), and contain greater than 260 ppm total mercury. As such, they are subject to the specified technology of RMERC (roasting/retorting with recovery of mercury). In both cases, the objective of the specified technology is to volatilize the metals in a high temperature treatment unit and subsequently condense and collect them for reuse, while significantly reducing the concentration of metals in the waste residual. This approach is technically inappropriate for radioactively contaminated cadmium- and mercury-containing batteries, because the recovered metals would likely contain residual radioactive contamination. As a consequence, the recovered metals would have an extremely low probability for reuse.

For silver-containing batteries that are D011, the existing LDR treatment standards require treatment to meet numerical constituent concentration levels for silver and any underlying hazardous constituents. Meeting these standards could involve manually segregating the silver-containing batteries from commingled waste batteries before treatment, which could entail increased worker exposure to radiation and result in the generation of

larger volumes of radioactively contaminated waste for disposal.

As a result, we intend to grant a national treatment variance by designation of new treatment subcategories for these materials. We believe that the appropriate treatment standard is macroencapsulation in accordance with the design and operating standards of 40 CFR 268.45. Macroencapsulation of debris is defined at 40 CFR 268.45 Table 1 as:

Application of surface coating materials such as polymeric organics (*e.g.*, resins and plastics) or use of a jacket of inert inorganic materials to substantially reduce surface exposure to potential leaching media.

The design and operating standard requires that the encapsulating material must completely encapsulate the waste and be resistant to degradation by the debris and its contaminants and materials into which it may come into contact after placement (*e.g.*, leachate, other waste, or microbes).

Encapsulation technologies are applicable primarily to wastes containing hazardous metal constituents. Macroencapsulation is the required treatment for D008 radioactive lead solids subcategory wastes and K175 mercury-bearing wastes. Macroencapsulation is also an alternative treatment standard for hazardous debris. We believe that macroencapsulation is appropriate for these radioactively contaminated batteries, because it would require minimal worker handling and reduce the potential for leaching media to contact the batteries following disposal. Thus, macroencapsulation would minimize worker exposure to radioactivity and the potential for release, which we wish to encourage.

#### **IV. State Authority**

##### *A. Applicability of Rules in Authorized States*

Under section 3006 of RCRA, EPA may authorize a qualified State to administer and enforce a hazardous waste program within the State in lieu of the federal program, and to issue and enforce permits in the State. A State may receive authorization by following the approval process described under 40 CFR 271.21. See 40 CFR part 271 for the overall standards and requirements for authorization. EPA continues to have independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. An authorized State also continues to have independent authority to bring enforcement actions under State law.

After a State receives initial authorization, new Federal requirements promulgated under RCRA authority existing prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that State until the State adopts and receives authorization for equivalent State requirements. In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), new Federal requirements and prohibitions promulgated pursuant to HSWA provisions take effect in authorized States at the same time that they take effect in unauthorized States. As such, EPA carries out HSWA requirements and prohibitions in authorized States, including the issuance of new permits implementing those requirements, until EPA authorizes the State to do so.

Authorized States are required to modify their programs when EPA promulgates Federal requirements that are more stringent or broader in scope than existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program. See also § 271.1(i). Therefore, authorized States are not required to adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than existing Federal requirements.

##### *B. Effect on State Authorization*

The requirements of today's rule, in EPA's view, are neither more nor less stringent than current regulatory requirements.<sup>1</sup> Therefore, when promulgated, the Agency will add the rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA. Although States are only required to adopt requirements that are more stringent than the existing provisions, EPA strongly encourages States to adopt the provisions of today's rule.

#### **V. Regulatory Requirements**

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

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant

<sup>1</sup> Although today's rule is granted through the 40 CFR 268.44 variance process, the Agency has determined that the new standards are neither more nor less stringent than the current standards. This is because today's rule offers a different technical approach (macroencapsulation) over the current technical approaches of recovery and stabilization.

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.

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

*B. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et. seq.*

The 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, a small entity is defined as: (1) A small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (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 rule is not expected to result in a net cost to any affected entity. Thus, adverse impacts are not anticipated. Costs could increase for entities that are not complying with current requirements, but even these costs, which are not properly attributable to the current rulemaking, would not be expected to result in significant impacts on a substantial number of small entities.

After considering the economic impacts of today’s rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

*C. Paperwork Reduction Act*

This rule does not change in any way the paperwork requirements already applicable to radioactive cadmium-, mercury-, or silver-containing batteries. Therefore, it does not affect requirements under the Paperwork Reduction Act.

*D. Unfunded Mandates*

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 the proposed and final rules with “federal mandates” that may result in expenditures by state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year.

Before promulgating a 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, enable 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.

The Agency’s analysis of compliance with the Unfunded Mandates Reform Act (UMRA) of 1995 found that today’s rule imposes no enforceable duty on any

state, local or tribal government or the private sector. This 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. In addition, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Because we consider today’s rule to be neither more nor less stringent than the current regulations, state governments are not required to adopt the proposed changes. The UMRA generally excludes from the definition of “Federal intergovernmental mandate” duties that arise from participation in a voluntary federal program. The UMRA also excludes from the definition of “Federal private sector mandate” duties that arise from participation in a voluntary federal program. Therefore, we have determined that today’s rule is not subject to the requirements of sections 202 and 205 of UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This 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, because states are not required to adopt the provisions of this rule. 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 it does not preempt tribal law. Thus, Executive Order 13175 does not apply to this rule.

*G. Executive Order 13045: Children's Health*

"Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potential effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. When the subject wastes are treated and disposed in accordance with this regulation, the Agency believes that future risks to the human health and the environment will be minimized.

*H. Executive Order 13211: Energy Effects*

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Effect 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"), Public Law 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 rule does not establish new technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Executive Order 12898: Environmental Justice*

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994) is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. In response to Executive Order 12898, EPA's Office of Solid Waste and Emergency Response (OSWER) 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). Facilities that would be affected by today's rule include any facility generating hazardous radioactive cadmium, radioactive mercury, or radioactive silver batteries for treatment or disposal. 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, because today's rule will facilitate the removal of the subject hazardous wastes from current generation sites for treatment and controlled disposal to ensure protection of human health and the environment.

*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. 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). This rule will be effective 45 days following the publication.

**List of Subjects**

*40 CFR Part 268*

Environmental protection, Hazardous waste, Reporting and recordkeeping requirements.

*40 CFR Part 271*

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous material transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: September 30, 2002.

**Christine Todd Whitman,**  
*Administrator.*

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. In § 268.40, the Table, "Treatment Standards for Hazardous Wastes" is amended by adding entries to the end of entries D006, D009, and D011 to read as follows. The footnotes are republished without change.

**§ 268.40 Applicability of treatment standards.**

\* \* \* \* \*

## TREATMENT STANDARDS FOR HAZARDOUS WASTES

| Waste code        | Waste description and treatment/Regulatory subcategory <sup>1</sup>   | Regulated hazardous constituent |                      | Wastewaters: Concentration in mg/L, <sup>3</sup> or technology code <sup>4</sup> | Nonwastewaters: Concentration in mg/kg <sup>5</sup> unless noted as "mg/L TCLP", or technology code. <sup>4</sup> |
|-------------------|---|---------------------------------|----------------------|--|---|
|                   |   | Common name                     | CAS <sup>2</sup> No. |  |   |
| D006 <sup>9</sup> | Radioactively contaminated cadmium containing batteries. ( <b>Note:</b> This subcategory consists of nonwastewaters only) | Cadmium                         | 7440-43-9            | NA   | Macroencapsulation in accordance with 40 CFR 268.45.  |
| D009 <sup>9</sup> | Radioactively contaminated mercury containing batteries. ( <b>Note:</b> This subcategory consists of nonwastewaters only) | Mercury                         | 7439-97-6            | NA   | Macroencapsulation in accordance with 40 CFR 268.45.  |
| D011 <sup>9</sup> | Radioactively contaminated silver containing batteries. ( <b>Note:</b> This subcategory consists of nonwastewaters only)  | Silver                          | 7440-22-4            | NA   | Macroencapsulation in accordance with 40 CFR 268.45.  |

**Footnotes to Treatment Standard Table 268.40**

<sup>1</sup>The waste descriptions provided in this table do not replace waste descriptions in 40 CFR part 261. Descriptions of Treatment/Regulatory Subcategories are provided, as needed, to distinguish between applicability of different standards.

<sup>2</sup>CAS means Chemical Abstract Services. When the waste code and/or regulated constituents are described as a combination of a chemical with its salts and/or esters, the CAS number is given for the parent compound only.

<sup>3</sup>Concentration standards for wastewaters are expressed in mg/L and are based on analysis of composite samples.

<sup>4</sup>All treatment standards expressed as a Technology Code or combination of Technology Codes are explained in detail in 40 CFR 268.42 Table 1—Technology Codes and Descriptions of Technology-Based Standards.

<sup>5</sup>Except for Metals (EP or TCLP) and Cyanides (Total and Amenable) the nonwastewater treatment standards expressed as a concentration were established, in part, based upon incineration in units operated in accordance with the technical requirements of 40 CFR Part 264, Subpart O, or Part 265, Subpart O, or based upon combustion in fuel substitution units operating in accordance with applicable technical requirements. A facility may comply with these treatment standards according to provisions in 40 CFR 268.40(d). All concentration standards for nonwastewaters are based on analysis of grab samples.

<sup>9</sup>These wastes, when rendered nonhazardous and then subsequently injected in a Class I SDWA well, are not subject to treatment standards. (See § 148.1(d)).

**PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS**

3. The authority citation for part 271 continues to read as follows:

**Authority:** 42 U.S.C. 6905, 6912(a), and 6926.

4. Section 271.1(j) is amended by adding the following entries to Table 1 in chronological order by date of publication to read as follows.

**§ 271.1 Purpose and scope.**

\* \* \*

(j) \* \* \*

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

| Promulgation date | Title of regulation  | Federal Register reference                              | Effective date    |
|-------------------|--|---|-------------------|
| Sept. 30, 2002    | Land Disposal Restrictions: National Treatment Variance to Designate New Treatment Subcategories for Radioactively Contaminated Cadmium-, Mercury-, and Silver-Containing Batteries. | [Insert <b>Federal Register</b> citation page numbers]. | November 21, 2002 |
| * * *             | * * *  | * * *   | * * *             |

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