

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[OAR-2003-0147; FRL-7594-3]

RIN 2060-AJ87

National Emission Standard for Benzene Waste Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; amendments.

SUMMARY: On November 12, 2002, the EPA issued amendments to the national emission standard for benzene waste

operations as a direct final rule, along with a parallel proposal to be used as a basis for final action in the event we received any adverse comments. Because an adverse comment was received on provisions related to control devices, we withdrew the corresponding parts of the direct final rule on February 6, 2003. This action promulgates the provisions that were withdrawn based on the proposed rule published on November 12, 2002. This action also amends the rule to correct a cross-reference citation.

EFFECTIVE DATE: December 4, 2003.

ADDRESSES: The official public docket is available for public viewing at the EPA

Docket Center, EPA West, Room B-102, 1301 Constitution Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Robert B. Lucas, Waste and Chemical Process Group (C504-05), Emission Standards Division, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541-0884, facsimile number (919) 541-5600, electronic mail (e-mail) address, *lucas.bob@epa.gov*.

SUPPLEMENTARY INFORMATION

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAIC ¹	Examples of regulated entities
Industry	32512-325182 32411 331111 22121 562211 324110	Chemical manufacturing plants, petroleum refineries, coke by-product recovery plants, and commercial hazardous waste treatment, storage, and disposal facilities that manage waste generated by these industries.
Federal government	Not affected.
State/local/tribal government	Not affected.

¹ North American Industry Classification System

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by the final rule amendments. To determine whether your facility is regulated by the final rule amendments, you should examine the applicability criteria in 40 CFR 61.340 of the national emission standard for benzene waste operations. If you have any questions concerning applicability and rule determinations, contact the technical contact person in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Docket. The EPA has established an official public docket for this action including both Docket ID No. OAR-2003-0147 and Docket ID No. A-2001-23. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they have received all materials relevant to the final rule amendments. Although a part of the official docket, the public docket does not include Confidential Business Information or other information whose disclosure is restricted by statute. The official public docket is available for public viewing at the EPA Docket Center (Air Docket), EPA West, Room B-102, 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 Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

Electronic Docket Access. You may access the final rule amendments 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 view public comments, access the index listing 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. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's final rule amendments will also be available on the WWW through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the final rule amendments will be posted on

the TTN's policy and guidance page for newly proposed or promulgated rules at <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541-5384.

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the final rule amendments is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 2, 2004. Under section 307(d)(7)(B) of the CAA, only an objection to the final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final rule amendments may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

Outline. The information in this preamble is organized as follows:

- I. Background
- II. Response to Comment on Amendments to the National Emission Standard for Benzene Waste Operations
- III. Editorial Correction to the Amendments
- IV. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act

- C. Regulatory Flexibility Analysis
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer Advancement Act
- J. Congressional Review Act

I. Background

On March 7, 1990, we issued the national emission standard for benzene waste operations (40 CFR part 61, subpart FF). Subpart FF applies to equipment and processes at certain chemical manufacturing plants, coke by-product recovery plants, petroleum refineries, and facilities that treat, store, or dispose of waste generated by those facilities.

On November 12, 2002, we issued a direct final rule (67 FR 68528) and a parallel proposed rule (67 FR 68546) to amend the national emission standard for benzene waste operations. We stated in the preamble to the direct final rule and parallel proposal that if we received adverse comments by December 12, 2002 (or February 18, 2003, if a public hearing was requested), on one or more distinct provisions of the direct final rule, we would publish a timely notice in the **Federal Register** specifying which provisions will become effective and which provisions will be withdrawn due to adverse comment.

We subsequently received an adverse comment from one commenter on the provisions related to control devices in a new compliance option for tanks equipped with an enclosure.

Accordingly, we withdrew 40 CFR 61.343(e) introductory text and withdrew and reserved paragraph (e)(2) in § 61.343 (68 FR 6082, February 6, 2003). The remaining provisions, for which we did not receive any adverse comments, became effective on February 10, 2002. After full and careful consideration of the comment, we are promulgating the amendments previously withdrawn based on the parallel proposal published on November 12, 2002.

II. Response to Comment on Amendments to the National Emission Standard for Benzene Waste Operations

The direct final rule published on November 12, 2002, included amendments to 40 CFR 61.343 of the benzene waste final rule that add a new compliance option for tanks located

inside a permanent total enclosure. The new compliance option was adopted from similar standards established under the Resource Conservation and Recovery Act (RCRA) for hazardous waste treatment, storage, and disposal facilities (40 CFR parts 264 and 265, subparts CC). This change was first requested as an alternative emission limitation by a company subject to both the benzene waste final rule and the RCRA subparts CC rules. Under 40 CFR 264.1082(c)(5) and 265.1083(c)(5) of the RCRA rules, tanks are specifically exempted from the standards provided that, among other conditions, the tank is located inside an enclosure, and the enclosure is vented to a control device designed and operated in accordance with the requirements in the benzene waste national emission standard.

Prior to development of the direct final rule amendments and parallel proposal, we reviewed the information submitted by the company and determined that their control system (a tank located inside a permanent total enclosure with emissions vented through a closed vent system to an enclosed combustion device) provided a level of control of benzene equivalent to that required by the national emission standard for benzene waste operations. Based on this equivalency determination, we issued direct final rule amendments to the national emission standard by adding a new compliance option that allowed tanks to be located inside a permanent total enclosure that routes organic vapors to an "enclosed combustion control device." This is the most common type of control device used for tanks located inside a total enclosure.

The commenter objected to provisions that restricted applicable emission controls for the compliance option (*i.e.* the controls on the emissions from the tank in the enclosure) to an "enclosed combustion control device." He correctly pointed out that the national emission standard allows a wide range of control devices to be used to comply with the requirements. In fact, a "control device" is defined in 40 CFR 61.341 of the rule to mean an enclosed combustion device (vapor incinerator, boiler, or process heater); a vapor recovery system (carbon canister or condenser); or flare.

The commenter also stated that the amendments were inconsistent with the spirit of 40 CFR 264.1082(c)(5) and 265.1083(c)(5) of the RCRA rules, in that they would lead to situations where the RCRA rules would continue to apply but were not, in fact, intended to be applicable any longer. The anomalous situation put forward by the commenter

would be where a tank is located inside an enclosure, and the enclosure is vented to a vapor recovery system designed and operated in accordance with the requirements in the benzene waste national emission standard. The commenter stated that their tanks meet all the requirements for the exemption from the RCRA rules. In this case, however, the control device applied to the emissions from the permanent total enclosure is not an enclosed combustion control device. Consequently, the facility would not qualify for the RCRA exemption, an unintended outcome.

It was not our intention to restrict the new compliance option for tanks to enclosed combustion control devices. Any of the control devices allowed under the benzene waste national emission standard can be used under the new compliance option provided it meets the control device performance standards in 40 CFR 61.349 of subpart FF. The benzene waste national emission standard also contains procedures and requirements for requesting approval of a control device other than an enclosed combustion system, vapor recovery system, or flare.

We agree with the issue raised by the commenter and are issuing final amendments to the new compliance option, based on the parallel proposal, that refer simply to the use of a "control device." This change allows a tank meeting all of the conditions for exemption under 40 CFR 264.1082(c)(5) and 265.1083(c)(5) of the RCRA rules to comply with the new compliance option using a "control device" as defined in 40 CFR 61.341 of the benzene waste national emission standard (meaning an enclosed combustion device, vapor recovery system, or flare). This change is effective immediately. No risk, environmental, energy, cost, or economic impacts are associated with this action.

III. Editorial Correction to the Amendments

Since publication of the direct final rule amendments and parallel proposal, we identified one cross-reference error. As proposed, paragraph (a)(3)(iii) of 40 CFR 61.345 allowed the use of safety devices on any container, enclosure, closed-vent system, or control device used to comply with the requirements of "paragraph (e)(1) of this section," which does not exist. We have corrected this citation in today's final rule amendments by referencing the control requirements in 40 CFR 61.345(a)(3)(i).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether the regulatory action is “significant” and, therefore, subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines a “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or 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 the final rule amendments are not a “significant regulatory action” under the terms of Executive Order 12866 and are, therefore, not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden because the only facility with a total enclosure is already conducting annual verifications and keeping the prescribed records. However, the OMB has previously approved the information collection requirements in the existing national emission standard (40 CFR part 61, subpart FF) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0183.

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 purpose of collecting, validating, and verifying information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel 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 Analysis

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the final rule amendments. For the purposes of assessing the impact of today’s final rule amendments on small entities, small entity is defined as: (1) A small business according to the Small Business Administration (SBA) size standards by NAICS code ranging from 500 to 1,500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s final rule amendments on small entities, EPA has concluded that this action will not impose a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives “which minimize any significant economic impact of the proposed rule on small entities.” (See 5 U.S.C. 603 and 604.) Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic impact on all of the small entities subject to the rule. These final rule amendments will not create any new costs for affected firms. In fact, the final rule amendments will relieve the regulatory burden for all facilities, large or small, by broadening the types of control devices that can be used to meet the requirements in RCRA rules for exemption from standards for tanks. This will decrease compliance costs for a few facilities subject to both the RCRA and CAA rules. We have, therefore, concluded that today’s final rule amendments will relieve regulatory burden for all small entities that are

subject to both the RCRA and CAA standards for tanks located inside a permanent total enclosure.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the 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 by State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires the 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 the 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 the 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 final rule amendments contain no Federal mandate (under the regulatory provisions of the UMRA) for State, local, or tribal governments. The EPA has determined that the final rule amendments do not contain a Federal mandate that may result in expenditures for State, local, or tribal governments, in the aggregate, or to the private sector of \$100 million or more in any 1 year. No costs are attributable to the final rule amendments. Thus, the final rule amendments are not subject to the requirements of sections 202 and 205 of the UMRA. The EPA has also

determined that the final rule amendments contain no regulatory requirements that might significantly or uniquely affect small governments. Thus, the final rule amendments are not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 (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.”

These final rule amendments do not have federalism implications. They 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. None of the affected facilities are owned or operated by State governments. Thus, Executive Order 13132 does not apply to the final rule amendments.

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

Executive Order 13175 (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” These final rule amendments do not have tribal implications, as specified in Executive Order 13175. They will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. No tribal governments own facilities subject to the benzene waste national emission standard. Thus, Executive Order 13175 does not apply to the final rule amendments.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that:

(1) Is determined to be “economically significant,” as defined under 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 EPA 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 EPA.

The EPA interprets Executive Order 13045 as applying only to regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The national emission standard for benzene waste operations is based on protection of the public health with an ample margin of safety. However, the amendments to the benzene waste national emission standard have no effect on the level of emissions from benzene waste operations or associated risk and are not subject to Executive Order 13045.

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

The final rule amendments are not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because they are not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113; 15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., material specifications, test methods, sampling and analytical procedures, business practices, etc.) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when EPA does not use available and applicable VCS.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. 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. The EPA has submitted a report containing the final rule amendments 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 final rule amendments in today’s **Federal Register**. The final rule amendments are not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 61

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

Dated: November 25, 2003.

Michael O. Leavitt,
Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 61 of the Code of Federal Regulations is amended as follows:

PART 61—[AMENDED]

■ 1. The authority citation for part 61 continues to read as follows:

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

Subpart FF—[AMENDED]

■ 2. Section 61.343 is amended by:
■ a. Revising paragraph (a)(2);
■ b. Adding paragraph (e) introductory text; and
■ c. Adding paragraph (e)(2).

The revisions and additions read as follows:

§ 61.343 Standards: Tanks.

(a) * * *

(2) The owner or operator must install, operate, and maintain an enclosure and closed-vent system that routes all organic vapors vented from the tank, located inside the enclosure, to a control device in accordance with the requirements specified in paragraph (e) of this section.

* * * * *

(e) Each owner or operator who controls air pollutant emissions by using an enclosure vented through a closed-vent system to a control device must meet the requirements specified in paragraphs (e)(1) through (4) of this section.

(1) * * *

(2) The enclosure must be vented through a closed-vent system to a control device that is designed and operated in accordance with the standards for control devices specified in § 61.349.

* * * * *

■ 3. Section 61.345 is amended by revising paragraph (a)(3)(iii) to read as follows:

§ 61.345 Standards: Containers.

(a) * * *

(3) * * *

(iii) Safety devices, as defined in this subpart, may be installed and operated

as necessary on any container, enclosure, closed-vent system, or control device used to comply with the requirements of paragraph (a)(3)(i) of this section.

* * * * *

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