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Part V

Environmental Protection Agency

40 CFR Part 247

**Comprehensive Guideline for
Procurement of Products Containing
Recovered Materials; Recovered Materials
Advisory Notice III; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 247

[SWH-FRL-6524-2]

RIN 2050-AE23

Comprehensive Guideline for Procurement of Products Containing Recovered Materials

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency today is amending the May 1, 1995 Comprehensive Procurement Guideline (CPG). EPA is designating 18 new items that are or can be made with recovered materials. These items are carpet cushion; flowable fill; railroad grade crossing surfaces; park benches and picnic tables; playground equipment; food waste compost; plastic lumber landscaping timbers and posts; solid plastic binders; plastic clipboards; plastic file folders; plastic clip portfolios; plastic presentation folders; sorbents (i.e., absorbents and adsorbents); industrial drums; awards and plaques; mats; signage; and manual-grade strapping.

The CPG implements section 6002 of the Resource Conservation and Recovery Act (RCRA) and section 502 of Executive Order 13101, which require EPA to designate items that are or can be made with recovered materials and to recommend practices that procuring agencies can use to procure designated items. Once EPA designates an item, any procuring agency that uses appropriated Federal funds to procure that item must purchase the item containing the highest percentage of recovered materials practicable. Today's action will use government purchasing power to stimulate the use of these materials in the manufacture of new products, thereby, fostering markets for materials recovered from solid waste.

RCRA section 6002 provides certain limited exceptions to the general requirement to buy EPA-designated items. Under certain circumstances based on competition, price, availability, and performance, RCRA section 6002 does not require that procuring agencies purchase an item designated by EPA. In the May 1, 1995 CPG, EPA codified the RCRA section 6002 procurement requirements for the convenience of procuring agencies so they could find all of the RCRA section 6002 procurement provisions, as well as EPA's item designations, in one

location. You can find these requirements at 40 CFR Part 247.

EFFECTIVE DATE: This final rule is effective on January 19, 2001.

ADDRESSES: The public docket for this document is Docket F-1999-CP3F-FFFFF. Documents related to today's notice are available for viewing in the RCRA Information Center (RIC), which is located at U.S. Environmental Protection Agency, Crystal Gateway One, 1235 Jefferson Davis Highway, Ground Floor, Arlington, VA 22202. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, except for Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling (703) 603-9230. Copies cost \$0.15/page. The index and some supporting materials are available electronically. See Section IX of the "Supplementary Information" section below for information on accessing the documents electronically.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline 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 technical information on individual item designations, contact Terry Grist at (703) 308-7257.

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I. What Is the Statutory Authority for This Amendment?

EPA ("the Agency") is promulgating this amendment to the Comprehensive Procurement Guideline under the authority of sections 2002(a) and 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6912(a) and 6962. The Agency is also promulgating this amendment under section 502 of Executive Order (E.O.) 13101, "Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition," (63 FR 49643, September 14, 1998).

II. Who Is Affected by This Amendment?

This action may potentially affect procuring agencies that purchase the following items: carpet cushion; flowable fill; railroad grade crossing surfaces; park benches and picnic tables; playground equipment; food waste compost; plastic lumber landscaping timbers and posts; solid plastic binders; plastic clipboards; plastic file folders; plastic clip portfolios; plastic presentation folders; sorbents (i.e., absorbents and adsorbents); awards and plaques; industrial drums; mats; signage; and manual-grade strapping. Under RCRA section 6002, procuring agencies include the following: (1) Any Federal agency; (2) any State or local agency using appropriated Federal funds for a procurement; or (3) any contractors of these agencies who are procuring these items for work they perform under the contract. See RCRA section 1004(17). The requirements of section 6002 apply to these procuring agencies only when the agencies procure designated items whose price exceeds \$10,000 or when the quantity of the item purchased in the previous year exceeded \$10,000. A list of entities that this rule may cover is provided in Table 1.

TABLE 1.—ENTITIES POTENTIALLY SUBJECT TO SECTION 6002 REQUIREMENTS TRIGGERED BY CPG AMENDMENTS

Category	Examples of regulated entities
Federal Government	Federal departments or agencies that procure \$10,000 or more of a designated item in a given year.
State Government	A State agency that uses appropriated Federal funds to procure \$10,000 or more of a designated item in a given year.
Local Government	A local agency that uses appropriated Federal funds to procure \$10,000 or more of a designated item in a given year.
Contractor	A contractor working on a project funded by appropriated Federal funds that purchases \$10,000 or more of a designated item in a given year.

This table is not intended to be exhaustive. To determine whether this action applies to your procurement practices, you should carefully examine the applicability criteria in 40 CFR § 247.12. If you have questions about whether this action applies to a particular entity, contact Terry Grist at (703) 308-7257.

RCRA section 6002 applies to procuring agencies that use at least a portion of Federal funds to procure over \$10,000 worth of a designated product in a given year. EPA estimates that this rule would apply to 35 Federal agencies, all 56 states and territories and 1,900 local governments. EPA calculated the number of local governments that would be impacted by this rule based on information on the amount of Federal funds that are dispersed to specific counties. In addition, EPA assumed that 1,000 contractors may be affected. A description of this information is provided in the Economic Impact Analysis for today's rule.

III. Why Is EPA Taking This Action?

Section 6002(e) of RCRA requires EPA to designate items that are or can be made with recovered materials and to recommend practices to help procuring agencies meet their obligations for procuring items designated under RCRA section 6002. RCRA requires that when a procuring agency purchase an EPA-designated item, the agency must purchase that item made of the highest percentage of recovered materials practicable.

E.O. 13101 establishes the procedures EPA must follow when implementing RCRA section 6002(e). Section 502 of the Executive Order directs EPA to issue a Comprehensive Procurement Guideline (CPG) that designates items that are or can be made with recovered materials. At the same time EPA promulgates the CPG, the Agency must publish its recommended procurement practices for entities that purchase designated items in a related Recovered Materials Advisory Notice (RMAN). These practices must also provide recommendations for the content of

recovered materials in the designated items. The Executive Order also directs EPA to update the CPG every two years and to issue RMANs periodically to reflect changing market conditions.

The original CPG (CPG I) was published on May 1, 1995 (60 FR 21370). It established eight product categories, designated 19 new items, and consolidated five earlier item designations. At the same time, EPA published the first RMAN (RMAN I) (60 FR 21386). On November 13, 1997, EPA published CPG II (62 FR 60962), which designated an additional 12 items. At the same time, EPA published a RMAN II (62 FR 60975). Paper Products RMANs were issued on May 29, 1996 (61 FR 26985) and June 8, 1998 (63 FR 31214).

On August 26, 1998, EPA proposed to designate 19 additional items (CPG III) and published draft recommendations that provided recommendations for entities to use when purchasing items that contain recovered materials (RMAN III). See 63 FR 45558-45578 and 63 FR 45580-45589, respectively. Today, EPA is designating 18 of the items proposed in CPG III. In CPG III, EPA proposed designating nylon carpet with backing containing recovered materials, but the Agency is not designating this item, at this time for the reasons explained below. The 18 newly designated items are listed below by product category.

Construction Products

- Carpet cushion
- Flowable fill
- Railroad grade crossing surfaces

Park and Recreation Products

- Park benches and picnic tables
- Playground equipment

Landscaping Products

- Food waste compost
- Plastic lumber landscaping timbers and posts

Non-Paper Office Products

- Solid plastic binders
- Plastic clipboards
- Plastic file folders
- Plastic clip portfolios
- Plastic presentation folders

Miscellaneous

- Sorbents
- Industrial drums
- Awards and plaques
- Mats
- Signage, including sign supports and posts
- Manual-grade strapping

IV. What Criteria Did EPA Use To Select Items for Designation?

RCRA section 6002(e) requires EPA to consider the following when determining which items it will designate:

- (1) Availability of the item;
- (2) Potential impact of the procurement of the item by procuring agencies on the solid waste stream;
- (3) Economic and technological feasibility of producing the item; and
- (4) Other uses for the recovered materials used to produce the item.

The Agency also considers other factors in its selection criteria. EPA consulted with Federal procurement and requirements officials to identify other criteria to consider when selecting items for designation. Based on these discussions, the Agency concluded that the limitations set forth in RCRA section 6002(c) should also be factored into its selection decisions. This provision requires that each procuring agency that procures an item that EPA has designated procure the item that contains the highest percentage of recovered materials practicable, while maintaining a satisfactory level of competition. A procuring agency, however, may decide not to procure an EPA-designated item containing recovered materials if the procuring agency determines: (1) The item is not available within a reasonable period of time; (2) the item fails to meet the performance standards that the procuring agency has set forth in the product specifications; or (3) the item is available only at an unreasonable price.

EPA recognized that these criteria could provide procuring agencies with a rationale for not purchasing EPA-designated items that contain recovered materials. For this reason, EPA considers the limitations cited in RCRA section 6002(c) when it selects items to

designate in the CPG. Therefore, in CPG I, the Agency outlined the following criteria that it uses when it selects items for designation:

- Use of materials found in solid waste,
- Economic and technological feasibility and performance,
- Impact of government procurement,
- Availability and competition, and
- Other uses for recovered materials.

EPA discussed these criteria in the CPG I background documents and repeated that discussion, for reader convenience, in Section II of the document entitled, "Proposed Comprehensive Procurement Guideline (CPG) III and Draft Recovered Materials Advisory Notice (RMAN) III—Supporting Analyses." The RCRA public docket for the proposed CPG III rule, docket F-1998-CP3P-FFFFF contains this document.

In CPG I, EPA stated that it had adopted two approaches for designating items that are made with recovered materials. For some items, such as floor tiles, the Agency designated *broad* categories and provided information in the RMAN about the appropriate applications or uses for the items. For other items, such as plastic trash bags, EPA designated *specific* items, and, in some instances, specified the types of recovered materials or applications to which the designation applies. The Agency explained the approaches that it took to designate items in the preamble to CPG I (60 FR 21373, May 1, 1995), and repeats them here for the convenience of the reader:

EPA sometimes had information on the availability of a particular item made with a specific recovered material (e.g., plastic), but no information on the availability of the item made from a different recovered material or any indication that it is possible to make the item with a different recovered material. In these instances, EPA concluded that it was appropriate to include the specific material in the item designation in order to provide vital information to procuring agencies as they seek to fulfill their obligations to purchase designated items composed of the highest percentage of recovered materials practicable. This information enables the agencies to focus their efforts on products that are currently available for purchase, reducing their administrative burden. EPA also included information in the proposed CPG, as well as in the draft RMAN that accompanied the proposed CPG, that advised procuring agencies that EPA is not recommending the purchase of an item made from one particular material over a similar item made from another material. For example, EPA included the following statement in the preamble discussion for plastic desktop accessories (59 FR 18879, April 20, 1994): "This designation does not preclude a procuring agency from purchasing desktop accessories manufactured from

another material, such as wood. It simply requires that a procuring agency, when purchasing plastic desktop accessories, purchase these accessories made with recovered materials * * *"

The Agency understands that some procuring agencies may believe that designating a broad category of items in the CPG requires that they (1) procure all items included in such category with recovered materials content and (2) establish an affirmative procurement program for the entire category of items, even when specific items within the category do not meet the procuring agency's performance standards. RCRA clearly does not require such actions, as implemented through the CPG and the RMAN. RCRA section 6002 does not require a procuring agency to purchase items that contain recovered materials if the items are not available or if they do not meet a procuring agency's specifications or reasonable performance standards for the contemplated use. Further, section 6002 does not require a procuring agency to purchase such items if the item that contains recovered material is only available at an unreasonable price, or if purchasing such item does not maintain a reasonable level of competition. However, EPA stresses that, the procuring agency should seek to purchase the product made with highest percentage of recovered materials practicable if that product meets the procuring agency's performance requirements and all other factors are equal.

The items designated today have all been evaluated against EPA's criteria. The Agency discusses these evaluations in the "Background Document for the Final Comprehensive Procurement Guideline (CPG) III and Final Recovered Materials Advisory Notice (RMAN) III" (hereafter referred to as the "Background Document for the Final CPG III/RMAN III"), which the Agency has placed in the docket for the final CPG III and RMAN III. You can also access the document electronically. (See Section IX below for Internet access directions.)

V. What Are the Definitions of Terms Used in Today's Action?

Today, in 40 CFR 247.3, EPA is defining the following new item-specific terms: carpet cushion; flowable fill; railroad grade crossing surfaces; park benches and picnic tables; playground equipment; food waste compost; plastic lumber landscaping timbers and posts; solid plastic binders; plastic clipboards; plastic file folders; plastic clip portfolios; plastic presentation folders; sorbents; industrial drums; awards and

plaques; mats; signage; and manual-grade strapping. These definitions are based on industry definitions, such as the American Society for Testing and Materials (ASTM) or other industry standards, or describe the scope of items that the Agency is designating.

For several items that the Agency is designating today, EPA recommends in the final RMAN III that procuring agencies use two different measures of the content of recovered materials: (1) A component of postconsumer recovered materials and (2) a component of total recovered materials. In these instances, EPA found that manufacturers were using both types of materials to manufacture the products. If the Agency recommended only postconsumer content levels, it would fail to meet the RCRA mandate to maximize the use of recovered materials, because the Agency would fail to acknowledge the contribution that manufacturers using other manufacturers' byproducts as feedstock have made to solid waste management.

Because the recommendations for the items that the Agency is designating today use the terms "postconsumer materials" and "recovered materials," we repeat the definitions for these terms in this notice. The Agency provided these definitions in CPG I, and they are also provided at 40 CFR 247.3.

Postconsumer materials means a material or finished product that has served its intended end use and has been diverted or recovered from waste destined for disposal, having completed its life as a consumer item. *Postconsumer material* is part of the broader category of recovered materials.

Recovered materials means waste materials and byproducts which have been recovered or diverted from solid waste, but the term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

VI. What Did Commenters Say About the Proposed CPG III and Draft RMAN III?

Forty commenters responded to the proposed CPG III and the draft RMAN III. These commenters represented various interests, including but not limited to Federal agencies, State agencies, local governments, product manufacturers, trade associations and product users.

In this section, EPA discusses the major comments that commenters provided on the proposed CPG III. The most significant comments received on the draft RMAN III are discussed in the preamble to the notice of availability of the final RMAN III, which is published in the notices section of today's **Federal Register**. You can find a summary of all

comments and EPA's responses in the "Background Document for the Final CPG III/RMAN III."

A. General Comments

1. Recordkeeping and Reporting

Comment: The U.S. Department of Energy (DOE) stated that it supports efforts to conserve resources by procuring products containing recovered materials. DOE stated that it has aggressively instituted an affirmative procurement program (APP) throughout the Department. DOE expressed its concern, however, that as the number of designated items increases, administrative costs of the program will become increasingly burdensome. DOE believes that as the reporting and data collection requirements continue to grow with additional designations, it is likely that the good will and positive environmental message of E.O. 13101 will be misplaced. DOE suggested that EPA seek to revise the Federal Acquisition Regulation (FAR) to channel federal purchasing toward products with recycled content. This way, federal agencies could report progress in implementing the FAR language, as opposed to attempting to capture every purchase made by the federal government.

Response: EPA has stated on many occasions that implementation of RCRA section 6002 must be consistent with other federal procurement law. For example, in Appendix II to the "Background Document for Proposed Comprehensive Procurement Guideline (CPG) III and Draft Recovered Materials Advisory Notice (RMAN) III," April 1998, EPA stated the following:

The purchase of recycled products under RCRA section 6002 must be consistent with other Federal procurement law, which requires that contracts be awarded to the lowest priced, responsive, responsible bidder * * *.

On August 22, 1997, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) issued a final rule amending the Federal Acquisition Regulation (FAR) parts 1, 10, 11, 13, 15, 23, 36, 42, and 52 to reflect the government's preference for the acquisition of environmentally-sound and energy-efficient products and services and to establish an affirmative procurement program favoring items containing the maximum practicable content of recovered materials. (See 62 FR 44809, August 22, 1997.)

On September 23, 1999, the CAAC and DARC proposed amendments to the FAR to clarify language relating to implementation of Executive Order 13101. The proposed rule (64 FR 51656, September 23, 1999) also reorganizes

various sections of the FAR to make environmental procurement policies easier to find and implement. Procuring agencies should consult the FAR for guidance on acquisitions issues.

In addition, the Office of the Federal Environmental Executive has established a Reporting Workgroup and associated subcommittees to examine issues on recordkeeping and reporting. Topics of discussion have included the potential for using automated systems and electronic commerce, vendor reporting, as well as other alternatives. It is the intent of these efforts that, through the use of interagency workgroups, reporting and recordkeeping requirements can be effectively and efficiently implemented. Presumably, if these workgroups determine that additional FAR changes are warranted, these changes could be proposed through the process and procedures already established for amending the FAR.

2. Designation of Materials

Comment: The Steel Recycling Institute (SRI) and the Steel Manufacturers Association submitted separate comments in support of EPA's proposed designation of items containing recovered steel (i.e., railroad grade crossing surfaces, park benches and picnic tables, playground equipment, industrial drums, signage, and strapping). SRI also urged EPA to recognize (i.e., designate) steel in general for its high recyclability and guaranteed recycled content. The American Iron and Steel Institute and the American Zinc Association also submitted comments endorsing the comments provided by SRI.

SRI provided updated information for use in the "Summary of Benefits" section of this notice, stating that its latest study shows that for every ton of steel recycled, 1,400 pounds of coal and 120 pounds of limestone are saved, versus 1,000 pounds of coal and 40 pounds of limestone stated in EPA's notice (63 FR 45575).

SRI also submitted comments on the recycled content of steel products. A summary of these comments and the Agency's response is discussed in RMAN III which is published in the notices section of today's **Federal Register**.

Response: EPA agrees that steel, like many metals, is both recyclable and can contain recovered materials. EPA also agrees that steel, like many metals, is a waste management success story in terms of its recyclability, high recycling rate, and recovered materials content. EPA also applauds the steel industry's source reduction efforts to produce

stronger, lighter weight steel, in response to customer demand. RCRA, however, specifically requires EPA to designate items that are or can be made with recovered materials, not the component materials used in those items. Accordingly, EPA designates items that are manufactured with steel, not the material itself.

EPA has used the new data provided by SRI for coal and limestone savings resulting from the use of recovered steel in manufacturing. This information has been incorporated in all applicable documents supporting the final CPG/RMAN III.

B. Comments on Proposed Item Designations

A vast majority of commenters supported the item designations proposed in CPG III with minor comments. This section discusses the major comments submitted on specific items proposed for designation in the proposed CPG III. EPA has included a summary of all comments on the proposed CPG III and our responses in the "Background Document for the Final CPG III/RMAN III." EPA received significant comments on four items: carpet backing, flowable fill, railroad grade crossings, and sorbents. These comments are discussed below. Based on the item-specific comments received, we are promulgating all of the items proposed with the exception of nylon carpet with backing containing recovered materials.

1. Nylon Carpet With Backing Containing Recovered Materials

Comments: EPA received six comments in opposition to the proposed designation of nylon carpet with backing containing recovered materials. These commenters all stated that there is only one manufacturer currently making nylon carpet backing with recovered materials content. They indicated that the manufacturer uses a patented process and, therefore, a designation is premature and does not meet the statutory requirements for adequate competition when designating items.

Response: EPA proposed to designate nylon carpet with backing containing recovered materials based on the fact that at the time of the proposal, one manufacturer was producing carpet tiles with backing containing recovered materials commercially and, as the Agency stated in the background document, two other manufacturers were piloting production runs with recovered materials content and were expected to enter the marketplace. As a result of this comment, EPA conducted

additional research and found that, since the proposal, significant developments have occurred in the carpet industry with respect to the use of recovered materials in nylon carpet backing and the fiber facing. As an example, one company is currently making "renewed" carpet tiles. The company takes old carpet and makes renewed carpet tiles through a series of process steps which include supercleaning, retexturing of fibers, and adding colors and patterns. In addition, many companies have begun or are expected to begin manufacturing nylon carpet tiles with recovered materials in the fiber facing. Since significant developments have occurred with respect to the use of recovered materials in the nylon carpet industry, the Agency believes additional research should be conducted before a final designation for nylon carpet or nylon carpet backing is issued to ensure these developments are given proper consideration. Therefore, the Agency is not designating this item at this time, but will consider designating nylon carpet products when proposing the next procurement guideline (CPG IV).

Although the Agency is not designating this item at this time, procuring agencies may choose to procure any item containing recovered materials, regardless of whether the item is specifically designated by EPA. Procurement of items containing recovered materials, whether or not they are designated by EPA, is consistent with RCRA section 6002 and E.O. 13101.

2. Flowable Fill

EPA received 18 sets of comments on its proposal to designate flowable fill containing coal fly ash and ferrous foundry sands. While all commenters supported the proposed designation for flowable fill containing coal fly ash, some commenters raised issues on the proposed designation of flowable fill containing ferrous foundry sands. The following discussions summarize these concerns and other issues raised by the commenters and also provides the Agency's response.

Comment: The FIRST Project (Foundry Industry Recycling Starts Today), which is an industry consortium, supported EPA's designation of flowable fill containing foundry sand, with a few comments. The FIRST Project took issue with EPA's statement that nonferrous foundry sands are typically hazardous waste due to their lead and cadmium content (63 FR 45563). The FIRST Project maintains that spent sand from the vast majority of nonferrous foundries is not

hazardous, nor does it contain lead and cadmium. The FIRST Project provided analytical data from nonferrous foundry sand samples to support their position. According to the FIRST Project, due to changes in alloy chemistries of many nonferrous foundry operations over the past decade, spent sands meet EPA and state definitions of nonhazardous waste. The FIRST Project requested that EPA correct the statement about nonferrous sands being hazardous waste. They also suggested that EPA list the American Foundrymen's Society as another resource for obtaining information on the use of spent foundry sand in flowable fill.

Response: EPA based its statement regarding the hazardousness of nonferrous foundry sands on industry data provided to the Agency in 1995 as part of the Phase IV Land Disposal Restrictions (LDR) rulemaking (60 FR 43654, August 22, 1995). These data indicated that the sands from 98% of bronze and brass (B&B) foundries and 40% of bronze and brass and aluminum (B&B&A) foundries were characteristically hazardous for metals.

The commenter's analytical data do not support their claim that a majority of nonferrous foundry sands are nonhazardous because in numerous cases, improper test methods were used. First, for 8 of 12 aluminum green sand waste samples, the digestion of the sample uses SW-846 Method 3010A or Method 3020A (both normally used for water) instead of Methods 3050 and 3051 (both used for solids). (The other 4 aluminum green sand samples did use Method 3051.) These digestion methods are weaker and would extract less of whatever metals are present in the waste matrix. In addition, virtually all of the commenter's leachate extraction data on spent sand waste samples were done using either the Synthetic Precipitation Leaching Procedure (SPLP) SW-846 Method 1312 (which relies on nitric/sulphuric acid as the extractant or deionized water) rather than the Toxicity Characteristic Leachate Procedure (TCLP) SW-846 Method 1311 which the Agency uses to determine toxicity for purposes of assessing hazardousness under 40 CFR 261.24. Therefore, the commenter's leachate extraction data are not appropriate for determining whether the samples tested are characteristically hazardous.

The Agency agrees with the commenter, however, that the statement in the proposed CPG III was too general and may have implied a conclusive determination about the regulatory nature of nonferrous foundry sands. This clearly was not the intent of the statement. Therefore, the Agency has

removed any characterization of nonferrous foundry sands as hazardous in the final CPG III and all supporting documents.

The Agency agrees with the commenter that the American Foundrymen's Society should be identified as a resource for obtaining information regarding the use of spent foundry sand in flowable fill and EPA will ensure this reference is made in all documents supporting the final CPG III/RMAN III where appropriate.

Comment: The FIRST Project commented that applications for the use of flowable fill should be broadened to include structural fill for foundation subbases, subfootings, floor lab bases, and pipe beddings.

Response: EPA's designation in the CPG and recommendations in the RMAN do not preclude procuring agencies from using flowable fill in the applications suggested by the commenter. If flowable fill meets the requisite specifications and performance standards for a particular application, then flowable fill can be considered for use by a procuring agency. The specifications and test methods identified in the RMAN are provided to help procuring agencies in their procurement efforts. If a procuring Agency wants to include other applications for flowable fill in their affirmative procurement program (APP), it can exercise its discretion in doing so without being restricted to the applications recommended by EPA in the RMAN. EPA is required to revise the RMAN recommendations periodically and will consider the applications suggested by the commenter in future revisions. However, any recommendations made by EPA, will be subject to notice and public comment. EPA requests that commenters provide any pertinent information on the suggested applications, including references to any industry specifications and test methods appropriate for the various applications. We will consider all information received on this matter when we update the RMAN recommendations.

Comment: The Federal Highway Administration (FHWA) submitted comments stating its concern that, based on one of its user guidelines, there might be a problem with foundry sand stockpile water being contaminated with phenols and, that if this is the case, there would be a discrepancy between this and the CPG statement that ferrous foundry sands are not known to be a hazardous waste. They provided no information or analytical data to substantiate their statement. FHWA requested that this issue be addressed

since they could not support this designation if it placed an undue burden on state departments of transportation to monitor each site or if it requires mitigation by contractors.

Response: EPA is aware that phenols may be present in some ferrous foundry sands. According to a 1989 study sponsored by the American Foundrymen's Society and conducted by the University of Wisconsin, phenols were present in some ferrous foundry sands well below regulatory levels, so the Agency does not believe there is reason for concern. In addition, the designation of flowable fill containing ferrous foundry sands in the CPG does not exempt these sands from regulatory control if phenols, or any other regulated contaminants, are present at levels of regulatory concern. EPA's designation does not change the regulatory management obligations for the recovered material nor does it in any way suggest that the materials are relieved from waste management regulations. The determination as to whether the sands contain contaminants at regulatory levels should be made in accordance with all applicable federal and state regulations and, thus, no additional burden would be placed on any entity to monitor stockpiles as a result of a final designation for this item in the CPG. All actions relating to determining the regulatory status of these sands would be performed by generators or those manufacturing flowable fill, not by those using a commercial product.

Comment: The Illinois Department of Transportation (IDOT) submitted comments in opposition to the use of ferrous foundry sands in flowable fill since, according to IDOT, these sands are normally contaminated with oil. They did not provide any information or data to substantiate this claim. IDOT believes the use of coal fly ash in flowable fill is logical because it has an acceptable track record. IDOT stated that little research has been done on ferrous foundry sand and that its use has been minimal.

EPA contacted the commenter to ascertain the basis for their comment and was told that since the comment was submitted, IDOT has learned that "oil contamination is not always present."

Response: As stated previously, EPA's designation does not change the regulatory management obligations for treatment or management of the recovered material nor does it exempt the materials from existing waste management regulations. The determination as to whether the ferrous foundry sands contain contaminants at

regulatory levels should be made in accordance with applicable federal and state regulations before the material is used to make a commercial product.

Comment: American Electric Power (AEP) submitted comments supporting the proposed designation of flowable fill containing ferrous foundry sand and also stated that EPA should note in the CPG and RMAN, that a variety of flowable fills have been successfully developed without the use of cement as an ingredient. AEP referred to flowable fills that use materials such as Class C fly ashes that have a high calcium content, making them appropriate for use in lieu of cement. AEP also stated that these flowable fill mixes, which sometimes utilize other recycled materials such as Class F fly ash and bottom ash as filler, have been approved for use in several states. AEP provided copies of some state specifications.

Response: Information presented in the CPG and RMAN pertains to those items that have been or are being designated by EPA. The designation of items under RCRA section 6002 and E.O. 13101 requires notice and comment before final designations are promulgated. Because EPA did not propose to designate flowable fill containing other materials such as Class C fly ashes, has not reviewed sufficient information on these materials, and did not solicit public comments, no reference or recommendations for these items are appropriate at this time. However, procuring agencies may choose to procure any item containing recovered materials, regardless of whether the item is specifically designated by EPA. Procurement of items containing recovered materials, whether or not they are designated by EPA, is consistent with RCRA section 6002 and E.O. 13101. EPA will consider designating additional flowable fills containing other recovered materials in future amendments to the CPG.

3. Railroad Grade Crossing Surfaces

Comment: The Illinois Department of Transportation (IDOT) submitted comments opposing the designation and recovered materials content recommendations for railroad grade crossing surfaces because crossing designs are usually job-specific, and IDOT believes this designation would inhibit innovation. In addition, IDOT believes it would be very costly to verify the total recovered materials content.

Response: EPA disagrees that designating railroad grade crossing surfaces and providing recommendations on recovered materials content ranges would inhibit innovation. As stated in Table C-11A of

RMAN III, "EPA's recommendations do not preclude a procuring agency from purchasing another type of railroad grade crossing surface * * *. They simply require procuring agencies, when purchasing concrete, rubber, or steel grade crossing surfaces, purchase these items made with recovered materials when these items meet applicable specifications and performance requirements." Therefore, job-specific requirements and specifications should be factored into the procuring agency's decision whether to use products containing recovered materials. If railroad grade crossings made with recovered materials do not meet legitimate job-specific requirements, the procuring agency is not required to use the designated items with recovered materials.

EPA disagrees with the commenter's claim that it might be costly to verify recovered materials content in designated items. RCRA section 6002(i) requires that an agency's affirmative procurement program (APP) "contain a program for requiring vendors to estimate, certify, and reasonably verify the recovered materials content of their products." This provision is not meant to burden either of the contracting parties. At the federal level, there are standard provisions for all contracts in the Federal Acquisition Regulations (FAR) that can be used to certify that the products contracted for are delivered. Standard clauses presumably exist for contracts issued by state agencies as well. These standard provisions can be used to certify recovered materials content levels with no extraneous costs to either party.

4. Sorbents

Comment: Synthetic Industries (SI) produces sorbents made of polypropylene (PP) that are used to clean up solvent and oil spills. SI is opposed to the designation of sorbents containing postconsumer recovered PP because, according to SI, such products are technologically infeasible. In addition, SI believes PP sorbents should not be designated for performance-related reasons, citing doubts about the ability of manufacturers to produce a highly sensitive PP product from postconsumer material. SI also stated that it is not feasible to make sorbents with postconsumer PP since it is difficult to obtain a consistent, non-contaminated source of postconsumer PP material. SI stated that if the sorbent's chemical content is not known, it could react with a spilled chemical, create a further hazard, or not work properly.

Response: EPA did not propose to designate sorbents with postconsumer PP, only those with total recovered plastics. EPA's research identified three companies currently making these products. The Agency agrees with the commenter that not all sorbent materials are right for all clean-ups. The Agency stated this position in both its background document and the proposed CPG III FR notice (63 FR 45569, August 26, 1998). The Agency wrote, "The type of sorbents used for spill applications generally depends on the type of substance being sorbed, where the spill occurs, and worker health and safety issues." The Agency provided a lengthy discussion of the importance of choosing sorbents for particular applications both in the FR notice and background document. The Agency notes that these factors should be considered regardless of whether the sorbent is made from recovered or virgin materials. In the RMAN, published in the notices section of today's **Federal Register**, EPA recommends that procuring agencies use industry standard specifications for solvent performance when determining the sorbents to be used in particular applications.

Comment: The Brookhaven National Laboratory commented on the performance of recovered-content sorbents. The commenter believes that EPA should tell potential users of sorbents that sorbent capacity is an important factor in sorbent selection for oil and solvent spills, and that lower sorbent capacities compromise performance and will result in greater waste volumes and higher disposal costs.

Response: EPA believes that both virgin and recovered material content sorbents can provide similar performance in oil and solvent spill situations as long as the appropriate type of sorbent is chosen (based on a variety of factors including sorbent capacity) for the type of substance being sorbed and for the location of the spill. Whenever an inappropriate sorbent is used, either virgin or recovered content, the possibility exists for dangerous reactions, environmental damage, or increased sorbent use and recovery or disposal. EPA notes that used sorbent material does not necessarily end in disposal. Under certain conditions, some sorbent materials can be reused or recycled. Synthetic sorbents, for example, release sorbed substances under pressure, and inorganic sorbents can be recovered and used again through a laundering process. Several federal agencies are successfully using recovered content sorbents to deal with

oil and solvent spills. The National Park Service, for example, uses a product made from recovered polypropylene, for heavy or viscous oils. The U.S. Army Corps of Engineers at Dworshak Dam in Idaho, uses a product made from 100 percent recovered wood waste, for emergency spill responses.

C. Comments on Other Items Considered for Designation

In the proposed CPG III notice, the Agency stated that we had considered two items (recycled ink and shotgun shells) and determined that it was inappropriate to designate these items (63 FR 45574). We requested additional information demonstrating whether these items should be reconsidered for possible future designation. No comments were submitted on these items or on our decision not to designate these items. EPA has received letters from a recycled ink manufacturer, separate from the **Federal Register** notice request for comments, stating that ink be reconsidered for designation. However, no additional information has been submitted by this company despite repeated requests by the Agency.

For the above reasons, EPA is no longer conducting research relative to these items or considering them for designation in a future CPG. However, we will review any information submitted in support of designating these items in the future to determine whether these items should be reconsidered.

VII. Where Can Agencies Get Information on the Availability of EPA-Designated Items?

EPA has developed lists of manufacturers and vendors of the items designated in today's rule. In addition, EPA has updated the lists of manufacturers and vendors of the 36 items previously designated in the CPG. These lists have been placed in the RCRA docket for this action and will be updated periodically as new sources are identified and product information changes. These lists will also be available through EPA's web site on the Internet. (See section IX below for Internet access information.) Procuring agencies should contact the manufacturers/vendors directly to discuss their specific needs and to obtain detailed information on the availability and price of recycled products meeting their needs.

Other information is available from the GSA, the Defense Logistics Agency (DLA), State and local recycling offices, private corporations, and trade associations. Refer to Section XIV of the

document, "Background Document for the Final CPG III/RMAN III" for more information on these other sources of information.

State and local recycling programs are also a potential source of information on local distributors and the availability of designated items. In addition, state and local government purchasing officials that are contracting for recycled content products may have relative price information. A current list of state purchasing/procurement officials has been placed in the docket for the final CPG III. The public docket also includes a list of states with recycled content products purchasing programs, current as of October 1998. Information is also available from trade associations whose members manufacture or distribute products containing recovered materials. These trade associations are included in the updated lists of product manufacturers and vendors described above.

Additionally, Environmental Newsletters, Inc., publisher of *Waste Reduction Tips*, prepared a directory of recycled product directories. EPA has placed the "1996 Directory of Recycled Product Directories," from Environmental Newsletters' *Recycled Products Business Letter*, in the public docket for the final CPG III. Environmental Newsletters, Inc. can be reached at 703 758-8436 for further information.

VIII. Administrative Assessments

A. Executive Order 12866: Regulatory Planning and Review

Executive Order 12866 requires agencies to determine whether a regulatory action is "significant." The 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 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; 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.

EPA estimates that the costs associated with today's rule is well below the \$100 million threshold. EPA

has prepared an Economic Impact Analysis (EIA) to evaluate the potential impact of today's action. The results of the EIA are discussed below. More information on the estimated economic impact of today's rule is included in the "Economic Impact Analysis for the Final Comprehensive Procurement Guideline III." A copy of this document is in the public docket.

1. Summary of Costs

EPA estimated that the annualized costs of the proposed rule to designate 19 items would fall in the range of \$6.5 to \$13 million. Even though today's final rule designates 18 items, rather

than 19 items, the costs associated with this rule are estimated to be slightly higher than the estimates in the proposal. This is due to the fact that the Agency revised the economic impact analysis to reflect 1999 labor rates which are higher than those in 1998 when the rule was proposed.

As shown in Table 2 below, EPA estimates that the annualized costs of today's rule will range from \$7.6 to \$14.8 million, with costs being spread across all procuring agencies (i.e., Federal agencies, State and local agencies that use appropriated Federal funds to procure designated items, and government contractors). These costs are

annualized over a 10-year period at a three percent discount rate. Because there is considerable uncertainty regarding several of the parameters that influence the costs, EPA conducted sensitivity analyses to identify the range of potential costs of today's rule. Thus, high-end and low-end estimates are presented along with the best estimate. The primary parameter affecting the range of cost estimates is the number of products each procuring agency is assumed to procure each year. Details of the costs associated with today's final rule are provided in the Economic Impact Analysis for this rule.

TABLE 2.—SUMMARY OF ANNUALIZED COSTS OF CPG III AMENDMENTS TO ALL PROCURING AGENCIES

Procuring agency	Total annualized costs (\$1000)	Best Estimate Total annualized costs (\$1000)
Federal agencies	\$9,254–\$4,627	\$9,254
States	1,680–840	\$1,680
Local Governments	3,787–2,066	2,927
Contractors	123–61	92
Total	14,844–7,594	13,953

As a result of today's rule, procuring agencies will be required to take certain actions pursuant to RCRA section 6002, including rule review and implementation; estimation, certification, and verification of designated item procurement; and for Federal agencies, reporting and recordkeeping. The costs shown in Table 2 represent the estimated annualized costs associated with these activities. Table 2 also includes estimates for Federal agencies that will incur costs for specification revisions and affirmative procurement program modification. More details of the costs associated with today's rule are included in the Economic Impact Analysis.

There may be both positive and negative impacts to individual businesses, including small businesses. EPA anticipates that today's final rule will provide additional opportunities for recycling businesses to begin supplying recovered materials to manufacturers and products made from recovered materials to procuring agencies. In addition, other businesses, including small businesses, that do not directly contract with procuring agencies may be affected positively by the increased demand for recovered materials. These include businesses involved in materials recovery programs and materials recycling. Municipalities that run recycling programs are also expected to benefit from increased

demand for certain materials collected in recycling programs.

EPA is unable to determine the number of businesses, including small businesses, that may be adversely impacted by today's final rule. If a business currently supplies products to a procuring agency and those products are made only out of virgin materials, the amendments to the CPG may reduce that company's ability to compete for future contracts. However, the amendments to the CPG will not affect existing purchase orders, nor will it preclude businesses from adapting their product lines to meet new specifications or solicitation requirements for products containing recovered materials. Thus, many businesses, including small businesses, that market to procuring agencies have the option to adapt their product lines to meet specifications.

2. Product Cost

Another potential cost of today's action is the possible price differential between an item made with recovered materials and an equivalent item manufactured using virgin materials. The relative prices of recycled content products compared to prices of comparable virgin products vary. In many cases, recycled content products are less expensive than similar virgin products. In other cases, virgin products have lower prices than recycled content products. Many factors can affect the price of various products. For example, temporary fluctuations in the overall

economy can create oversupplies of virgin products, leading to a decrease in prices for these items. Under RCRA section 6002(c), procuring agencies are not required to purchase a product containing recovered materials if it is only available at an unreasonable price. However, the decision to pay more or less for such a product is left up to the procuring agency.

3. Summary of Benefits

EPA anticipates that today's final rule will result in increased opportunities for recycling and waste prevention. Waste prevention can reduce the nation's reliance on natural resources by reducing the amount of materials used in making products. Using less raw materials results in a commensurate reduction in energy use and a reduction in the generation and release of air and water pollutants associated with manufacturing. Additionally, waste prevention leads to a reduction in the environmental impacts of mining, harvesting, and other extraction processes.

Recycling can effect the more efficient use of natural resources. For many products, the use of recovered materials in manufacturing can result in significantly lower energy and material input costs than when virgin raw materials are used; reduce the generation and release of air and water pollutants often associated with manufacturing; and reduce the environmental impacts of mining,

harvesting, and other extraction of natural resources. For example, according to information published by the Steel Recycling Institute, recycling one ton of steel saves nearly 11 million Btus of energy; 2,500 lbs. of ore; 1,400 lbs. of coal; and 120 lbs. of limestone. Recycling can also reduce greenhouse gas emissions associated with manufacturing new products. When compared to landfilling, recycling one ton of high density polyethylene, low density polyethylene, or polyethylene terephthalate plastic can reduce greenhouse gas emissions by up to 0.64 metric tons of carbon equivalent (MTCE). In addition to conserving non-renewable resources and reducing the environmental impacts associated with resource extraction and processing, recycling can also divert large amounts of materials from landfills, conserving increasingly valuable space for the management of materials that truly require disposal.

By purchasing products made from recovered materials, government agencies can increase opportunities for all of these benefits. On a national and regional level, today's final rule can result in expanding and strengthening markets for materials diverted or recovered through public and private collection programs. Also, since many State and local governments, as well as private companies, reference EPA guidelines when purchasing designated items, this rule can result in increased purchase of recycled products, locally, regionally, and nationally and provide opportunities for businesses involved in recycling activities.

B. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act, provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, after being required by that section or any other law to public a general notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis (FRFA). The agency must prepare an FRFA for a final rule unless the head of the agency certifies that it will not have a significant economic impact on a substantial number of small entities. EPA is today certifying, pursuant to section 605(b) of the RFA, that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, the Agency did not prepare an FRFA.

The final rule will not have a significant economic impact on a

substantial number of small entities for the following reasons. The RFA defines "small entity" to mean a small business, small organization or small governmental jurisdiction. EPA's action today in designating 18 new items that are or may be produced with recovered materials content may establish requirements applicable, in some cases, to small governmental jurisdictions and small businesses.

In the case of small entities which are small governmental jurisdictions, EPA has concluded that the rule will not have a significant economic impact. EPA concluded that no small government with a population of less than 50,000 is likely to incur costs associated with the designation of the 18 items because it is improbable that such jurisdictions will purchase more than \$10,000 of any designated item. Consequently, section 6002 would not apply to their purchases of designated items. Moreover, there is no evidence that complying with the requirements of section 6002 would impose significant additional costs on the small governmental entity to comply in the event that a small governmental jurisdiction purchased more than \$10,000 worth of a designated item. This is the case because in many instances items with recovered materials content may be less expensive than items produced from virgin material.

Similarly, EPA has concluded that the economic impact on small entities that are small businesses would not be significant. The CPG applies to small businesses that are "procuring agencies." The potential economic impact of the CPG on small businesses that are "procuring agencies" is minimal.

RCRA section 6002 applies to a contractor with a Federal agency (or a state or local agency that is a procuring agency under Section 6002) when the contractor is purchasing a designated item, is using Federal money to do so, and exceeds the \$10,000 threshold. There is an exception for purchases that are "incidental to" the purposes of the contract, i.e., not the direct result of the funds disbursement. For example, a courier service contractor is not required to purchase re-refined oil and retread tires for its fleets because purchases of these items are incidental to the purpose of the contract. Therefore, as a practical matter, there would be very limited circumstances when a contractor's status as a "procuring agency" for section 6002 purposes would impose additional costs on the contractor. Thus, for example, if the State or Federal agency is

contracting with a supplier to obtain a designated item, then the cost of the designated item (and any associated costs of meeting section 6002 requirements) to the supplier presumably will be fully recovered in the contract price. Any costs to small businesses that are "procuring agencies" (and subject to section 6002) are likely to be insubstantial. Even if a small business is required to purchase other items with recovered materials content, such items may be less expensive than items with virgin content.

For these reasons, EPA certifies that today's designations will not have a significant economic impact on a substantial number of small entities. Because today's action does not impose significant new burdens on small entities, this rule does not require a final regulatory flexibility analysis.

The basis for EPA's conclusions that today's rule will not have a significant impact on a substantial number of small entities is described in greater detail in the "Economic Impact Analysis" for the rule which is located in the RCRA public docket.

While not a factor relevant to determining whether the rule will have a significant impact for RFA purposes, EPA believes that the effect of today's rule would be to provide positive opportunities to businesses engaged in recycling and the manufacture of recycled products. Purchase and use of recycled products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies. Technological innovation associated with the use of recovered materials can translate into economic growth and increased industry competitiveness worldwide, thereby, creating opportunities for small entities.

C. Unfunded Mandates Reform Act of 1995 and Consultation With State, Local, and Tribal Governments

Under section 202 of the Unfunded Mandates Reform Act of 1995 (the Act), Public Law 104-4, which was signed into law on March 22, 1995, EPA generally must prepare a written statement for rules with Federal mandates that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is required for EPA rules, under section 205 of the Act EPA must identify and consider alternatives, including the least costly, most cost-effective or least burdensome alternative that achieves

the objectives of the rule. EPA must select that alternative, unless the Administrator explains in the final rule why it was not selected or it is inconsistent with law. Before EPA establishes regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must develop under section 203 of the Act a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

EPA has determined that today's final rule does not include a Federal mandate that may result in estimated annualized costs of \$100 million or more to either State or local governments in the aggregate, or to the private sector. To the extent enforceable duties arise as a result of this rule on State and local governments, they are exempt from inclusion as Federal inter-governmental mandates if such duties are conditions of Federal assistance. Even if they are not conditions of Federal assistance, such enforceable duties do not result in a significant regulatory action being imposed upon State and local governments since the estimated aggregate cost of compliance for them are not expected to exceed, at the maximum, \$4.6 million annually. The cost of enforceable duties which may arise as a result of today's rule on the private sector are estimated not to exceed \$92,000 annually. Thus, today's rule is not subject to the written statement requirement in sections 202 and 205 of the Act.

The newly designated items included in the CPG may give rise to additional obligations under section 6002(i) (requiring procuring agencies to adopt affirmative procurement program and to amend their specifications) for state and local governments. As noted above, the expense associated with any additional costs is not expected to exceed, at the maximum, \$4.6 million annually. In compliance with E.O. 12875, which requires the involvement of State and local governments in the development of certain Federal regulatory actions, EPA conducts a wide outreach effort and actively seeks the input of representatives of state and local governments in the process of developing its guidelines.

When EPA proposes to designate items in the CPG, information about the proposal is distributed to governmental

organizations so that they can inform their members about the proposals and solicit their comments. These organizations include the U.S. Conference of Mayors, the National Association of Counties, the National Association of Towns and Townships, the National Association of State Purchasing Officials, and the American Association of State Highway and Transportation Officials. EPA also provides information to potentially affected entities through relevant recycling, solid waste, environmental, and industry publications. In addition, EPA's regional offices sponsor and participate in regional and state meetings at which information about proposed and final designations of items in the CPG is presented. Finally, EPA has sponsored buy-recycled education and outreach activities by organizations such as the U.S. Conference of Mayors, the Northeast Recycling Council, the Environmental Defense Fund, Keep America Beautiful, and the California Local Government Commission, whose target audience includes small governmental entities.

The requirements do not significantly affect small governments because they are subject to the same requirements as other entities whose duties result from today's rule. As discussed above, the expense associated with any additional costs to State and local governments, is not expected to exceed, at the maximum, \$4.6 million annually. The requirements do not uniquely affect small governments because they have the same ability to purchase these designated items as other entities whose duties result from today's rule. Additionally, use of designated items affects small governments in the same manner as other such entities. Thus, any applicable requirements of section 203 have been satisfied.

D. 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."

Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes

substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

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. The rule will not impose substantial costs on States and localities. As a result of today's action, procuring agencies will be required to perform certain activities pursuant to RCRA section 6002, including rule review and implementation; estimation, certification, and verification of designated item procurement; and for Federal agencies, reporting and record keeping. As noted above, EPA estimates that the total annualized costs of today's rule will range from \$7.6 to \$14.8 million. EPA's estimate reflects the costs of the rule for all procuring agencies (i.e., Federal agencies, State and local agencies that use appropriated Federal funds to procure designated items, and government contractors), not just States and localities. Thus, the costs to States and localities alone will be even lower and not substantial. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

E. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the

rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's Rule does not significantly or uniquely affect the communities of Indian tribal governments. The rule does not impose any mandate on tribal governments or impose any duties on these entities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

F. Executive Order 13045: Protection of Children from Environmental Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that EPA determines is (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 potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets the E.O. 13045 as encompassing only those regulatory actions that are risk based or health based, such that the analysis required under section 5-501 of the E.O. has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not involve decisions regarding environmental health or safety risks.

G. 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, business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not establish technical standards. Therefore, the Agency has not conducted a search to identify potentially applicable test methods from voluntary consensus standard bodies. As part of this rulemaking effort, EPA has developed guidance for procuring agencies to use in complying with section 6002's obligation to purchase items with recovered materials content to the maximum extent practicable. These recommendations include minimum recovered materials content standards and, as previously noted, are published today in the companion RMAN for the designated items. In developing these recommendations, EPA did consider current voluntary consensus standards on recovered materials content.

H. Submission to Congress and the General Accounting Office

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 January 19, 2000.

IX. Supporting Information and Accessing Internet

The index of supporting materials for today's final CPG III is available in the RCRA Information Center (RIC) and on the Internet. The address and telephone number of the RIC are provided in **ADDRESSES** above. The index and the following supporting materials are available in the RIC and on the Internet:

"Background Document for the Final CPG III/RMAN III," U.S. EPA, Office of Solid Waste and Emergency Response, September 1999.

Copies of the following supporting materials are available for viewing at the RIC only:

"Economic Impact Analysis for the Final Comprehensive Procurement Guideline III," U.S. Environmental Protection Agency, July 14, 1999.

"Telephone Notes, Nylon Carpet With Backing Containing Recovered Materials, Between Lynne Gilbert, Eastern Research Group and Dave Whitley, Interface Carpet, January, 22, 1999."

"E-mail message, Nylon Carpet With Backing Containing Recovered Materials, Between Lynne Gilbert, Eastern Research Group and Dobbin Callahan, Collins & Aikman, January 26, 1999."

"Telephone Notes and Facsimile Message, Nylon Carpet With Backing Containing Recovered Materials, Between Birgette Junior, Eastern Research Group and Pamela Marple, Brand, Lowell, and Ryan, June 24, 1999."

"National Association of State Purchasing Officials, 1998/1999 Membership Roster."

"List of States with Recycled Content Product Purchasing Programs."

To access information on the Internet go to www.epa.gov/cpg.

List of Subjects in 40 CFR Part 247

Environmental protection, Government procurement, Recycling.

Dated: January 10, 2000.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations, part 247, is amended as set forth below.

PART 247—COMPREHENSIVE PROCUREMENT GUIDELINE FOR PRODUCTS CONTAINING RECOVERED MATERIALS

1. The authority citation for part 247 is revised to read as follows:

Authority: 42 U.S.C. 6912(a) and 6962; E.O. 13101, 63 FR 49643, 3 CFR, 1998 Comp., p. 210.

2. In § 247.3, the following definitions are added alphabetically:

§ 247.3 Definitions.

* * * * *

Awards and plaques refers to free-standing statues and boardlike products generally used as wall-hangings.

* * * * *

Carpet cushion, also known as carpet underlay, is padding placed beneath carpet to reduce carpet wear caused by foot traffic or furniture indentation,

enhance comfort, and prolong appearance.

* * * * *

Compost made from yard trimmings, leaves, grass clippings, and/or food wastes is a thermophilic converted product with high humus content. Compost can be used as a soil amendment and can also be used to prevent or remediate pollutants in soil, air, and storm water run-off.

* * * * *

Flowable fill is a low strength material that is mixed to a wet, flowable slurry and used as an economical fill or backfill material in place of concrete, compacted soils, or sand.

* * * * *

Industrial drums are cylindrical containers used for shipping and storing liquid or solid materials.

* * * * *

Manual-grade strapping refers to straps of material used with transport packaging to hold products in place on pallets or in other methods of commercial, bulk shipment. Strapping can also prevent tampering and pilferage during shipping.

Mats are temporary or semipermanent protective floor coverings used for numerous applications, including home and office carpet protection, car and truck floor board protection, traction on slippery surfaces, cushion from floor hardness, and reduction of injury risk during athletic events.

* * * * *

Park benches and picnic tables are recreational furniture found in parks, outdoor recreational facilities, and the grounds of office buildings and other facilities.

* * * * *

Plastic lumber landscaping timbers and posts are used to enhance the appearance of and control erosion in parks, highways, housing developments, urban plazas, zoos, and the exteriors of office buildings, military facilities, schools, and other public use areas.

Playground equipment includes many components, like slides, merry-go-rounds, hand rails, etc., and is found in parks, schools, child care facilities,

institutions, multiple family dwellings, restaurants, resort and recreational developments, and other public use areas.

* * * * *

Railroad grade crossing surfaces are materials placed between railroad tracks, and between the track and the road at highway and street railroad crossings, to enhance automobile and pedestrian safety.

* * * * *

Signage (including sign posts and supports) is used for identification and directional purposes for public roads and highways, and inside and outside office buildings, museums, parks, and other public places.

* * * * *

Sorbents (i.e., absorbents and adsorbents) are materials used to retain liquids and gases in a diverse number of environmental, industrial, agricultural, medical, and scientific applications. Absorbents incorporate a substance while adsorbents gather substances on their surfaces.

* * * * *

3. In § 247.12, add paragraphs (h), (i), and (j) to read as follows:

§ 247.12 Construction products.

* * * * *

(h) Carpet cushion made from bonded polyurethane, jute, synthetic fibers, or rubber containing recovered materials.

(i) Flowable fill containing coal fly ash and/or ferrous foundry sands.

(j) Railroad grade crossing surfaces containing coal fly ash, recovered rubber, or recovered steel.

4. In § 247.14, add paragraphs (c) and (d) to read as follows:

§ 247.14 Park and recreation products.

* * * * *

(c) Park benches and picnic tables containing recovered steel, aluminum, plastic, or concrete.

(d) Playground equipment containing recovered plastic, steel, or aluminum.

5. In § 247.15, revise paragraph (b) and add paragraph (e) to read as follows:

§ 247.15 Landscaping products.

* * * * *

(b) Compost made from yard trimmings, leaves, grass clippings, and/or food waste for use in landscaping, seeding of grass or other plants on roadsides and embankments, as a nutritious mulch under trees and shrubs, and in erosion control and soil reclamation.

* * * * *

(e) Plastic lumber landscaping timbers and posts containing recovered materials.

6. In § 247.16, revise paragraph (d) and add paragraphs (h) through (k) to read as follows:

§ 247.16 Non-paper office products.

* * * * *

(d) Plastic-covered binders containing recovered plastic; chipboard and pressboard binders containing recovered paper; and solid plastic binders containing recovered plastic.

* * * * *

(h) Plastic clipboards containing recovered plastic.

(i) Plastic file folders containing recovered plastic.

(j) Plastic clip portfolios containing recovered plastic.

(k) Plastic presentation folders containing recovered plastic.

7. In § 247.17, add paragraphs (b) through (g) to read as follows:

§ 247.17 Miscellaneous products.

* * * * *

(b) Sorbents containing recovered materials for use in oil and solvent clean-ups and as animal bedding.

(c) Industrial drums containing recovered steel, plastic, or paper.

(d) Awards and plaques containing recovered glass, wood, paper, or plastic.

(e) Mats containing recovered rubber and/or plastic.

(f)(1) Non-road signs containing recovered plastic or aluminum and road signs containing recovered aluminum.

(2) Sign supports and posts containing recovered plastic or steel.

(g) Manual-grade strapping containing recovered steel or plastic.

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