

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 268**

[EPA # -530-Z-96-P33F-FFFF; FRL-5857-7]

**Land Disposal Restrictions Phase III—Emergency Extension of the K088 National Capacity Variance****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** Under the Land Disposal Restrictions (LDR) program of the Resource Conservation and Recovery Act (RCRA), EPA is extending the current national capacity variance for spent potliners from primary aluminum production (Hazardous Waste Number K088) for three (3) months. Thus, K088 wastes may be land disposed without being treated to meet LDR treatment standards until October 8, 1997, three months from the current treatment standard effective date of July 8, 1997. EPA is taking this action because it now appears that sufficient treatment capacity exists which is capable of achieving the treatment standards promulgated by EPA on March 8, 1996, the process provides substantial treatment of spent potliners and minimizes the threats posed by land disposal of these wastes, and the treatment and disposal capacity provided for the waste will be protective of human health and the environment because it will occur at subtitle C units. EPA is extending the national capacity variance for a further three months in order to provide time for generators to make contractual and other logistical arrangements relating to utilization of the treatment capacity.

**DATES:** This rule is effective July 7, 1997.

**ADDRESSES:** Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA. The Docket Identification Number is F-96-P33F-FFFF. The RCRA Docket is open from 9:00 a.m. to 4:00 p.m. Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials by calling (703) 603-9230. The public may copy a maximum of 100 pages from any regulatory document at no cost. Additional copies cost \$0.15 per page.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the RCRA Hotline at (800) 424-9346 (toll-free) or

TDD (800) 553-7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412-9810 or TDD (703) 412-3323. For specific information, contact the Waste Treatment Branch (5302W), Office of Solid Waste (OSW), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460; phone (703) 308-8434. For information on the capacity analyses, call Pan Lee or Bill Kline at (703) 308-8440. For information on the regulatory impact analyses, contact Paul Borst at (703) 308-0481. For other questions, call John Austin at (703) 308-0436 or Mary Cunningham at (703) 308-8453.

**SUPPLEMENTARY INFORMATION:****Availability of rule on Internet**

This Federal Register notice is available on the Internet System through the EPA Public Web Page at: <http://www.epa.gov/EPA-WASTE/>. For the text of the notice, choose: Year/Month/Day.

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**I. Background**

Land disposal of hazardous wastes without prior treatment is largely prohibited by law. RCRA sections 3004(d), (e) and (g). The prohibition on land disposal is normally to take effect immediately on promulgation, but may be extended if EPA finds that adequate alternative treatment, recovery or disposal capacity which protects human health and the environment will not be available. RCRA section 3004(h)(2). In that event, the prohibition is to take effect on the earliest date on which such adequate capacity exists, and in no event be extended nationally for more than two years from the promulgation date. *Id.*

**A. The Existing Treatment Standard and National Capacity Variance for Spent Potliners**

On April 8, 1996, EPA promulgated a prohibition on land disposing spent potliners from primary aluminum production (Hazardous Waste K088) unless the waste satisfied the treatment standards for K088 established by EPA as part of the same rulemaking. (61 FR 15566, April 8, 1996). Spent potliners are a highly toxic hazardous waste, whose hazardous constituents include cyanide (present in concentrations between 0.1 and 1 percent, which are quite high for such a toxic constituent), toxic metals, and polycyclic aromatic hydrocarbons (PAHs). See the Final BDAT Background Document for Spent Potliners from Primary Aluminum Reduction—K088, February 29, 1995. These wastes also contain high concentrations of fluoride. See generally *id.* at 61 FR 15584-15585. Previous improper management of spent potliners has resulted in widespread groundwater contamination with cyanide and fluoride, and was an important factor in EPA's decision to list these materials as hazardous wastes. See 53 FR 35412, September 13, 1988. The treatment standards for K088 wastes require substantial reductions in the total concentration of organic hazardous constituents and cyanide, and substantial reductions in the leachability of toxic metals and fluoride. See 61 FR 15626. The reduction in leachability is measured by application of the Toxicity Characteristic Leaching Procedure (TCLP), SW-846 Method 1311. *Id.*

These treatment standards are based upon performance of combustion technology plus stabilization treatment of combustion residues. *Id.* at 15584. The treatment standard for fluoride is based upon the performance demonstrated by the treatment process developed by Reynolds Metals Company (Reynolds) during studies conducted as part of their application for delisting<sup>1</sup> treated K088. See 61 FR 15585. Although treatment standards were based upon these technologies, any treatment technology (other than impermissible dilution) may be used to achieve these established numerical

<sup>1</sup> EPA granted a final exclusion from the lists of hazardous wastes contained in 40 CFR 261.32 —i.e., a delisting—for certain solid wastes derived from the treatment of K088 at Reynolds Metals Company, Gum Springs, Arkansas (56 FR 67197, December 30, 1991). The delisting is based on treating the same parameters covered by the LDR treatment standard, and compliance is measured by TCLP analyses for toxic metals, PAHs, cyanide, and fluoride. However, as explained later in this Notice, the delisting was incorrect and will be withdrawn.

standards. Data in the administrative record indicate that these treatment standards are achievable by a number of different technologies. See the Final BDAT Background Document for Spent Potliners from Primary Aluminum Reduction—K088, February 29, 1995, available in the docket.

Notwithstanding that a number of different treatment technologies can achieve the treatment standard, in fact, virtually all existing treatment capacity is provided by a single operation, the Reynolds treatment facility located in Gum Springs, Arkansas. See 61 FR 15589; see also Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–4 to 4–11). The Reynolds' process entails the crushing and sizing of spent potliner materials, the addition of roughly equal portions of limestone and brown sand as flux, and the feeding of the combined mixture to a rotary kiln for thermal destruction of cyanide and PAHs. Spent potliners (SPL) are generated in large volumes ranging from 100,000 to 125,000 tons annually.<sup>2</sup> Of the approximate 140,000 tons of treatment capacity EPA estimated was available, 120,000 tons are provided by Reynolds.<sup>3</sup>

For the purposes of comparing required treatment capacity to available capacity, EPA combined all the data available and presented in the updated Capacity Background Document<sup>4</sup> to estimate that approximately 90,000 tons per year of K088 is expected to require treatment. As noted above and in the Background Document, Reynolds provides sufficient treatment volume to accommodate this volume of waste.<sup>5</sup>

## II. Subsequent Events

Because there is adequate volume of treatment capacity, the issue becomes one of the environmental adequacy, specifically whether treatment satisfies the requirements of section 3004(m) which says that treatment is to be sufficient to minimize threats to human

health and the environment posed by land disposal of the waste, and section 3004 (h)(2) which says that to be adequate treatment and disposal capacity must be protective of human health and the environment.

Events occurring after promulgation of the K088 treatment standards have raised questions about each of these issues. Reynolds appears able to treat spent potliners to meet the promulgated treatment standards.<sup>6</sup> However, as set out in the January 14 notice, the leachate being generated from actual disposal of the treatment residues is more hazardous than initially anticipated. In hindsight, it is now apparent that spent potliners are themselves highly alkaline, and contain cyanide, arsenic, and fluoride—constituents which are most soluble under alkaline pH. Reynolds in fact disposed of most of the treatment residues from its process in a dedicated monofill (a landfill receiving only these treatment residues) where pH is alkaline (the pH of the treatment residue is essentially unbuffered by anything in the landfill), and the concentrations of these constituents were high. As measured in September 1996, total cyanide concentrations in the leachate were 46.5 mg/L (the treatment standards for K088 wastewaters specify a concentration of 1.2 mg/L); arsenic concentrations are at 6.55 mg/L (treatment standard 1.2 mg/L); and fluoride concentrations are at 2228 mg/L (treatment standard 35 mg/L). (Gum Springs Leachate Analytical Results, Reynolds Metals Co., Sept. 26, 1996).<sup>7</sup> Other residues were used as fill material in unlined pits at a Hurricane Creek, Arkansas mining site, and as a test all-weather road surface at the mining site (62 FR 1992, January 14, 1997). The levels of hazardous constituents and fluoride in the leachate and runoff from this site were less than those from the landfill, undoubtedly because the prevailing pH is acidic rather than basic, but still were high enough to warrant regulatory concern.

As set out in the January 14 notice, EPA had failed to take into account the effect of alkaline disposal conditions on potliners and potliner treatment

residues when promulgating either the treatment standard for K088 wastes or the delisting for the treatment residues from Reynolds' process. EPA's immediate response, set out in the January notice, was to extend the national capacity variance for six months for two reasons: (1) because of the delisting, the disposal capacity provided by Reynolds was not protective since the wastes could be disposed essentially anywhere under federal law, and (2) because there was a possibility that the treatment process might actually be increasing the hazards posed by land disposal of the waste by increasing hazardous constituent and fluoride mobility. See 62 FR 1994. Because EPA had some expectation that short-term treatment process changes could resolve some of these problems, EPA extended the national capacity variance until July 8, 1997 (62 FR 1992).

Following this extension, Reynolds initiated various full scale tests in an attempt to find a process change that would result in improved destruction of cyanide, and greater immobilization of arsenic and fluoride. On April 9, 1997, Reynolds presented to EPA representatives a confidential summary of the research and development testing performed pursuant to improving the Gum Springs' treatment residue. (See April 4, 1997 letter to William Gallagher, EPA Region 6 from Patrick Grover, Reynolds Metals Company.) These results indicate that EPA's prior judgement that the process could be modified relatively quickly by substitution of different sand and other means of pH control (62 FR 1995), has proven to be overly optimistic. Reynolds is continuing to consider options that they believe may both increase the thoroughness of combustion of the cyanide, and reduce leachability of any remaining cyanide in the residue, as well as further reducing the mobility of the fluoride and arsenic. Also, Reynolds is continuing to try to isolate and remove additional sources of arsenic in the process, and is considering ways to lower the pH of the residue, which may further reduce leachability of the constituents of concern. After further discussions with Reynolds and re-analysis of data from the existing Reynolds' process,<sup>8</sup> EPA too is reconsidering the potential causes of the unexpectedly high levels of hazardous constituents. As discussed below, however, recent developments have satisfied the Agency's immediate concern that safe capacity be provided.

<sup>2</sup> Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–5 to 4–8). Because SPL are not generated continuously, and because the rate of generation fluctuates according to the amount of aluminum produced, it is not possible to estimate this figure with more accuracy.

<sup>3</sup> Id., pages 4–9 to 4–10.

<sup>4</sup> Background Document (pages 6–12) for Capacity Analysis Update for Land Disposal Restrictions—Phase III: Spent Aluminum Potliner (Final Rule), December 1996 (part of the docket files for Emergency Extension of the K088 Capacity Variance; Final Rule; 62 FR 1992, January 14, 1997). The capacity analysis in this document reflects generation data and other information submitted after the publication date (April 8, 1996) for the LDR Phase III Final Rule.

<sup>5</sup> Id., pages 12–16.

<sup>6</sup> Commenters have questioned this, and EPA responds to those comments below.

<sup>7</sup> EPA was not aware of these data until the Fall of 1996, and, in particular was not aware of these data during the rulemaking proceeding leading to establishing the K088 treatment standard. EPA notes further that the leachate from the landfill is being intercepted and collected by Reynolds, and so is not contaminating the environment at the treatment site. However, EPA also notes that there is no interception of leachate at the Hurricane Creek Mine Site and that Reynolds has agreed to cease disposal at the mine site effective June 1, 1997.

<sup>8</sup> See Discussions on TCLP Results and Monofill Leachate Quality, Reynolds, May 29, 1997.

### III. EPA's Decision With Respect to Extending the National Capacity Variance

The situation EPA is evaluating is thus one where a waste is being treated to meet the promulgated treatment standard, but actual performance of the treatment technology is less than predicted for some of the waste's constituents, and current disposal conditions appear to EPA to be unprotective of human health and the environment because of the existing delisting, which allows unregulated disposal of a waste which generates a hazardous leachate. EPA addresses first issues related to extent of treatment, and then the resolution of issues relating to disposal conditions.

#### A. The Reynolds Process Provides Substantial Treatment

RCRA section 3004 (m) requires that treatment "substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." EPA believes that treatment is normally adequate to meet these requirements where treatment results in substantial reduction of toxics and/or substantial reduction of their mobility. See 62 FR 1994, January 14, 1997 and sources there cited.

The Agency's review of the Reynolds' process shows that polycyclic aromatic hydrocarbons are destroyed virtually completely<sup>9</sup>, and cyanide is destroyed to a significant, but lesser degree.<sup>10</sup> These are the most significant hazardous constituents in the waste, based on concentration, potential mobility and toxicity. However, the current treatment process does not neutralize the alkalinity of the spent potliner or of the resulting residual, provides limited treatment of fluoride, and results in an increase in the concentration of leachable arsenic in the residual.<sup>11</sup> Despite these mixed results, EPA still concludes that on the whole, the process does provide substantial treatment. The Reynolds' process destroys PAH constituents virtually 100% through combustion. Further, cyanide is destroyed to a significant extent by this same combustion process. Total levels of cyanide appear to be reduced by the Reynolds' process by an average of over 90% from the untreated

levels. High concentrations of cyanide was a major reason that K088 was listed as a hazardous waste (53 FR 35412, September 13, 1988), and destruction of cyanide is therefore a key consideration in whether a K088 process is providing substantial treatment. The leachability of fluoride, on the other hand, is not being significantly altered the Reynolds' process. The addition of lime and sand in the Reynolds' process is meant in part to help reduce the leachability of the very high amounts of fluoride found in untreated K088. It appears the Reynolds' process does provide some reduction (perhaps 25%) in the initial leachability of fluoride. However, while treatment of fluoride is an important indicator in a K088 treatment process, fluoride is not a highly toxic constituent (it is not included in Part 261, Appendix VIII). The Agency views the PAH and cyanide reductions as more important. Likewise, the Reynolds' process appears to actually increase the amounts of leachable arsenic as compared to untreated K088. This is not an encouraging result, but the explanation is apparently that given the destruction of organic components of the K088, perhaps combined with arsenic levels in sand that is used as a fluxing agent in the process, some elevation of arsenic continues to occur.

Commenters have argued, however, that Reynolds' process isn't providing substantial treatment because levels of hazardous constituents and fluoride in actual leachate exceed the K088 standards for wastewaters.<sup>12</sup> EPA notes first that this information does not alter the fact that the process significantly reduces total concentrations of hazardous constituents. Second, EPA would not normally consider data reflecting actual disposal as invalidating a treatment process unless the results are directly at odds with the basic premise of the land disposal restrictions program: that treatment reduces the risks posed by disposing of hazardous wastes without treatment. EPA believes that the destruction of organic constituents and cyanide reduces threats posed by land disposal of the K088 wastes. In this regard, the Agency notes that it found in the January notice that the Reynolds' process might

actually pose greater risks than disposal of untreated wastes in subtitle C facilities (62 FR 1993). This finding was based in part on the fact that the delisting allowed Reynolds to dispose of the waste in units controlled less stringently than under federal standards. (62 FR 1992 and 1995). However, EPA also thought that the monofill leachate quality might be worse than that generated from subtitle C landfills managing untreated potliners. EPA now withdraws that finding. It is the Agency's current assessment that Reynolds' treatment (albeit imperfect) does reduce the overall toxicity associated with the waste. As a result, the disposal of the treated residue in a tightly controlled Subtitle C landfill is preferable to the disposal of untreated wastes. We base this finding on the determination that the total mass of the available cyanide and PAHs has been reduced.<sup>13</sup> EPA also concludes that the concentration observed in Reynolds' monofill leachate are in part the result of the high mass to leachate ratio that results from partial cover of the unit, resulting in a lower volume but less dilute leachate than results from other subtitle C landfills.<sup>14</sup>

The only alternative to Reynolds' treatment, at present, is no treatment at all.<sup>15</sup> The whole premise of the law is not to land dispose untreated hazardous wastes, and to require expeditiously that existing treatment processes providing substantial treatment be utilized. See citations at 61 FR 55724 (Oct. 28, 1996). EPA finds that the combustion process followed by limited stabilization appears to be adequate for the Agency to conclude that Reynolds provides substantial treatment which reduces the threats posed by land disposal of untreated spent potliners.<sup>16</sup>

<sup>13</sup> See Agency's calculation of treatment effectiveness from Reynolds' 12/8/96 Special Laboratory Report.

<sup>14</sup> See Discussion on TCLP Results and Monofill Leachate Quality, Reynolds, May 29, 1997.

<sup>15</sup> The Agency anticipates that a number of producers will pursue the construction of alternative treatment facilities. In fact, the Agency is currently evaluating two proposals for recycling facilities that would employ vitrification processes that produce a glass product and recover fluoride compounds. One of these recycling facilities would use a process similar that currently in use at the Ormet Corporation, Hannibal, Ohio. The Agency expects to provide guidance on the regulatory status of these proposed recycling facilities shortly.

<sup>16</sup> Commenters suggested that threats might not be minimized by the Reynolds' process, within the meaning of RCRA section 3004 (m). EPA disagrees. As explained above, the treatment process provides treatment which reflects the best commercially available treatment. The D.C. Circuit has sustained the use of technology-based treatment standards as a reasonable means of implementing the minimize threat requirement. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 345 (D.C. Cir. 1989). In

<sup>9</sup> 56 FR 33004-5, July 18, 1991.

<sup>10</sup> See Reynolds' Special Laboratory Report (P33F-S0020.A).

<sup>11</sup> Data set F; letter from Pat Grover, Reynolds Metals Company to James R. Berlow, EPA; June 5, 1997.

<sup>12</sup> Commenters also suggested that these data show lack of compliance with the actual treatment standard. This is incorrect, since the treatment standard is measured not on actual leachate analysis, but on either a total waste concentration basis, or based on leachate generated using the TCLP. Although it is now apparent that the TCLP is not a good model for disposal conditions to which K088 would be subject, the treatment standard still requires use of the TCLP and any results so obtained that do not exceed the treatment standard are in compliance.

Commenters also questioned whether Reynolds is even achieving current treatment standards, focusing on cyanide results in particular. If the commenters were correct that the only available treatment process consistently is unable to meet a treatment standard, then EPA would likely find that insufficient treatment capacity exists. However, data provided by Reynolds appears to show compliance with the total and amenable cyanide LDR standards (see June 17, 1997 fax from Pat Grover to John Austin, U.S. EPA). The Agency believes this data does show compliance in all but limited instances. The commenter's argument is premised on the notion that addition of fluxing and stabilizing agents to the treatment process increases waste volume three-fold, so that treatment analytical results should be multiplied by three to reflect the amount of dilution occurring. This is not correct. Although certain types of dilution—generally, dilution that does not reduce the toxicity or mobility of hazardous constituents—is an impermissible means of achieving a treatment standard, dilution which is a necessary part of a treatment process is normally permissible. See 51 FR at 40592 (Nov. 7, 1986). Thus, addition of treatment reagents which produce physical and chemical changes in the waste and which are a normal part of the process of treating a waste are typically permissible. *Id.* This is what occurs in the Reynolds' process, where fluxing agents are a usual part of the process, and function to aid the passage of the residue through the kiln and the fusion of the reagents. Thus, EPA believes that the Reynolds' process does consistently achieve the current treatment standards.

#### *B. Reynolds Will Provide Safe Disposal Capacity*

The above discussion of the Reynolds' process focused on the destruction of organic constituents and cyanide, and the limited stabilization of fluoride, leading to the conclusion that from an engineering perspective, substantial treatment is occurring which reduces the threats posed by land disposal of the hazardous wastes. However, as explained above, EPA, in determining when a prohibition on land disposal takes effect, must consider whether the treatment and disposal capacity being offered "protects human health and the

environment." RCRA section 3004(h)(2). EPA's assessment has been that Reynolds' disposal of the delisted waste in non-subtitle C units failed to adequately protect human health and the environment, and that the delisting allows unsafe disposal practices to continue. As long as the treated residual retains its current delisted status such practices could continue.

However, Reynolds has very recently agreed to give up the delisting and to manage the waste—that is, the residue from its treatment process—subject to full subtitle C controls, including disposal in a landfill satisfying minimum technology design criteria (i.e. double liners and leachate collection system). Based on this new development, it now appears that the residues will in fact be managed safely (indeed, must be managed safely under the federal standards), so that protective disposal capacity exists.

Today's decision is premised on the understanding that EPA will issue to Reynolds Metals Company an administrative order specifying Subtitle C management for their residues and the monitoring of Reynolds' compliance with applicable LDR treatment standards, no later than September 5, 1997. This order would serve as an interim bridge until the administrative process of withdrawing the delisting (which entails amending a final rule) is completed. The order will require Reynolds to conduct daily sampling of key constituents for at least the first 30 days of the order to document further that LDR treatment standards are being met. Reynolds will operate under a Federal administrative order until EPA action formally amends the Code of Federal Regulations to repeal the subject delisting, and then they will operate as an interim status facility pending application for and receipt of a permit. If for some reason an administrative order is not in place by September 5, 1997, EPA could extend the deadline up to April 8, 1998.

EPA also notes that the finding that the Reynolds process provides substantial treatment of the spent potliner, sufficient to justify the technology's use to satisfy the requirements of the Land Disposal Restrictions program, is not at odds with the finding that the treatment residue is still a hazardous waste. There is no inherent conflict between a finding that a waste has been treated substantially enough to satisfy LDR requirements and that the treatment residue nevertheless remains a hazardous waste. This in fact is the normal case (few residues from treating listed wastes have been delisted even after being treated to satisfy LDR

requirements), and is directly contemplated in RCRA section 3004(m)(2), which states that after treatment which minimizes threats the treated waste may be disposed in a subtitle C facility (i.e. the treatment residue remains a hazardous waste). In this particular case, EPA has found that most cyanides in the initial potliner are destroyed by Reynolds' thermal treatment process, and that polycyclic aromatic hydrocarbons are essentially fully destroyed. Other constituents' mobility is reduced. Thus, substantial treatment has reduced (but not eliminated) the hazardous properties of the waste, so that the resulting treatment residue remains hazardous.

#### *C. Agency's Conclusion Is That Protective Capacity is Presently Available*

Based on all of the above discussion, the Agency's conclusion is that there is adequate treatment capacity for spent potliners at this time, because the Reynolds process meets LDR treatment standards and because ultimate disposal of the treatment residues is protective of human health and the environment. (RCRA section 3004(h)(2)). The Reynolds' process provides virtually all available treatment capacity (See 62 FR 1995). However, given that generators need some time to make arrangements with Reynolds, which in some cases involves cross-country shipment, the Agency is extending the national capacity variance by three months until October 8, 1997. EPA is selecting that length of extension because it is the Agency's judgment (based on current facts, and the pattern of previous discussions on the issue) that this is a sufficient amount of time to make necessary logistical arrangements.

#### **IV. Disposal of Potliners During National Capacity Variance Period**

Section 3004 (h) (4) states that during periods of national capacity variances (and case-by-case extensions), hazardous wastes subject to those extensions that are disposed in landfills (and surface impoundments) may only be so disposed if the landfill (or impoundment) is in compliance with the minimum technology requirements of section 3004 (o). EPA has interpreted this language as requiring the individual unit receiving the waste to be in compliance with those so-called minimum technology standards, an interpretation sustained in *Mobil Oil v. EPA*, 871 F. 2d 149 (D.C. Cir. 1989). In addition, EPA has indicated that this requirement only applies to wastes that are still hazardous when disposed (55 F R 22659–22660, June 1, 1990).

any event, EPA has said many times, and the legislative history confirms, that the "minimize threat" statutory language is susceptible to a number of interpretations, and was not intended to mean that treatment must remove every conceivable threat posed by disposal of a hazardous waste. See 61 FR at 55724 and sources there cited.

Accordingly, this means that during the extended period of the national capacity extension, generators other than Reynolds will dispose of K088 wastes in landfill units that satisfy the minimum technology requirements of section 3004(o). While Reynolds' treatment residue is not subject to these requirements at this time because it has been delisted, a process will soon be initiated to reclassify it as a hazardous waste. Should the national capacity extension still be in effect when Reynolds treatment residue is reclassified as hazardous, such residues would also be required to be disposed in landfill units satisfying minimum technology requirements (assuming that landfill disposal is utilized) during the extension period.

#### V. Use Constituting Disposal Issues

Although not directly related to the LDR capacity determination being promulgated today, EPA is also taking this opportunity to address concerns that have been raised regarding the use of Reynolds' residue in a manner constituting disposal.

In a separate action, EPA is intending to propose to withdraw the existing delisting for the residues from Reynolds' treatment process. EPA remains concerned, however, that even if the residues are a listed hazardous waste, Reynolds may be able under current regulations to use those residues in uses constituting disposal if they can demonstrate that such uses are "legitimate" product uses under 40 CFR 266.20(b).

EPA is concerned about possible environmental impacts such uses might have because of the concerns EPA has about the leachate generated from the treated potliner and data from road test beds Reynolds constructed using the residues. (See 62 FR 1993; January 14, 1997.)

EPA understands that Reynolds has since ceased such uses under the terms of a compliance order from the State of Arkansas.

EPA remains concerned about this possibility and intends to monitor the situation. If the Agency determines at some point in the future that such uses are taking place or are being pursued, and if we determine such uses may pose health or environmental concerns, EPA may consider amendments to Section 266.20(b) to further restrict such uses. See, e.g., 62 FR 26061; May 12, 1997. At that time, EPA may decide on whether to prohibit uses of the Reynolds residue.

#### VI. Regulatory Requirements

##### A. Regulatory Impact Analysis Pursuant to Executive Order 12866

Executive Order No. 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."

The Agency considers today's final rule to be nonsignificant as defined by the Executive Order and therefore not subject to the requirement that a regulatory impact analysis has to be prepared. Today's rule delays for three months the imposition of treatment standards for spent aluminum potliners that were estimated previously by EPA to cost between \$11.9 million and \$47.3 million (61 FR 15566 and 15591, April 8, 1996). Thus, today's rule results in net savings over this period of time and prevents any potential hardship that would otherwise result from the lack of available treatment capacity for spent aluminum potliners.

##### B. Paperwork Reduction Act

This rule does not contain any new information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Since there are no new information collection requirements being promulgated today, an Information Collection Request has not been prepared.

##### C. Unfunded Mandates Reform Act and Regulatory Flexibility Act

In addition, this action does not impose annual costs of \$100 million or more, will not significantly or uniquely affect small governments, and is not a significant federal intergovernmental mandate. The Agency thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act. Moreover, since this action is not subject to notice-and-comment

requirements under the Administrative Procedure Act or any other statute, it is not subject to sections 603 or 604 of the Regulatory Flexibility Act.

##### D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### VII. Immediate Effective Date

EPA has determined to make today's action effective immediately. The Agency believes that there is good cause to do so, within the meaning of 5 U.S.C. 553 (b) (B). The current capacity extension ends on July 8, and EPA does not believe it is physically possible for generators to begin shipping wastes to Reynolds on that date (nor is the Agency willing to speculate as to existence or non-existence of generator storage capacity). The reason the Agency is issuing this notice so close to the deadline is because the whole situation involving this capacity extension is complicated (involving decisions relating to both treatment performance and reclassification of the existing delisting), and, accordingly, the Agency continued considering new information until just before it was issued. During this time, the Agency carried on technical and other discussions with all interested persons. EPA believes that this process was reasonable, and that putting out a separate proposal during this period when the Agency's analysis of the existing information was changing based on changing facts would not have significantly benefitted either the Agency or interested persons, and could have interfered with the on-going dialogue by diverting resources from them. EPA has endeavored to obtain as much public comment on the issues as possible and to avoid issuing a decision until carrying on as extensive a dialogue as possible with concerned parties. Thus, EPA has held a number of meetings with both Reynolds and affected primary aluminum generators (noted in the record for this action), solicited and accepted written submissions from these entities (again part of the administrative record), and made each sides' submissions available to the other for response (which have been forthcoming in abundance). The

Agency has also had contacts (albeit more limited) with representatives of the hazardous waste treatment industry and the environmental community. This process extended until June 30. Actual notice and opportunity for comment of course satisfies all procedural requirements of the Administrative Procedure Act (as to parties receiving such notice). 5 U.S.C. 553 (b).

In addition, EPA believes that the January 14 notice served as a type of proposal that EPA would consider and grant a further extension if there were not significant changes in the disposal and treatment occurring at Reynolds' Arkansas facility, and at least some of the comments the Agency has received since January reflect that view.

For all of these reasons, EPA finds that this rule extending the current

national capacity extension until October 8, 1997 may be made effective immediately.

#### List of Subjects in 40 CFR Part 268

Environmental protection, Hazardous waste, Reporting and recordkeeping requirements.

Dated: July 7, 1997.

**Carol M. Browner,**  
*Administrator.*

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

#### PART 268—LAND DISPOSAL RESTRICTIONS

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

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

2. Section 268.39 is amended by revising paragraph (c) to read as follows:

**§ 268.39 Waste specific prohibitions—spent aluminum potliners; reactive; and carbamate wastes.**

\* \* \* \* \*

(c) On October 8, 1997, the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste number K088 are prohibited from land disposal. In addition, soil and debris contaminated with this waste are prohibited from land disposal.

\* \* \* \* \*

[FR Doc. 97-18410 Filed 7-11-97; 8:45 am]

BILLING CODE 6560-50-P