

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 745**

[OPPTS-62160; FRL-5784-3]

RIN 2070-AC72

Lead; Management and Disposal of Lead-Based Paint Debris**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: EPA is proposing a rule under the Toxic Substances Control Act (TSCA) to provide new standards for the management and disposal of lead-based paint (LBP) debris generated by individuals or firms. In another document in today's **Federal Register**, the Agency is also separately proposing to suspend temporarily the applicability of regulations under Subtitle C of the Resource Conservation and Recovery Act (RCRA) which currently apply to LBP debris. The companion RCRA proposal, issued elsewhere in today's **Federal Register**, is necessary to avoid inconsistent or duplicative Federal requirements under RCRA and TSCA. In addition, this proposal finds LBP debris which is disposed of improperly to be a lead-based paint hazard under TSCA. Today's proposed TSCA standards do not address LBP debris generated by homeowners in their own homes. The Agency is concerned that current RCRA requirements for the identification, management, and disposal LBP debris may be reducing the number of residential LBP abatements by imposing significant disposal costs for LBP debris that is determined to be a hazardous waste under RCRA. Today's proposed rule would provide new management and disposal standards for generators of LBP debris under TSCA. These standards would be generally less burdensome than current RCRA hazardous waste requirements, yet the standards are reliable, effective, safe, and protective of human health and the environment. By reducing costs associated with management and disposal of LBP debris, the Agency believes that the number of abatements will increase thus resulting in a reduction of children exposed to LBP. The Agency is also applying today's proposed standards to LBP debris from renovation, remodeling, public and commercial buildings in order to simplify requirements to generators and transporters of LBP debris.

DATES: Written comments in response to this proposed rule must be received on or before February 16, 1999. The Agency is having two public meetings, where oral comments will be heard, one in Washington DC on Thursday, January 14, 1999, from 9 a.m. to 4 p.m. and one in San Francisco, CA on Thursday, January 21, 1999, from 9 a.m. to 4 p.m.

ADDRESSES: Comments may be submitted by regular mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the SUPPLEMENTARY INFORMATION section of this proposal.

The Washington DC meeting will be held at the Omni Shoreham Hotel, 2500 Calvert St., NW., Washington, DC 20008, telephone: (202) 234-0700.

The San Francisco meeting will be held at the Holiday Inn Civic Center, 50 Eight St., San Francisco, CA 94103, telephone: (415) 626-6103.

FOR FURTHER INFORMATION CONTACT: For general information contact: National Lead Information Center at: 1-800-424-LEAD(5323). For technical questions relating to TSCA: Tova Spector, (202) 260-3467; for RCRA-related questions: Rajani Joglekar, (703) 308-8806.

SUPPLEMENTARY INFORMATION: The following outline is provided to assist the reader in locating specific topics in the preamble.

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I. General Information**A. Does this Notice Apply to Me?**

You may be potentially affected by this proposed rule if you generate, store, transport, reuse, offer for reuse, reclaim (defined in today's proposal at § 745.303 in the regulatory text) or dispose of LBP debris from abatements, renovations, and demolitions of target housing, and from deleading and demolition of public buildings and commercial buildings (definitions of structure types and activities appear at § 745.303 of the regulatory text).

Regulated categories and entities would include:

Category	Examples of Regulated Entities
Individuals and firms who generate and/or store LBP debris	Contractors who generate and/or store LBP debris from abatements, renovations, and demolitions of target housing, and deleading or demolition of public buildings, and commercial buildings
Waste transporters	Firms providing transportation services for LBP debris
Reusers of LBP debris	Firms or individuals who reuse LBP debris
Reclamation facility owner/operators	Owners or operators of facilities which accept LBP debris for reclamation
Disposal facility owner/operators	Owners or operators of facilities which accept LBP debris for disposal

This table is not intended to be exhaustive, but rather provides a guide regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you or your business may be regulated by this action, you should carefully examine the provisions of §§ 745.301 through 745.319 of the regulatory text. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the "FOR FURTHER INFORMATION CONTACT" unit above.

B. How Can I Get Additional Information or Copies of this Document or Other Support Documents?

1. *Electronically.* You may obtain electronic copies of this document and various support documents from the EPA internet Home Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations" and then look up the entry for this document under the "Federal Register - Environmental Documents." You can also go directly to the "Federal Register" listings at <http://www.epa.gov/homepage/fedrgstr/>.

2. *In person or by phone.* If you have any questions or need additional information about this action, please contact the technical person identified in the "FOR FURTHER INFORMATION CONTACT" section. In addition, the

official record for this notice, including the public version, has been established under docket control number OPPTS-62160, (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection from noon to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Rm. NE-B607, 401 M St., SW., Washington, DC 20460. The TSCA Nonconfidential Information Center telephone number is 202-260-7099.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. Be sure to identify the appropriate docket control number (i.e., "OPPTS-62160") in your correspondence.

1. *By mail.* Submit written comments to: Document Control Office (7407), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

2. *In person or by courier.* Deliver written comments to: Document Control Office in Rm. G-099, Waterside Mall, 401 M St., SW., Washington, DC, telephone: 202-260-7093.

3. *Electronically.* Submit your comments and/or data electronically by E-mail to: "oppt.ncic@epamail.epa.gov." Please note that you should not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on standard computer disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number OPPTS-62160. Electronic comments on this notice may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI Information that I Want to Submit to the Agency?

You may claim information that you submit in response to this document as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public

record. Information not marked confidential will be included in the public docket by EPA without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult with the technical person identified in the "FOR FURTHER INFORMATION CONTACT" section.

II. Introduction

Unit II. of this preamble provides an overview of today's proposed rule and background information; the succeeding units cover the proposal and rationale in more detail.

A. Purpose of this Proposed Rule

This document proposes new management and disposal standards for LBP debris, which is defined at § 745.303 of today's proposed rule to be (1) Debris resulting from demolitions where LBP is present and/or (2) LBP architectural component debris (such as windows, doors, molding, etc) from abatement, renovation, and deleading activities. These proposed standards have been developed under TSCA sections 402 and 404 and in coordination with the RCRA Temporary Suspension of the Toxicity Characteristic Proposed Rule for LBP Debris. (For a detailed discussion of the regulatory authority refer to Unit III. of this preamble). The primary objective of this proposed rule is to address obstacles to the removal of LBP hazards in target housing and other child-occupied facilities, such as schools and day-care centers. The Agency has concluded for this proposal that disposal of LBP debris resulting from abatements, deleading, renovations, remodeling and demolitions of target housing, child-occupied facilities, and public and commercial buildings in certain non-hazardous solid waste disposal facilities (discussed in Unit III. of this preamble) is safe, reliable, effective, and protective of human health and the environment.

Accordingly, the coverage of today's RCRA and TSCA proposals would include LBP debris generated during deleading, demolitions, and renovation and remodeling activities in all target housing, public buildings, and commercial buildings. EPA believes it is important to provide a clear and consistent regulatory scheme for those who conduct these activities and to avoid the imposition of unnecessary costs on the regulated community.

The Agency believes the LBP debris management and disposal standards contained in this proposal would provide increased protection of human health by: (1) Reducing the cost of LBP abatements and deleading so as to

facilitate the removal of LBP from areas that children and others frequent; and (2) addressing gaps in coverage of LBP debris under the current RCRA management and disposal requirements. This proposal is designed to minimize the burdens associated with LBP debris management and disposal through enacting a TSCA program that is less costly than the current RCRA scheme but is nonetheless safe, effective, and reliable.

The standards in today's proposal would apply only to LBP debris. If LBP architectural component debris or LBP demolition debris contain any substance or constituent subject to regulations (in addition to LBP), the generator would still have to comply with those requirements. For example, if LBP debris also contained asbestos, it would have to be disposed of in facilities subject to both today's proposed standards and to the existing asbestos disposal standards found at 40 CFR part 61, subpart M.

The disposal of soil is not addressed under the proposed TSCA standards. For a further discussion of soil and why it was excluded from this proposed rule please see Unit VII.B.4. of this preamble.

B. Background: The Hazards of LBP and Federal Efforts to Reduce Exposure

The Centers for Disease Control and Prevention (CDC) has estimated approximately 900,000 children, or about 4.4% of children under the age of 6, may have unacceptably high levels of lead in their blood (Ref. 1). Lead exposure in young children is of particular concern, because children absorb lead more readily than adults and their nervous systems are particularly vulnerable to the effects of lead. Common sources of lead exposure to children include contaminated dust and paint chips from deteriorating LBP in older homes and renovation activities which disturb LBP. Children with high levels of lead in their body can suffer from learning disabilities, behavioral and learning problems, and mental retardation. The effects of long-term lead exposure or poisoning in children are well-documented: higher school failure rates and reductions in lifetime earnings due to permanent loss of intelligence and increased social pathologies. Fetuses are also at risk, as lead can pass from a pregnant woman's bloodstream to the developing child. There is also some indication that lead exposure contributes to high blood pressure, reproductive and memory problems in adults. Lead has no known use in the body and is difficult to remove from blood and bones in cases

where medical intervention is necessary.

Over the past 2 decades the Federal government has taken a number of steps to address the problems of lead exposure. In 1978, the Consumer Product Safety Commission banned the residential use of paint containing more than 0.06% lead by weight on interior and exterior surfaces, toys, and furniture. EPA placed controls on lead in gasoline in 1978 and lowered the maximum levels of lead permitted in public water systems (40 CFR parts 141 and 142). CDC has set and lowered blood lead levels of concern several times, most recently in 1991. The Department of Housing and Urban Development (HUD) began in 1986 to abate lead hazards in public housing that is being renovated or in structures occupied by a child with elevated blood lead levels. These efforts, and those of State and local agencies and the private sector, have reduced the incidence of lead poisoning.

It is estimated that more than half the housing stock in the U.S. (an estimated 64 million pre-1980 homes) still contain some LBP (Ref. 2). Further, the LBP Hazard Reduction and Financing Task Force established by HUD pursuant to section 1015 of Title X (the LBP Hazard Reduction Act of 1992) estimates that between 5 and 15 million housing units contain hazards associated with the presence of LBP.

In response to this health threat, Congress enacted the Residential LBP Hazard Reduction Act of 1992 (hereinafter referred to as Title X of the Housing and Community Development Act of 1992 or as Title X) Pub. L. No. 102-550, 106 Stat. 3897. The purposes of Title X include: (1) To develop a national strategy to build the infrastructure necessary to eliminate LBP hazards in all housing as expeditiously as possible; (2) to reorient the national approach to the presence of LBP in housing to implement a broad program to evaluate and reduce LBP hazards in the Nation's housing stock; and (3) to encourage effective action to prevent childhood lead poisoning by establishing a framework for LBP hazard evaluation and reduction and by ending confusion pertaining to reasonable standards of care (Pub. L. 102-550, Title X, Sec. 1003 (codified at 42 U.S.C. 4851a)).

To further these goals, Title X requires that HUD provide public housing authorities and other owners of Federally assisted properties with guidelines for evaluating and reducing lead hazards in their properties. Title X also amended TSCA by adding a new Title IV, which directs EPA to

promulgate standards to govern: (1) The training and certification of individuals engaged in LBP activities; (2) the accreditation of training programs; and (3) the process by which LBP activities are conducted by certified individuals (TSCA section 402(a), 15 U.S.C. 2682(a)). TSCA Title IV also directs EPA to identify by regulation LBP hazards, lead-contaminated dust, and lead-contaminated soil (TSCA section 403, 15 U.S.C. 2683). States and Indian Tribes may seek to administer and enforce these requirements (TSCA section 404, 15 U.S.C. 2684).

As a result of the enactment of Title X, there is an increasing effort to reduce the hazards posed by LBP in residential housing and other buildings. Although there are a number of methods to reduce LBP exposure, abatements (which under TSCA Title IV involve any set of measures designed to eliminate permanently LBP hazards) are typically conducted in situations where LBP exposure has resulted in elevated blood lead levels in children and in other situations where permanent removal of LBP is desired. Abatement efforts frequently result in the production of LBP waste which may currently be subject to regulatory controls under Subtitle C of the Resource Conservation and Recovery Act (RCRA) (discussed in Unit V. of this preamble).

The Agency has spent considerable resources working with health specialists, environmental groups, the lead abatement industry, and State and local governments to develop regulatory options for lead abatement activities. EPA believes that there is an overwhelming consensus that action should be taken as quickly as possible to reduce lead exposure hazards to young children.

The Lead-Based Paint Hazard Reduction and Financing Task Force established by HUD pursuant to section 1015 of Title X (42 U.S.C. 4852a), representing the spectrum of interests affected by LBP issues, released final recommendations on evaluating and reducing LBP hazards in private housing on July 11, 1995. Their report is entitled "Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing" (Ref. 3). In addition, a letter from the Task Force to EPA Administrator Carol Browner dated April 13, 1994, specifically recommended that the Agency "shift regulation of discarded architectural components from the hazardous waste regulatory program to a tailored management program under TSCA §§ 402/404" (Ref. 4). The Task Force recommendations enjoy the support of a broad range of the groups and interests

affected by LBP activities and regulations. The Agency has given substantial weight to the Task Force recommendations in the development of today's proposal. EPA has developed and is proposing a regulatory approach it believes will both work to speed the conduct of lead abatement and deleading activities (by lowering costs) and, at the same time, ensure that LBP debris from all activities is managed and disposed of in safe, reliable, and effective manner.

III. Statutory Framework and Authority

As noted above, today's action consists of two proposed rules: (1) this TSCA proposal introducing new LBP debris management and disposal standards; and (2) a companion RCRA proposal, issued elsewhere in today's **Federal Register**, to temporarily suspend the applicability of the RCRA Toxicity Characteristic (TC) Rule (40 CFR 261.24) to LBP debris. Unit III.A. below discusses TSCA Title IV and Unit III.B. discusses RCRA Subtitle C and the TC Rule.

A. TSCA Title IV

The Agency is issuing today's proposed rule under the authority of sections 402 and 404 of TSCA (15 U.S.C. 2682 and 2684). Section 402 of TSCA, LBP Activities Training and Certification, directs EPA to promulgate regulations governing the training and certification of individuals engaged in LBP activities, the accreditation of training programs, and standards for conducting LBP activities. Section 404 of TSCA, Authorized State Programs, provides authority for EPA to authorize States to administer and enforce the requirements established by the Agency under section 402 of TSCA.

1. *LBP activities.* On August 29, 1996 (61 FR 45778) (FRL-5389-9), EPA promulgated a rule under sections 402 and 404 of TSCA (hereafter, the LBP training and certification rule) addressing the conduct of certain LBP activities in target housing and child-occupied facilities (40 CFR part 745). The LBP training and certification rule requires that individuals and firms conducting specified LBP activities in target housing and child-occupied facilities receive training from accredited training programs and be certified to conduct LBP activities. The rule also contains standards for conducting LBP activities. The LBP training and certification rule did not specifically address the management and disposal of LBP debris. Today's proposal would create standards under TSCA for the management and disposal of LBP debris and clarifies that other

LBP wastes remain subject to RCRA management and disposal requirements.

The term "LBP activities" includes, among other activities, abatements in target housing. 15 U.S.C. 2682(b)(1). TSCA section 401(1) defines "abatement" as "any set of measures designed to permanently eliminate LBP hazards" including, among other things, all "clean-up, disposal, and post-abatement clearance testing activities." 15 U.S.C. 2681(1)(B). Because the term "abatement" includes all clean-up and disposal activities, TSCA Title IV provides the Agency with clear legal authority to promulgate regulations establishing standards for the management and disposal of LBP (including any LBP found on debris) resulting from the abatement of target housing. TSCA Title IV defines "target housing" generally to mean any housing constructed prior to 1978, except for housing for the elderly or those with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling. TSCA section 401(17). 15 U.S.C. 2681.

In addition to target housing, the LBP Activities Training and Certification Rule (40 CFR part 745) included in the TSCA section 402 requirements a subcategory of public buildings called "child-occupied facilities." A child-occupied facility is defined as "a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least 2 different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day-care centers, preschools and kindergarten classrooms." Thus, EPA is also covering "child-occupied facilities" in today's proposal consistent with the LBP Training and Certification rule.

TSCA section 402 excludes homeowners who conduct LBP activities (including abatement or renovation and remodeling activities) themselves in target housing that they own, unless the housing is occupied by a person or persons other than the owner or the owners' immediate family while the LBP debris is being generated. See Unit VII.C.1. below for a further discussion of the homeowner exclusion.

In the case of public buildings constructed before 1978 and commercial buildings, TSCA section 402 defines the term "LBP activities" to include

deleading and demolition. "Deleading" is defined to mean "activities conducted by a person who offers to eliminate LBP or LBP hazards or to plan such activities." *Id.* Management and disposal of LBP debris from public and commercial buildings are among the activities a person conducts to eliminate LBP or LBP hazards, and, therefore, are considered to constitute "deleading" activities under TSCA section 402(b)(2). Although section 402(b)(2) uses terms such as "identification" and "deleading" instead of the terms used in 402(a) such as "inspection," "risk assessment," and "abatement," EPA believes that, given the similarity of the population to be protected and the nature of the risk they face, the section 402(b)(2) terms can be understood to include the same types of LBP activities as specified in section 402(b)(1). "Deleading" under section 402(b)(2) is equivalent to "abatement" under section 402(b)(1). As such, management and disposal of LBP debris from deleading and demolition are among the LBP activities EPA has the authority to regulate in public buildings and commercial buildings under TSCA section 402.

2. *LBP hazards.* TSCA section 402 (c) addresses LBP risks associated with renovation and remodeling activities in target housing, public buildings and commercial buildings. EPA was directed under section 402(c)(1) to develop guidelines for conducting such activities. These guidelines, "Reducing Lead Hazards When Remodeling Your Home" (EPA 747-R-94-002), were published in April 1994, (updated September 1997) and are available through the National Lead Information Center (Telephone: 1-800-424-LEAD). EPA was also directed under section 402(c)(2) to conduct a study of the extent to which renovation and remodeling activities create a "LBP hazard" on a regular or occasional basis. EPA has not completed this study, however, the study did not examine management or disposal of LBP debris. EPA is authorized under section 402(c)(3) of TSCA to apply the standards developed under section 402(a) of TSCA for LBP activities to renovation and remodeling activities that create LBP hazards. EPA has determined for this proposal, as described in Unit V.F. of this preamble, that improper management and disposal of LBP debris, including debris from renovation and remodeling activities constitutes a LBP hazard and has included LBP debris from renovation and remodeling activities within the scope of today's proposal. The proposed

rule determination that improper management and disposal of LBP debris constitutes a LBP hazard is included in the regulatory text of this proposal.

Today's proposal also includes certain restrictions on the reuse of LBP debris. The proposed restrictions are designed to prevent the transfer of LBP hazards from one structure to another. For example, today's proposal would prohibit reuse of LBP debris which would be identified as a "LBP hazard." For a more in depth discussion of reuse of LBP debris, see Unit VII.G.1. of this preamble.

3. *Certification.* Section 402(a)(1) of TSCA directs the Agency to promulgate regulations which ensure that individuals engaged in LBP activities are:

...properly trained; that training programs are accredited; and that contractors engaged in such activities are certified. Such regulations shall contain standards for performing LBP activities, taking into account reliability, effectiveness, and safety.

Today's action proposes standards for the management and disposal of LBP debris which take into account reliability, effectiveness, and safety. It does not, however, create training requirements for individuals engaged in the management and disposal of LBP debris.

The Agency believes that the activities covered by this proposal, and the requirements governing them do not warrant any specialized training. These activities and requirements are similar, if not, identical to the types of waste management activities already being conducted by generators, transporters, and disposal facility owner/operators and parties reusing LBP debris. The proposed requirements are designed to be as simple as possible while continuing to meet the TSCA section 402 standard of "taking into account reliability, effectiveness, and safety." The addition of training requirements would add to the burden of conducting LBP debris management and disposal activities without providing a measurable reduction in risk of exposure to LBP hazards.

The primary reason for requiring the certification of individuals is to ensure that the individual has received proper training. However, because the Agency would not require specialized training for the management and disposal of LBP debris, § 745.315 proposes to certify all individuals who comply with the requirements of the rule. Certification would be extended only to individuals and firms engaged in management and disposal of LBP debris. To perform other LBP activities, individuals and firms

would need to be certified in accordance with TSCA sections 402 and 404 rules (40 CFR part 745). This "certification by rule" for management and disposal of LBP debris allows the Agency to efficiently fulfill the TSCA section 402 mandate noted above to "ensure that...contractors engaged in such activities are certified" without sacrificing safety, effectiveness, or reliability.

Today the Agency is proposing under section 402 of TSCA to establish a clear regulatory environment covering the management and disposal of LBP debris from abatements, deleading, demolitions, renovations and remodeling from target housing, public buildings, and commercial buildings. The TSCA standards being proposed today represent a common sense approach to management and disposal of LBP debris which addresses the problems associated with current RCRA regulation of LBP debris.

B. RCRA Subtitle C and the Toxicity Characteristic Rule

Subtitle C of RCRA, 42 U.S.C. 6921-39b, establishes a comprehensive program for the regulation of hazardous waste. In enacting RCRA, however, Congress did not set forth a list of hazardous wastes nor provide a specific test for determining whether a waste is hazardous. Instead, in RCRA section 1004(5), Congress defined "hazardous waste" broadly as a "solid waste" which "may...pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed or otherwise managed." Under RCRA section 3001(a), EPA is responsible for defining which solid wastes are hazardous by either identifying the characteristics of hazardous waste or listing particular hazardous wastes.

In response to the Congressional directive in RCRA section 3001(a), EPA adopted a two-part definition for identified or listed "hazardous wastes" (45 FR 33084, May 19, 1980). First, EPA published lists of specific hazardous wastes, in which EPA described the wastes and assigned a "waste code" to each of them (40 CFR part 261, subpart D). These wastes are known as "listed" hazardous wastes. Second, the Agency identified four characteristics of hazardous waste that are subject to objective measurement: ignitability, corrosivity, reactivity, and toxicity (see 45 FR 33121-22, May 19, 1980). Any solid waste exhibiting one or more of these characteristics is a "characteristic hazardous waste" subject to regulation under RCRA Subtitle C (see 40 CFR parts 262, 264 to 268, and 270).

To measure objectively the characteristic of "toxicity" under RCRA Subtitle C, EPA established the Toxicity Characteristic Leaching Procedure (TCLP) test as part of the Toxicity Characteristic (TC) rule. (55 FR 11798, March 29, 1990). Under the TC rule, a waste may be a hazardous waste if any chemicals identified in the rule, such as lead, are present in leachate from the waste (generated from use of the TCLP) at or above the specified regulatory levels (40 CFR 261.24).

Under the TC rule, generators of solid waste must either use their knowledge of the waste or perform the TCLP test using a representative sample of the waste "as generated" to determine if the waste exhibits a toxicity characteristic. The regulatory level for lead in the waste extract (i.e., leachate) is 5 milligrams per liter (mg/L). If the leachate of waste contains lead at this level or higher, then the waste is a "characteristic" hazardous waste, and the generator must comply with the applicable RCRA Subtitle C requirements in 40 CFR parts 262 through 266, 268, and 270.

IV. Overview of Proposed Rule

This Unit is designed to provide a brief review of the main provisions in this proposal. Rationale, analyses supporting the proposal, and the details of the provisions outlined in this section are discussed later in this preamble.

A. Summary of Management and Disposal Standards

1. *Scope of proposed standards.* This proposal would apply to persons who generate, store, transport, reuse, transfer for reuse, reclaim and/or dispose of LBP debris from the following structures and activities: (1) Abatement, demolition, renovation and remodeling in target housing and child-occupied facilities; and (2) deleading, demolition, renovation and remodeling in public buildings and commercial buildings. The definition of LBP debris at § 745.303 of the regulatory text does not include concentrated LBP wastes such as LBP chips, dust, blast media, solvents, sludges, and treatment residues. Such wastes would remain subject to RCRA requirements (discussed further in Unit VII.B. of this preamble).

The proposal would not apply to LBP debris generated by persons who conduct abatement or renovation and remodeling activities themselves in target housing in which they reside. Such debris may, also, be exempt from RCRA Subtitle C requirements under the household hazardous waste exclusion. For a further discussion please refer to

the companion proposed RCRA Toxicity Characteristic Suspension document issued elsewhere in today's **Federal Register**. Under this TSCA proposal, if a homeowner hires an individual or firm to perform abatement, demolition, or renovation activities and LBP debris is created, the individual or firm would be considered to be a generator of LBP debris. In such cases, the individual or firm would be responsible for compliance with the generator requirements in today's proposal rather than the homeowner.

One important distinction between this proposal and current RCRA Subtitle C requirements is that today's proposal would apply to all LBP debris (as defined at § 745.303), whereas RCRA Subtitle C requirements apply only if LBP debris is a waste and is determined to be "hazardous." The comprehensive coverage of today's TSCA proposal would resolve the current problems involved in conducting the TCLP test on heterogeneous LBP debris and in leaving largely unregulated large quantities of "non-hazardous" LBP debris. Today's proposal would have the effect of subjecting all LBP debris to one common sense regulatory scheme including management controls which take into account the risks that LBP debris poses to humans, particularly children—even if LBP debris has not been found to be "hazardous" under the TCLP test. See Unit VII.B. through VII.D. of this preamble for an in-depth discussion of the wastes, activities, and structures covered in this proposal.

2. *Disposal/reclamation options.* Section 745.309 of today's proposal would allow disposal of LBP debris in a variety of facilities, specifically:

- i. Construction and demolition landfills.
- ii. Nonmunicipal landfills which accept conditionally exempt small quantity generated waste.
- iii. Hazardous waste disposal facilities, including hazardous waste incinerators and landfills.
- iv. In the case of incineration, facilities subject to specified Clean Air Act requirements.

Each of the disposal options listed above is discussed in greater detail in Unit VII.F. of this preamble. Under the proposal, LBP debris would be able to be reclaimed (either for recovery of lead, or for energy combustion value) only in facilities which meet the Clean Air Act requirements specified at § 745.309(b) of today's proposal.

3. *Controls on transportation, storage, and reuse.* The Agency has included proposed controls on the transportation, storage, reuse and transfer for reuse of LBP debris in §§ 745.308 and 745.311. If

finalized, today's proposed rule would stipulate that when LBP debris is stored for more than 72 hours, there must be access limitations, and that LBP debris must not be stored for more than 180 days (§ 745.311). There are also proposed limitations on when LBP debris may be transferred for reuse (§ 745.311). In addition, the proposal would require that LBP debris be transported in covered vehicles to prevent any inadvertent release of LBP chips or dust (§ 745.308). These controls are discussed at length in Unit VII.G. of this preamble.

4. *Notification and recordkeeping.* In order to promote compliance and provide for effective enforcement of the standards contained in today's proposal, the Agency has included a proposed requirement that when LBP debris is transferred from one party to another, the recipient should be notified in writing that the material is LBP debris (§ 745.313(a)). Both parties to any transfer of LBP debris would also be required to keep a copy of the notification on record for 3 years (§ 745.313(b)). The notification and recordkeeping requirements are discussed in Unit VII.H. of this preamble.

B. State and Tribal Programs

Today's proposal contains provisions for EPA authorization of State or Tribal LBP debris management and disposal programs. States and Indian Tribes are encouraged to develop and seek EPA authorization of their own LBP debris management and disposal programs. EPA invites States and Tribes to submit their applications 60 days after promulgation of the final rule.

Sections 745.350 and 745.352 of today's proposal identify key program elements which EPA believes are needed to administer and enforce a LBP debris management and disposal program which is at least as protective as the Federal standards at §§ 745.307 through 745.319 and provides for adequate enforcement. The proposed required program elements found at § 745.350 are: (1) Requirements governing the reuse and storage of LBP debris; (2) requirements governing the transportation of LBP debris; (3) requirements for the disposal or reclamation of LBP debris; and (4) requirements for notification and recordkeeping. The proposed required elements found at § 745.352 are designed to ensure that State or Tribal programs provide adequate enforcement.

The proposed §§ 745.341 through 745.359 also contain procedures for States and Indian Tribes to follow when

applying to EPA for LBP debris management and disposal program authorization. State or Tribal programs would be required to be "at least as protective as" the Federal requirements at §§ 745.307 through 745.319 and to provide adequate enforcement. In their application, States and Tribes would be free to retain or establish more stringent requirements for the management and disposal of LBP debris in their jurisdictions. State and Tribal program requirements are discussed in Unit VIII. of this preamble.

V. Policy Basis for Today's Proposal

It is important to understand the relationship between today's proposal and the existing RCRA Subtitle C regulations. The regulated community has expressed a variety of concerns about the appropriateness of current RCRA requirements governing the management and disposal of LBP debris.

In keeping with EPA's responsibility under TSCA Title IV to promote and facilitate the expeditious reduction of risks related to LBP, the Agency has explored alternative options for management and disposal of LBP debris. The result of this investigation is today's proposed rule providing safe, effective, and reliable TSCA management and disposal standards for LBP debris. Sections A through F of this unit describe stakeholder consultation and the policy basis for today's proposal.

A. Stakeholder Consultation

The input and comments of stakeholders have been important in the development of today's proposal. As mentioned in Unit II. of this preamble, the TSCA section 1015 Task Force, which represented a wide array of interested parties, specifically requested that EPA "shift regulation of discarded architectural components from the hazardous waste regulatory program to a tailored management program under TSCA sections 402/404."

In addition, the Agency held a stakeholders' meeting on September 28, 1994, to discuss possible approaches to improving management and disposal requirements for LBP debris. Stakeholders participating in the meeting included HUD, State agency representatives, environmental and advocacy groups, labor representatives, professional organizations representing the building and waste management trades and private contractors. The participants provided many opinions and suggestions.

As noted, many stakeholders have urged EPA to develop today's proposal. A number of commenters on the LBP Training and Certification rule (40 CFR

part 745) specifically requested that EPA issue disposal standards for LBP debris under TSCA. In response, the Agency has, in today's proposal, identified new disposal options for LBP debris (in addition to those currently allowed under RCRA Subtitle C). The new LBP debris disposal options are discussed in Units VI. and VII. of this preamble. Stakeholder concerns about this proposed rule have generally focused on the risk of ground water contamination resulting from alternative disposal options, a question which is addressed by the analyses conducted for this proposal (as discussed in Unit VI. of this preamble).

Other stakeholders have expressed concern about the Agency's characterization of the current market for disposal, believing the Agency may have overestimated costs of disposal under RCRA Subtitle C. The Agency has reviewed current data as part of the economic analysis conducted for this proposal and believes that Agency estimates of the current costs of LBP debris disposal are accurate. It is clear from the economic analysis that management and disposal costs for LBP debris which fails the TCLP for lead are high and that these high costs can act as a deterrent to the removal of LBP hazards.

Stakeholders have also noted that under current RCRA requirements, all LBP debris is not treated equally. First, the RCRA regulations only apply if the debris is a waste. There are no RCRA standards for the management of LBP debris that is intended for re-use. For LBP that is a waste, difficulties conducting the TCLP (discussed in section D. of this unit) can result in insufficient management and disposal standards for potentially hazardous LBP debris (debris which does not exhibit the TC due to anomalous TCLP results) while other, similar LBP debris fails the TCLP and is subject to the strict and costly requirements of RCRA Subtitle C. Stakeholder concerns about the unequal requirements and regulations governing the management and disposal of LBP debris are addressed in today's TSCA proposal.

In June of 1996, EPA sent a stakeholders' mailing to a large list of parties the Agency had identified as potentially having an interest in today's proposed rule. The stakeholder mailing included an outline of provisions under consideration for inclusion in today's proposal, the draft background document for the Groundwater Pathway Analysis for LBP Architectural Debris conducted in support of today's proposal, and names of Agency staff to contact with questions. Further input by

stakeholders as a result of the mailing has been considered during development of today's proposal.

B. RCRA Coverage of LBP Debris

Under current RCRA requirements, all LBP debris is not treated equally. Some LBP debris, specifically, debris which fails the TCLP for lead or is assessed by the generator to exhibit the Toxicity Characteristic, is subject to the strict and costly requirements of RCRA Subtitle C. However, LBP debris which passes the TCLP or is correctly determined by the generator to be nonhazardous solid waste is not subject to Subtitle C management and disposal standards. Unfortunately as further described in section D. of this unit, TCLP results are not reproducible on LBP debris. Therefore, one piece of LBP debris might fail the TCLP in one instance and pass it in another, subjecting the debris to radically different management and disposal requirements in each case.

During the development of this proposal, it has become clear to the Agency that the two management and disposal standards which apply to LBP debris under RCRA are both inappropriate. In cases where LBP debris is determined to be hazardous, the Agency has concluded that RCRA Subtitle C management and disposal requirements are unnecessarily strict and costly (see Unit VI. of this preamble for a discussion of the analytical basis for this finding).

Conversely, in cases where LBP debris passes the TCLP or is determined by the generator to be nonhazardous, EPA believes that the absence of clear management and disposal standards is inappropriate and could result in LBP hazards. Today's proposal would resolve the problems associated with RCRA regulation of LBP debris by affording equal and appropriate standards for all LBP debris.

C. LBP Debris Exclusions/Exemptions from RCRA Subtitle C

Currently, certain types of waste are excluded from RCRA hazardous waste requirements. Some LBP wastes, including certain types of LBP debris eligible for exclusion from RCRA requirements, are not covered by today's TSCA proposal (see Unit VII.B. of this preamble for a discussion of LBP wastes not covered by this proposal). The Agency believes that the RCRA exclusions clearly and adequately address management and disposal of these types of waste and new TSCA standards are not necessary for these RCRA-exempted LBP wastes. The exclusions described in the RCRA proposal include: (1) The household

waste exclusion; (2) the conditionally exempt small quantity generator (CESQG) exclusion; and (3) the scrap metal exemption. See today's RCRA proposal published elsewhere in today's **Federal Register** for a thorough discussion of these exemptions.

D. Difficulties in Conducting the TCLP on LBP Debris

An important factor the Agency considered in developing today's proposal is the difficulty of performing reproducible TCLP tests on LBP debris. Proper TCLP testing requires the collection of a representative sample of the waste "as generated." LBP debris typically includes a mixture of painted and unpainted material, and debris generated at a single site often includes a variety of building materials (e.g., wood, metal, brick, plaster, etc.). In addition, different components of the debris frequently have different numbers of layers of paint—often with different formulations—each of which may contain varying amounts of lead. Collection of manageable-sized samples that are representative of the entire heterogeneous waste stream presents obvious challenges.

A second testing difficulty is sample preparation. The particle size reduction step of the TCLP requires that samples be small enough to pass through a 3/8-inch sieve. Thus, the various components of the sample may require different procedures in order to accomplish size reduction. For example, grinding may be the most appropriate procedure to apply to plaster components of a sample, but may not be practicable for the sample's metal components. One consequence of this is that paint layers originally on the surface of different types of materials can vary widely after the size-reduction step, ranging from a powdered state to 3/8 inch-sized pieces. Because of sample preparation difficulties, the result from one sample (e.g., lead present above the regulatory level) may not be duplicated by the result from another sample of the same waste. EPA is concerned that this situation creates an uncertain regulatory environment and that it may lead to inappropriate regulation or lack of regulation of LBP debris.

A third difficulty is introduced by the physical state of the paint matrix. LBP on exposed exterior components will usually have been subject to years of weathering, since it was almost exclusively applied before the late 1970s. In contrast, paint from interior surfaces would likely not be weathered and the paint matrix would still be intact. It is reasonable to expect that the integrity of the paint matrix would be a

factor in the leachability of lead from the paint when it is subjected to the TCLP test and that the amount of weathered exterior paint versus interior paint in the sample would affect test results. Variability of weathering in painted surfaces poses a significant problem in collecting a representative, reproducible sample of LBP debris.

The Agency believes that these factors contribute significantly to variation in TCLP results for LBP debris, causing considerable difficulty in characterizing LBP debris under the Toxicity Characteristic. These problems are reflected both in stakeholder comments and in the Agency's empirical data on TCLP testing of LBP debris.

In March 1993, EPA completed a study that examined the RCRA status of various waste materials from abatement projects. The study had three components: First, the Agency evaluated data on waste that HUD collected during its nationwide abatement demonstration project (Ref. 5). Second, EPA carried out a detailed testing program for two categories of waste—large solid debris and protective plastic sheeting. Third, EPA examined the waste disposal experience of HUD's contractor on the abatement project in order to obtain preliminary estimates of the volume of hazardous waste that was generated and the cost of disposal. The goal was to determine whether the Agency could provide useful guidance to individuals and firms conducting abatements, on the likely result of TCLP testing for various types of waste generated during abatements.

The study identified three major categories of waste produced during abatements: filtered wash water, solid architectural debris, and plastic sheets and tape used to cover floors and other surfaces. The study concluded that filtered wash water is generally nonhazardous. The results for solid architectural debris demonstrated that LBP debris tends to fail the TCLP when the lead in the paint, as measured by Atomic Absorption Spectrometry (AAS) exceeds 4 milligrams per square centimeters (mg/cm²). However, TCLP failure in the study was not well-correlated with results of on-site testing of lead levels in paint using an X-Ray Fluorescence (XRF) device. The study's failure rate for plastic sheeting tended to depend on the abatement method. For example, removal and replacement tends to generate nonhazardous plastic sheeting, but use of a heat gun for LBP removal tends to result in plastic sheeting which exhibits a hazardous characteristic. The study also notes that other categories of waste, such as sludges, LBP chips, mops and rags,

often exceed the RCRA regulatory limit for lead.

The Agency learned from this study that there is no clear and well-defined sampling strategy for LBP debris, and that the TCLP may not give consistently reproducible results for LBP debris. Today's proposal addresses these difficulties.

E. Economic Impacts of RCRA Subtitle C Regulation on LBP Abatements

RCRA Subtitle C requirements for the management and disposal of a hazardous waste include making the determination that the waste is hazardous, the completion of a manifest which tracks waste from the generator to ultimate disposal, maintenance of records for 3 years, treatment subject to land disposal restrictions, transport to a hazardous waste facility, and disposal at a hazardous waste facility. Disposal in a RCRA Subtitle C facility is not required for hazardous lead waste which is treated (i.e., decharacterized) such that it no longer exhibits the Toxicity Characteristic for lead. This alternative requires the generator to test the waste after treatment using the TCLP to demonstrate compliance with the land disposal restrictions at 40 CFR 268.9. For further explanation of RCRA Subtitle C, please see Unit III.B. of this preamble or the RCRA companion document to this proposed rule published elsewhere in today's **Federal Register**.

RCRA Subtitle C hazardous waste management and disposal requirements can substantially increase the costs of performing abatements which remove and replace painted architectural components (e.g. doors and windows), a technique which results in a relatively large volume of waste but which minimizes dust generation that can cause further human exposure to LBP. In a 1991 report on its demonstration project on LBP abatement in public housing, HUD noted that the abatement strategy chosen relates directly to a unit's eventual passing of post-abatement dust clearance tests (Ref. 6). HUD found that units which had undergone removal and replacement abatements were more likely to pass clearance tests, suggesting that these activities tend to generate less lead-containing dust than other abatement options.

Among the materials generated during abatement, LBP architectural component debris (e.g., doors, windows and window frames, external woodwork) represent largest volume. Other materials, such as LBP chips and dust, treatment residues, solvents, blast media, waste water, plastic sheets, and

worker equipment and clothing, are generated in smaller quantities, are comparatively easy to sample and analyze, and are not covered under today's proposal (see Unit VII.B. of this preamble for a discussion of the scope of materials covered in this proposal).

However, the cost of disposal of the large volume of LBP debris which frequently results from removal and replacement abatements can be very high. EPA estimates these costs to be \$316 per ton, including the cost of waste analysis, transportation, and disposal. Disposal as a RCRA hazardous waste of an average amount of LBP debris from an abatement project in a single-family home can represent up to 18.9% of the total cost of the project (Ref. 7). Individuals and firms do not necessarily know when beginning an abatement project whether the resulting debris will require management as a hazardous waste, but they may frequently account for this possibility in cost estimates. In some cases, sampling and analysis performed prior to bidding on a project allows estimation of disposal cost, which affects the decision about whether or not to undertake an abatement project.

RCRA subtitle C requirements may also interfere with achieving economies of scale in LBP debris disposal. RCRA requires that LBP debris which is determined to be hazardous be sent directly from the site of generation to a hazardous waste treatment, storage, and disposal facility and thereby precludes the aggregation of waste from different work sites at a central collection site, which would allow for lower transportation and disposal costs.

As noted above, RCRA Subtitle C testing, transportation and disposal costs can add up to approximately \$316 per ton (Ref. 7). The estimated cost to dispose of LBP debris in a construction and demolition landfill, taking into account the costs of the management and disposal requirements in today's proposal is approximately \$37.20 per ton (including average transport and disposal costs) (Ref. 7). Thus, the management and disposal cost of 100 tons of LBP debris which failed the TCLP from an abatement at a 100 unit apartment complex would be \$31,600 under Subtitle C requirements as opposed to \$3,720 under today's proposal.

The alternatives to RCRA hazardous waste management and disposal presented in today's proposal would result in significant cost saving for the conduct of LBP abatement activities. These savings would be achieved primarily by allowing disposal of LBP debris in construction and demolition

landfills and eliminating the testing and other requirements associated with RCRA Subtitle C regulations. These cost savings could stimulate demand for abatements which would in turn serve to reduce hazards to human health and mitigate the economic impacts associated with human exposure to LBP hazards including: reduced lifetime earnings due to diminished intelligence, increased educational costs, increased health care costs, lost work days and productivity, and costs associated with increased morbidity and mortality. In the public housing sector alone, where a fixed amount of funds are currently designated specifically for modernization including the performance of abatements (24 CFR part 965, subpart H), the cost savings associated with today's proposal would result in an increase in the number of LBP abatements of more than 5,454 annually. These economic and risk considerations were also important factors leading the Agency to identify the alternative management controls and disposal options being proposed today.

F. TSCA Coverage of LBP Debris

The legislative history of TSCA Title X shows clearly that by enacting TSCA Title IV, Congress wanted to "remove all major obstacles to progress, making important changes in approach and laying the foundation for more cost-effective and widespread activities for reducing LBP hazards." S. Rep. No. 102-332, 102nd Cong., 2nd Sess. 111 (1992). As the Senate Committee on Banking, Housing and Urban Affairs stated, "... by establishing realistic, cost-effective procedures for achieving hazard reduction, Title X will speed the clean-up of lead paint hazards ... and greatly decrease the incidence of childhood lead poisoning." (Id. at 112.)

Given the demonstrated risks that LBP poses and the clear Congressional intent for risks from LBP hazards to be reduced, the Agency is using today's proposal to improve the regulatory program governing the management and disposal of LBP debris from abatement, deleading, renovation, remodeling, and demolition activities.

It is important to note that although EPA is proposing to suspend the RCRA Subtitle C regulations which apply to LBP debris (see companion RCRA proposal), the Agency is not basing the proposed suspension on a determination that regulation of LBP debris is unnecessary. On the contrary, EPA believes that regulation of the management and disposal of LBP debris is necessary, and that TSCA, Title IV is

the more appropriate and effective authority for such regulation.

EPA is today proposing a determination that improper management of LBP debris or reuse of certain LBP debris constitute LBP hazards.

According to TSCA, Title IV, "LBP hazard" means "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects" as established by EPA. EPA believes that, in the absence of appropriate controls, the management and disposal of LBP debris creates a "LBP hazard." This preliminary determination is a statutory prerequisite to EPA's application of the TSCA management and disposal requirements developed for abatements and deleading activities to debris from renovations. (TSCA section 402(c)(3)).

Historically, research on hazards associated with residential LBP has focused upon deteriorated paint in homes, rather than on the debris generated during abatements and renovation. In today's determination that improper management of LBP debris is a hazard, the Agency believes that the same exposure pathways are relevant for debris and that, in general, debris by its very nature would tend to pose a greater hazard than deteriorated LBP in a home. This is because, except in the case of re-use, the debris has little or no value and there is no motivation to maintain the integrity of the paint on the debris surfaces. Hence, even the intact paint on debris would be expected to deteriorate (e.g., flake or peel off) rapidly.

Exposures to lead from deteriorated LBP can occur in several ways. First, children who exhibit pica, a hunger for substances not fit for food, may eat paint chips from accessible waste piles, resulting in the ingestion of substantial amounts of lead (Ref. 8). Also, the deteriorated paint from uncontrolled piles of debris is likely to fall onto the ground resulting in potentially high soil-lead levels. (LBP, as defined in today's proposal, contains at least 5,000 ppm lead.) Such contaminated soil can be inadvertently ingested by children through their normal hand-to-mouth activity. In addition, the lead-contaminated soil can be tracked into a residence, introducing lead into the household dust.

These scenarios have been demonstrated in various studies that used stable isotopes of lead as tracers. Basically, this technique relies upon the

fact that the isotope ratios of lead ores vary by deposit. Consequently, lead-containing products such as LBPs, leaded gasolines, etc. can have unique ratios of the stable isotopes in the lead. Comparison of the isotope ratios in these products to those of environmental media and blood can in some cases identify these products as the source of lead in the environmental media and/or lead in the blood.

Rabinowitz reports use of this technique to investigate the specific sources and pathways of lead exposure in three cases of chronic, high-level lead poisoning (blood-lead concentrations of 120, 83, and 66 µg/dl) (Ref. 9). In each case, blood, feces, and the child's home environment (paint, dust, and soil) were sampled and analyzed. All of the children had deteriorated paint present in their homes. Additionally, a series of environmental samples were collected and analyzed to characterize background lead throughout the city.

In the first two cases, the isotopic composition of the blood (indicative of chronic exposure) and the feces (indicative of exposure during the preceding day) were nearly identical. In the first case, they resembled the paint sample from the child's bedroom wall (which was similar to the exterior soil). In the second case, they closely matched the lead in window sill paint, but not the kitchen wall or garden soil. In the third case, the blood lead was close to that of the paint in the child's bedroom, which was believed to be the source of his chronic exposure, whereas the fecal lead appeared to be similar to fallout from current automobile emissions in the area. While such data do present some ambiguities, they are consistent with paint being the proximate or remote source of the child's lead exposure and the conclusion that, in cases of severe lead poisoning, the lead in the child's blood and feces closely resembles lead in paint on an accessible surface. Additionally, based upon isotopic comparisons between household dust and urban soils, the study also concluded that: (1) In the absence of lead paint, the lead in urban soils and household dust have nearly the same isotopic composition, and (2) lead paint, when present, can be responsible for 20-70% of lead in household dust and much of the lead in yard soil.

Yaffe, *et al.* presented two cases which also included measurement of the isotopic ratios of lead in blood, paint, dust, and soil (Ref. 10). In both cases, it was unlikely that direct ingestion of paint chips was the cause of the elevated blood-lead concentrations. This was based on the

facts that: (1) There was no indication that the children were pica-prone based upon interviews with the children and their parents, and (2) higher than exhibited blood-lead concentrations would be expected if paint chips were being ingested, given the very high lead levels in the paint.

The first case involved 10 children with blood-lead concentrations from 28 to 43 µg/dl. The isotopic ratios of the children's blood lead were similar, suggesting a common set of lead exposures. These ratios were quite similar to those of soil samples collected around the house and interior dust samples. The close agreement between the average isotopic ratios of exterior paint samples and the soils near the house suggested that the soil was contaminated by the exterior paint, which was badly deteriorated.

The second case involved twin 2-year-old males with blood-lead concentrations of 37 and 43 µg/dl. The isotopic ratios of the twins' blood lead were similar to the soil in their side yard and in the back yard of a nearby house where they often played. These soils had similar ratios to adjacent exterior walls. This suggests that the lead in the soils was primarily derived from the weathering of nearby painted surfaces and that the contaminated soil was a significant source of the twins' exposure. The interior dust sample lead was not similar to the exterior soil or the twins' blood lead.

The scientific literature also includes several studies that have identified a statistically significant relationship between deteriorated paint and children's blood-lead concentrations. One study suggests that infant blood-lead concentrations are a function of paint deterioration and lack of maintenance of the residence (Ref. 11). In this study, deteriorated housing was classified as deteriorated if the exterior was not well maintained or had peeling paint, as observed from the street. For infants at 12 to 18 months old, geometric mean blood-lead concentrations were twice as high in deteriorated housing (33 µg/dl) than in housing graded as satisfactory (15 µg/dl).

Improper management and disposal of LBP debris could cause a LBP hazard by allowing the accumulation and deterioration of LBP in locations, such as uncontrolled waste piles, where it may be accessible to children or contaminate the soil.

EPA believes that allowing such a LBP hazard to go unregulated would undermine benefits gained through the elimination or reduction of exposure to LBP in target housing, public buildings

and commercial buildings. The proposed controls on storage and transportation which are included in today's proposal (see Unit VII.G. of this preamble for a more thorough discussion of these controls) are intended to facilitate safe management of LBP debris.

In order to prevent the transfer of LBP hazards from one structure to another, today's proposal also prohibits the reuse and transfer for reuse of any LBP debris which is identified as a LBP hazard in today's TSCA proposal. The proposal identifies a LBP hazard as the presence of any deteriorated LBP on the debris. Under today's proposal, reuse or transfer for reuse of LBP debris which is identified as a LBP hazard (i.e., LBP debris with deteriorated LBP) would be prohibited. The prohibition would not apply if the LBP is removed prior to reuse or transfer for reuse. See Unit VII.G.1. of this preamble for a more in-depth discussion of reuse of LBP debris.

In authorizing EPA under TSCA Title IV to promulgate management and disposal standards for LBP debris, Congress did not directly address the conflict that would arise concerning the overlapping jurisdiction of the RCRA TC rule and any new TSCA management and disposal standards. Nor did Congress clearly address the obstacles to the conduct of lead abatements and deleading that could result if LBP debris is determined to be hazardous and subject to the high costs of compliance with RCRA Subtitle C. The concurrent proposal of today's RCRA TC suspension and new TSCA standards should resolve the duplication inherent in the statutory schemes. The new TSCA standards would be less burdensome than RCRA Subtitle C requirements and therefore would remove obstacles to the conduct of LBP activities while identifying standards to prevent improper management, disposal, and reuse of LBP debris.

VI. Analytic Basis for Landfill Disposal Options in Today's Proposed Rule

Identification of safe, effective, and reliable alternative landfill disposal options for LBP debris has been an important component of this proposed rulemaking. EPA believes that landfill disposal is the most common waste management practice for LBP debris, and, as noted above in Unit V. of this preamble, disposal of LBP debris in RCRA Subtitle C landfills (hazardous waste landfills) is very expensive. To identify safe and accessible alternative landfill disposal options, the Agency considered the following information.

A. Leaching and Mobility of Lead from LBP Debris

Under RCRA, LBP debris is considered hazardous if it exhibits the hazardous waste characteristic of toxicity (other hazardous waste characteristics of ignitability, corrosivity, and reactivity are not likely relevant). EPA changed the test to determine whether a waste exhibits the characteristic of toxicity under RCRA in 1990, when the Agency promulgated the Toxicity Characteristic (TC) rule (40 CFR 261.24). In addition to adding more hazardous compounds that are regulated under that characteristic, the TC rule replaced the Extraction Procedure (EP) test with the Toxicity Characteristic Leaching Procedure (TCLP). The test was designed to indicate a waste's potential to leach hazardous constituents into groundwater if the waste was co-disposed in a landfill with municipal wastes. In such a landfill, the decomposition of municipal wastes would produce organic acids creating relatively more aggressive leaching conditions than in landfills without co-disposal with municipal waste. (55 FR 11862, March 29, 1990.)

After the promulgation of the TC rule, concerns were expressed to the Agency that TCLP tests conducted on LBP debris for determining lead concentrations in leachate produced higher lead leachate levels than the old EP test. The results of TCLP testing caused certain previously nonhazardous LBP debris to be classified as hazardous waste under RCRA Subtitle C. Thus, the higher lead leachate levels produced by the TCLP effectively limited disposal options for LBP debris. LBP debris that had previously been managed as nonhazardous waste now often became subject to RCRA hazardous waste management requirements. In response, the Agency conducted a study to investigate which LBP wastes would be hazardous under the TC rule. This report contained EP test results from some wastes and TCLP results from others. While the study did not include testing of duplicate samples with both tests, in general, TCLP results were higher than EP results for similar materials.

The Agency conducted another study to investigate the leaching behavior of lead from LBP wastes under the TCLP as compared with the Agency's "Synthetic Precipitation Leaching Procedure" (SPLP). While the TCLP is designed to simulate leaching in a municipal landfill environment, the SPLP is designed to simulate the leaching of wastes disposed in landfills that do not accept municipal garbage

and other putrescible wastes that could decompose and form organic acids that could aggressively leach hazardous constituents in waste. Accordingly, the SPLP uses a mild inorganic leaching solution that would be typical of acid rain instead of the organic (acetic) acid used in the TCLP. This study indicated that LBP waste leached considerably lower levels of lead in the SPLP than in the TCLP (Ref. 12).

In a third study of LBP waste, the Agency analyzed more samples of LBP debris using both the TCLP and SPLP methods to compare lead concentration in the leachate (Ref. 13). The results showed that when LBP debris was subjected to the TCLP analysis, the leachate concentration of lead exceeded the TC limit of 5.0 mg/L for lead in approximately 75% of the cases. However, when the samples were subjected to the SPLP, in only a few cases did the lead in leachate exceed 5.0 mg/L. In general, for those materials that comprise LBP debris as defined at § 745.303 of the regulatory text, lead in leachate samples subjected to the SPLP was approximately 1/10 of the amount of lead measured in leachate samples subjected to the TCLP.

Lead was the only contaminant for which analysis was done in the LBP debris leachate testing described in the above three studies. This was simply because these studies focused on lead as the principal hazardous constituent in LBP debris. The Agency has no reason to believe that LBP debris would be a TC hazardous waste for any other reason. However, EPA requests comments and information on whether contaminants other than lead associated with LBP debris may cause LBP debris to be identified as a TC hazardous waste.

The relative immobility of lead in subsurface soils under non-highly acidic conditions, and its increased mobility under conditions of higher acidity, has been documented in many studies (Ref. 14). Deutsch provides a review of lead geochemistry and has summarized some of these studies. Lead entering the subsurface environment may be strongly affected by adsorption and/or chemical precipitation onto the solid-phase surfaces. Due to their strong adsorption affinity for lead, soils appear to have large capacities for immobilization of lead. Lead generally is likely to be confined to the top soil layers due to adsorption to the soils. Whatever lead moves past the top soil zone, iron and manganese oxides in the subsurface soil may play the greatest roles in the adsorption and chemical precipitation of lead.

While Deutsch concludes that lead is one of the least mobile of the common metal contaminants in the environment, he also states that lead can be relatively mobile, as with most metals, if the contaminant source is very acidic and the environment does not have the capacity to neutralize the acid. These conclusions are consistent with the findings of the leaching tests described above. That is, lead, in general, tends to be less mobile in less aggressive acidic conditions than in a highly acidic environment. For LBP debris, the organic acid of the TCLP (which is predictive of conditions in a municipal waste landfill) is considerably more aggressive in leaching lead than the milder, "acid rain" type of inorganic acid of the SPLP (nonmunicipal landfill scenario).

Regardless of the mobility issues noted above, there are certain other environmental conditions in the United States where lead, if soluble, might move appreciably with groundwater. For example, the existence of highly fractured bedrock, or highly porous soils, karst formations, soils with low cation exchange capacity or low organic content, and dissolved organic acids in the groundwater can appreciably increase the mobility of lead in the subsurface soil.

Upon review of the above-cited studies and the LBP debris leachate testing data, EPA made some preliminary conclusions regarding the potential for lead leachability in non-municipal versus municipal landfills. Based on these data, because non-municipal landfills are likely to be less aggressive environments for the leaching of lead, the Agency focused its further analysis on these types of landfills. Specifically, the Agency has focused on evaluating the safety of disposal of LBP debris in construction and demolition (C&D) landfills.

However, the Agency recognizes a need to conduct further analyses to come to more definitive conclusions regarding the potential for lead leachability and mobility from disposal of LBP debris under various types of landfill conditions. Therefore, the Agency plans to conduct such additional studies. The results of such analyses could potentially cause the Agency to revise its current conclusions regarding the leachability and mobility of lead in various landfill environments. However, until that time, the Agency maintains its long-held position that, in general, municipal solid waste landfills represent a more aggressive leaching environment for lead (and other hazardous constituents) than many non-municipal landfill environments.

Municipal landfill disposal remains the worst-case, generic mismanagement scenario that the Agency has determined, under RCRA, to be a plausible scenario for disposal of non-municipal solid wastes. The TCLP remains the appropriate leaching test to mimic municipal landfill conditions for determining whether solid waste exhibits the RCRA toxicity characteristic. The TCLP is also an important factor used by the Agency, when determining whether industrial process waste should be listed as a RCRA hazardous waste.

B. Ground Water Risks from C&D Landfills

The Agency has performed several studies providing data on leachate quality and on the environmental performance of some C&D landfills.

One study investigated leachate quality in C&D landfills (Ref. 15). The results indicated that of 21 C&D landfills for which there were leachate data, 18 landfills monitored leachate for lead, and of these, 15 had detectable lead concentrations. Although the existence of lead in landfill leachate at levels above the detection level is not unusual, the Agency intends to conduct further studies on the presence of lead in leachate from various types of landfills.

Additionally, the Agency has performed two studies which provide data on the environmental performance of some C&D landfills. Because these two studies were completed for the purpose of identifying cases of environmental releases from C&D landfills, they do not include data from the vast majority of C&D landfills for which there is no evidence of groundwater contamination.

The first of the two studies, "Damage Cases: Construction and Demolition Waste Landfills," identified 11 C&D landfills for which there was adequate evidence to find that they may have threatened or damaged human health or the environment (Ref. 16). The second report "Hazardous Waste Characteristics Scoping Study," reviewed the 11 C&D landfill cases documented by the first report but used more stringent criteria pertaining to proof of damage (Ref. 17). In particular, the second report eliminated from consideration 5 of the 11 cases documented by the first report, due to the fact that these 5 C&D landfills, in addition to receiving C&D wastes, also received municipal, hazardous or other improper wastes. Disposal of the inappropriate wastes at these C&D landfills may have adversely influenced their environmental performance.

Of the six damage cases that are described in the Hazardous Waste Characteristics Scoping Study, two are documented to have lead concentrations in groundwater that, at least once, exceeded a State or Federal standard. The highest reported values of lead in these cases are 0.090 and 0.056 mg/L, exceeding 0.015 mg/L, the Safe Drinking Water action level for lead at the tap. The site having the higher of these lead concentrations in ground water (0.090 mg/L) was operated during its entire life as an illegal dumpsite with no regulatory oversight. Therefore, it is not particularly surprising that release of lead has occurred at this site. The Agency is currently conducting further studies to better understand the circumstances that have resulted in these levels of lead being detected in groundwater at these C&D landfills.

To provide a more comprehensive understanding of the potential ground water risks of allowing LBP debris to be disposed in C&D landfills, the Agency conducted a groundwater modeling analysis. This analysis was done on a national scale, using groundwater modeling techniques similar to those used in previous EPA rulemakings (e.g., the Toxicity Characteristics Final rule (40 CFR 261.24); the Hazardous Waste Identification Proposed Rule (60 FR 66344, 66406, December 21, 1995) (FRL-5337-9); and the Petroleum Refining Listing Determination (62 FR 16747, April 8, 1997) (FRL-5807-5)). The groundwater modeling analysis is summarized briefly below and in more detail in the background document "Groundwater Pathway Analysis for LBP Architectural Debris," a copy of which is in the docket for today's proposal (Ref. 18).

The Agency recognizes that any "national" modeling analysis is limited in its ability to reflect every relevant siting and operational condition at any particular landfill. Public comments and supporting data are invited on this approach.

1. *Parameters used for the groundwater pathway analysis*—i. *Leachate composition.* SPLP data from the 1995 report on LBP debris was used to estimate the concentration of lead from LBP debris in the leachate emanating from the modeled C&D landfills. As noted above, the SPLP data, which represent the disposal of LBP debris in RCRA Subtitle D non-municipal solid waste landfills was designed to be more representative of the C&D landfill environment than the TCLP data, which is intended to represent co-disposal in an environment with wastes containing predominantly municipal garbage. Although the

Agency is aware that organic matter and putrescible wastes have been found to be present in some unknown number of C&D landfills, the Agency believes that C&D landfills generally produce less organic acids than municipal solid waste landfills (MSWLFs) (Ref. 19).

Thus, the SPLP data is more appropriate for this analysis. The Agency specifically solicits comments on the use of the SPLP leachate test data for the LBP debris risk analysis. EPA has initiated studies to obtain data concerning C&D and municipal solid waste landfill leachate quality and to determine whether organic waste disposed in C&D landfills generates leachate that could facilitate the leaching of lead in C&D landfills.

ii. *LBP debris quantity.* Using information from a 1990 HUD Report to Congress, the Agency first estimated total quantities of LBP debris likely to be generated from abatement of housing and day-care facilities (Ref. 20). For this estimate, the Agency conservatively assumed that all abatements would result in removal and replacement of painted architectural components from pre-1978 housing and day-care facilities. The analysis estimated that approximately 19 million tons of debris will be generated annually over the next 34 years comprised mainly of three types of LBP debris: doors, exterior wood (e.g., soffits, clapboards), and miscellaneous components (e.g., windows, window sills) (Ref. 20). The Agency used this quantity estimate for LBP abatement debris for the groundwater risk analysis.

The Agency also estimated total quantities of C&D waste and building construction and demolition waste that is disposed of in C&D landfills (Refs. 18 and 20). Data for waste quantities from renovation and remodeling (R&R) activities are not available separately and are likely to fluctuate from year-to-year. EPA assumed that part of the demolition waste could be attributed to R&R waste. The Agency used the quantities of LBP demolition waste in conjunction with the LBP abatement debris volumes to assess the combined groundwater risks from the disposal of these wastes in C&D landfills (Ref. 18).

For the ground water risk analysis, based on finite source modeling (i.e., each C&D landfill would contain a pre-determined quantity of LBP debris over the operating life of a landfill), the Agency conservatively assumed that only one-half (900) of the nation's existing 1,800 C&D landfills would receive the 19 million tons of LBP debris for disposal until LBP debris generation ceases (approximately after the next 34 years). It was also assumed

that all C&D landfills would receive building construction, demolition, and R&R debris and other C&D waste equally. The Agency requests comment on these assumptions and their use in the groundwater risk analysis.

iii. *C&D landfill characteristics.* The Agency has information on the number of commercial C&D landfills (1,800) and a distribution of their sizes (areas). However, the Agency does not have other site-specific data (e.g., hydrogeology) for these C&D landfills. These data representing the national distribution of various parameters are required as input for the groundwater risk modeling. Therefore, for the site-specific parameters with no data specific to C&D landfills, the Agency decided to use information from the Industrial Subtitle D Landfill Survey discussed below. The basis for this decision was that both C&D and Industrial D landfills are subject to the Federal regulations at 40 CFR part 257, subpart A (which includes some restrictions on siting of landfills), and therefore, both types of these facilities would be located in similar hydrogeologic regions of the country.

The national survey of Industrial Subtitle D landfills was conducted in the late 1980's and the results are presented in the background documents to this proposal (Refs. 18 and 22(b), (c), (d)). This stratified and weighted survey represents the nationwide distribution of the Industrial D landfills (e.g., geographic location, area, etc.), and represents the best available data on Industrial Subtitle D landfills on a nationwide basis. The survey represents a snapshot of the Industrial Subtitle D universe in the U.S. and has been used by the Agency in support of other regulatory (RCRA) programs.

The Agency assumed that the national distribution of C&D landfill locations is similar to that of Industrial D landfills. Therefore, this modeling analysis used the surficial soil and hydrogeologic data from the Industrial D landfill data base in order to represent relevant characteristics of C&D landfills (Refs. 18 and 22(a), (b), (c), (d)).

These assumptions add some uncertainty to the overall results, the exact magnitude of uncertainty is presently unknown. However, EPA believes it to be low, because the Agency used only the locational information from the Industrial D survey. The errors resulting from some differences in locations are not likely to add major errors in the national Monte Carlo analyses, as long as the respective modeled site locations are in the same hydrogeologic region as the original site locations.

The Agency has information from a survey on the location of closest downgradient drinking-water wells relative to municipal solid waste landfills, but, similar information is not available for C&D or Industrial D landfills. Therefore, the Agency used the distances to the closest downgradient drinking-water wells from the distribution of distances from the municipal solid waste landfill survey (Refs. 18 and 22(b), (c), (d)). In characterizing the drinking-water well distribution with respect to municipal landfills, the Agency collected information on the receptor wells closest to the landfills that were located within a radial distance of 1 mile from the downgradient edge of the landfill. The distribution of receptor well distances from municipal landfills used in the modeling analysis for the LBP debris rule is the best information available to the Agency on distances to receptor wells. As discussed later in this section, for this proposal, the Agency estimated lead concentrations in the drinking water wells located downgradient anywhere within a radial distance of 1 mile. However, the Agency intends to examine the effect on lead levels if the downgradient drinking water wells were restricted in location to the plume centerline or within the plume, as opposed to downgradient well location within a radial distance of one mile, prior to the promulgation of the final rule.

The data from the Industrial D and municipal solid waste landfill surveys, and all other data used as inputs in the modeling exercise are described in detail in the background documents for this proposal.

The Agency seeks comment on whether other data exist for C&D landfill locations and drinking water well locations that could be used as inputs to achieve a reduction in the uncertainty in the modeling analysis. Also, the Agency seeks leachate composition data for C&D landfills.

2. Modeling approach. The Agency modeled lead leachate migration from the bottom of unlined C&D landfills into the subsurface environment, and estimated the overall percentage of C&D landfills across the nation which might indicate peak lead concentrations in the closest down gradient receptor wells above the lead health-based levels (i.e., the Federal regulatory action level for lead in drinking water of 0.015 mg/L). As in previous RCRA rulemakings (e.g., the TC rule), the groundwater modeling analysis used a "Monte Carlo" approach to determine the national probability distribution of peak receptor well concentrations over the exposure time

horizon. Also, as in many other EPA groundwater risk analyses, a modeling time horizon of 10,000 years was used.

The Agency recently enhanced the subsurface transport model used to support RCRA rulemakings. The new model is called EPACMTP (EPA's Composite Model for Leachate Migration with Transformation Products). The model simulates the migration of contaminants in three dimensions to take into consideration the mounding effects beneath waste management units. The model also can simulate the fate and transport of primary constituents and their secondary reaction, decay products. The model is particularly appropriate for the LBP debris risk analysis, because it can consider the nonlinear nature of the lead isotherm (the relation between the mass of lead adsorbed or precipitated on the solids and the concentration of lead in water). The Agency developed a technique for the nonlinear isotherms and this was incorporated in to the EPACMTP analyses for lead (Ref. 23). The Agency also invites comments on the use of this nonlinear isotherm approach.

For the 1990 TC rule, EPA assumed that the source of contamination was infinite; i.e., waste would be disposed within a landfill continuously, therefore, hazardous constituent loading would never be depleted. For this reason, EPA limited its application to selected chemical constituents which correspond to infinite source behavior. The EPACMTP has a new modeling methodology. The new approach is called Regional Site-Based finite source methodology (Ref. 22(b)). The Monte Carlo-based approach uses all site-specific data and, if some site-specific data are not available, it uses data from regional distributions as the default data. If regional data are not available, then data from national distributions are used. The approach uses the best available data and keeps the site-correlated hydrogeological parameters together for each Monte Carlo realization in the modeling analyses.

For this risk analysis, the Agency used the Regional Site-Based approach to reduce data gaps related to the EPACMTP model input parameters. For example, since site-specific depth-to-groundwater information was not available, EPA used groundwater depth data within the Monte Carlo framework for the geographical region in which the site is located. The Agency assigned specific values for the climatic and hydrogeological model parameters based on the geographical locations of waste disposal sites across the U.S. This approach preserves the interdependence

between the site location and the climatic and hydrogeological region.

As mentioned in the previous section, when specific locational data for C&D landfills were lacking, the Agency used data from the EPA Survey of Industrial Subtitle D Waste Management Facilities. In certain instances (e.g., well location), information from the Agency's municipal solid waste landfill database was used. The underlying assumption in using these data is that, in general, the overall C&D site distribution is similar in terms of climatic and hydrogeological settings to other non-hazardous waste landfill sites. Thus, even if the locations of these types of landfills do not coincide exactly, the regional climatic and hydrogeologic characteristics would not be expected to vary widely and, therefore, would not significantly affect the results in a nationwide Monte Carlo framework. The size of the landfill and waste volumes, however, tend to be significant factors influencing the outcome of the Monte Carlo results as long as the sites under consideration are within the same climatic region. EPA requests comments on whether assumptions related to landfill size and waste volume are appropriate, as well as any supporting data.

The Agency's modeling approach assessed a full range of fate and transport conditions, including the climatic and hydrogeological properties which were assumed to characterize C&D landfills across the nation. Correlated hydrogeologic characteristics were utilized, based on a survey conducted by the National Water Association, in the Monte Carlo analysis. Impossible combinations of site conditions are rejected in the Monte Carlo analysis; e.g., very low rainfall and high infiltration. However, some assumptions can lead to overestimation or underestimation of risks. For example, the approach assumed that the receptor well may be located anywhere, within a radial distance of a mile from the edge of the landfill, on the down gradient side of the landfill. This may underestimate the risk compared to sites where the receptor well was restricted in location to the plume centerline or within the plume. However, the risk modeling approach also assumes that the receptor wells pump water from the uppermost layer of groundwater below the ground surface, where leachate releases from landfills would be most likely. This may overestimate potential exposure, because many private wells gather water from deeper layers of groundwater which may not be exposed to the landfill leachate. The Agency seeks comment on the modeling

approach and data to improve the modeling analyses.

The new model (EPACMTP) and the Regional Site-Based Monte Carlo approach were favorably reviewed by EPA's Science Advisory Board (SAB) (Ref. 24). The SAB also provided suggestions for improving the model, which EPA has considered. The Agency's response to the SAB's review is also in the docket for today's proposal (Ref. 25). The Agency believes it is applying the best available modeling approach for this national assessment. EPA may conduct additional analyses using this modeling approach should additional data for C&D landfills become available. This Monte Carlo approach avoids the compounding effects of conservatism that may occur if, for example, single, reasonable-worst-case values were used for each parameter.

The MINTEQA2 (geochemical speciation model) is another EPACMTP model component which determines subsurface lead sorption isotherms under a range of environmental conditions i.e., variation in pH and other factors controlling the subsurface mobility of lead (Refs. 18 and 22(a), (b), (c), (d)). The Agency considered the subsurface behavior of lead in combination with waste volume, hydrogeological, climatological and soil characteristics to generate the distribution of concentrations of lead in drinking water wells.

3. *Modeling results.* The results of the LBP debris modeling effort are summarized below. These findings result from application of the parameters described in section B.1. of this unit, including the use of SPLP data for leachate composition, to the modeling approach described in section B.2. of this unit.

- The peak receptor well lead concentration would be between zero and 0.015 mg/L over the 110,000 year modeled time frame in approximately 95% of the modeling simulations. (Each simulation corresponds to a single downgradient well located within a radial distance of a mile. Every Monte Carlo simulation picks a different downgradient well location within a radial distance of a mile along with an input data set, including landfill size, soil hydraulic conductivity, etc.)

- In less than 4.5% of the cases would the receptor well lead concentration exceed the Federal regulatory action level for lead in drinking water of 0.015 mg/L over the full modeling time horizon, and most of these exceedances would occur between 5,000 and 10,000 years after the disposal of LBP debris in C&D landfills.

- The drinking water action level for lead was not exceeded in any receptor well during the first 500 years and, between 500 and 1,000 years, it was potentially exceeded at only one site in 10,000 Monte Carlo realized sites (i.e., 0.01%).

Thus, at the national level, the modeling results indicate that the impact on groundwater at drinking-water wells down gradient of C&D landfills accepting LBP debris appears to be very low and would only occur after an extremely long period of time.

For this proposal, modeling efforts indicate that the disposal of LBP debris in C&D landfills would be protective of human health at the 95th percentile protection level. This level of protectiveness is at the high end (most protective) of the levels of protectiveness that the Agency has used in regulating hazardous wastes under the RCRA program. Historically, the EPA RCRA program has used levels of protectiveness ranging from 85 to 95%, when considering the results of various risk analyses. For example, for the TC rule, the level was 85% (40 CFR 261.24); for hazardous waste delistings, the level was 95% (56 FR 67197, December 30, 1991); and for the Hazardous Waste Identification Rule for Process Wastes (HWIR), the level was 90% (60 FR 66344, December 21, 1995) (FRL-5337-9).

4. *Monte Carlo Modeling uncertainties.* Monte Carlo analysis is a statistical technique that can be used to simulate the effects of natural variability and informational uncertainty which often accompany many environmental conditions. It is a process by which an outcome is calculated repeatedly for many actual situations, using in each iteration randomly selected values from the distribution of each of the variable input parameters. Information on the range and likelihood of possible values for these parameters is produced using this technique. When compared with alternative approaches for assessing parameter uncertainty or variability, the Monte Carlo technique has the advantages of very general applicability, no inherent restrictions on input distributions or input-output relationships, and relatively straightforward computations. Monte Carlo application results can also be expressed in easily understood graphs, can be used to satisfactorily calculate uncertainty, and can be used to quantitatively specify the degree of conservativeness used. With deterministic analyses (e.g., worst-case analyses), an alternative to Monte Carlo, it is often not possible to quantify the level of protection represented by the

results. However, some potential limitations may also exist when applying Monte Carlo techniques for modeling risks depending on the data and model utilized for the analyses.

The Agency has been using the Monte Carlo modeling methodology in various rulemakings for many years. EPA has conducted numerous sensitivity analyses and comparison with deterministic approaches in those rulemakings (e.g., Proposed rule for Petroleum Refining Waste Listing Determination, 62 FR 16747, April 8, 1997). The methodology and the model have gone through many reviews and evaluations by the SAB and EPA's Office of Research and Development (Ref. 24). Additionally, these analyses were subjected to the public review and comment process. Consequently, the model and the modeling methodology have been significantly enhanced over a number of years as noted by the SAB in their latest review.

The modeling analyses conducted on disposal of LBP debris in C&D landfills have some uncertainties associated with them, like any other modeling analyses. The uncertainties may include the following: (1) The use of the Industrial Subtitle D locational data; (2) the exact nature of the leachate environment in C&D landfills; (3) the likelihood that lead which may leach from LBP debris would form soluble or insoluble organic complexes which may increase or decrease the potential for lead migration; (4) the possibility of the existence of certain environments underneath the modeled C&D landfills that might increase or decrease the migration of lead from C&D landfills, e.g., highly fractured or highly impermeable subsurface environments; (5) the location of drinking water wells, exposed to leachate from C&D landfills, that might not have been factored in the distribution of well locations; (6) limitations associated with model validation and verification; and (7) the difficulties in predicting conditions over very long periods of time into the future.

This analysis may have certain other limitations. For example, the Agency did not model some specific environmental conditions (e.g., karst and fractured rocks, highly porous soils, presence of excessive amounts of organics in groundwater). To attempt to compensate for the inability to address all possible environmental conditions where C&D landfills may be located, the Agency modeled the disposal of LBP debris conservatively. For example, the Agency made a number of assumptions to help ensure protectiveness: (1) The fate and transport of lead in the subsurface environment was modeled

over a time horizon of 10,000 years; and (2) The total amount of waste in C&D landfills was doubled by assuming the waste is managed in 900 landfills instead of the actual 1,800 landfills.

The Agency specifically invites comments and data on the areas of uncertainty within the LBP debris modeling analysis.

C. Preliminary Conclusions on Disposal of LBP Debris in C&D Landfills

Based on the data and analyses discussed in sections A and B of this unit, the Agency is proposing to allow disposal of LBP debris in C&D landfills as defined at § 745.303 of the regulatory text.

The relative immobility of lead in the soil and subsoil environment under non-highly acidic conditions is described in section A of this unit. The results of comparative leaching studies using the SPLP and TCLP tests are generally consistent with those findings. That is, under conditions of higher acidity, the potential for lead to leach from LBP debris is greater than under low acidity conditions. Once released, the subsurface movement of lead depends on the hydrogeologic conditions which may contribute to the increased or decreased movement of lead through soils and subsoils. The environment in a C&D landfill is not considered likely to be highly acidic and generally should not result in high levels of lead leaching. The Agency conducted groundwater modeling (as described in section B of this unit) of the fate and transport of lead from C&D landfills that would accept LBP debris and found in this modeling that the likelihood of contamination of groundwater in drinking-water wells downgradient from C&D landfills appears to be remote.

These modeling results (in combination with the TCLP and SPLP data for LBP debris and the general geochemical behavior of lead in the subsurface environment) were convincing factors leading the Agency to propose a rule allowing disposal of LBP debris in C&D landfills. EPA believes that such disposal would, in general, be a safe, effective, and reliable option for management of LBP debris.

As discussed in section B of this unit, EPA recognizes that uncertainty in the national groundwater modeling analysis exists, especially relating to site-specific conditions that might be present at some C&D landfills. This concern is perhaps reinforced by the Agency studies on environmental releases from a limited number of C&D landfills which raise questions regarding the mobility of lead and the potential for groundwater

contamination. As stated above, the Agency is further examining the sites addressed in these studies.

States with C&D landfills regulate them to some degree, but the extent of regulatory coverage varies. Twenty-nine States require the facilities to have some form of groundwater monitoring and 22 have corrective action requirements. In addition, 22 States require C&D landfills to have a liner and 18 require a leachate collection system (Ref. 15). The State requirements for groundwater monitoring and leachate collection are deterrents against the migration of hazardous constituents.

EPA is proposing that LBP debris may be disposed of in C&D landfills subject only to the requirements in 40 CFR part 257, subpart A. These criteria do not include groundwater monitoring or corrective action requirements, but do include some location and other standards. The Agency solicits comments on whether it should require disposal of LBP debris only in the C&D landfills with ground water monitoring and corrective action systems. In addition, EPA is interested in comments on whether the Agency should restrict the disposal of LBP debris to C&D landfills which satisfy additional State requirements. Data demonstrating the need for these protective measures is particularly requested, as is information on whether such requirements would significantly limit disposal options for LBP debris.

D. Other Non-hazardous Waste Disposal Options

1. *Non-municipal landfills accepting conditionally exempt small quantity generator hazardous wastes.* The Agency believes that preliminary conclusions reached regarding C&D landfills meeting 40 CFR part 257, subpart A requirements also apply to industrial and C&D landfills meeting 40 CFR part 257, subpart B requirements that would accept hazardous waste from conditionally exempt small quantity generators (CESQG). These preliminary conclusions, however, do not apply to industrial waste landfills subject to 40 CFR part 257, subpart A requirements since the industrial facilities may generate leachate with different leachate characteristics. If LBP debris were to be disposed of in these landfills, the landfill conditions may accelerate lead leaching. Because EPA has not studied this possibility, EPA has not proposed disposal of LBP debris in industrial solid waste landfills meeting 40 CFR part 257, subpart A requirements.

Under the 1995 promulgated regulations for the disposal of CESQG wastes (61 FR 34252), CESQG wastes

must be disposed of at either: (1) Subtitle C hazardous waste landfills; or (2) municipal solid waste landfills subject to 40 CFR part 258 landfill design criteria; or (3) nonmunicipal, nonhazardous waste disposal units subject to part 257, subpart B requirements. These subpart B requirements for nonmunicipal, nonhazardous waste disposal units accepting the CESQG wastes for disposal include location standards, groundwater monitoring, and corrective action provisions. If LBP debris disposal occurs in C&D landfills or Industrial D landfills accepting CESQG hazardous wastes for disposal, these requirements would, during the landfill operating life and post-closure period, allow detection and control against potential migration of not only lead leachate but also leachate containing other hazardous constituents associated with CESQG hazardous wastes. Because of the recent promulgation of the CESQG waste disposal requirements, it is unclear at this time, how many of the approximately 1,800 C&D landfills nationwide will accept CESQG waste.

Currently, more than half the States require groundwater monitoring and some also require corrective action at C&D landfills. C&D landfills in these States can accept CESQG waste for disposal. The Agency believes it is unlikely that disposal of LBP debris in landfills subject to 40 CFR part 257, subpart B requirements (whether or not these landfills are also C&D landfills) would pose a threat to groundwater. Accordingly, the Agency is also proposing today to allow disposal of LBP debris in those landfills that receive CESQG wastes and are subject to part 257, subpart B requirements. Public comments are invited on this disposal option.

2. *Municipal solid waste landfills.* The Agency has not included municipal solid waste landfills (MSWLF) in the list of allowable disposal facilities at § 745.309 of today's proposed rule. However, the Agency is actively considering whether MSWLFs are acceptable for disposal of LBP debris, and the Agency solicits comments, data and studies that are relevant to this question.

As stated above, the Agency decided, based on concerns about disposal of LBP debris in the organic-acid-generating environment of MSWLFs, as well as the supporting TCLP and SPLP leachate test data, to focus its analytic effort in preparing for today's proposal on the disposal of LBP debris in C&D landfills. However, the Agency has recently also completed a groundwater risk analysis on the disposal of LBP

debris in MSWLFs. This risk analysis has been incorporated into the background document describing the groundwater pathway analysis supporting this proposed rule (Ref. 22(a)).

Although the results of the groundwater risk analysis for MSWLFs, as described in the background document, are quite similar to those for C&D landfills (i.e., the calculated risks are quite low), the Agency remains concerned about the results of the leaching tests that were described earlier. That is, lead leachate levels resulting from use of the TCLP (intended to mimic leaching in a MSWLF) on LBP debris samples were found, in general, to be an order of magnitude greater than those resulting from use of the SPLP (intended to mimic leaching in a non-municipal waste landfill). Given these higher rates of predicted leaching of lead from MSWLFs, the Agency decided not to propose a regulation allowing the disposal of LBP debris in MSWLFs at this time, but to study this issue further.

EPA seeks information concerning quantities of lead-containing waste disposed in municipal landfills, MSWLF leachate characteristics (pH, nature of organic acids) and empirical data for groundwater/leachate monitoring from older MSWLFs and new MSWLFs operated according to 40 CFR part 258 requirements. Also, the Agency requests comment on: (1) Whether engineered landfill systems will be operational for extended time periods (since groundwater modeling shows it can take hundreds, if not thousands, of years for lead to reach hazardous concentrations at downgradient drinking water wells), and (2) other options that might be available to ensure that, if EPA allows MSWLFs to receive LBP debris, those options are fully protective of human health and the environment over such long time frames. Depending on the information received, the results of planned EPA analyses, and public comments on this proposal, EPA might allow the disposal of LBP debris in MSWLFs when it finalizes today's proposed rule.

VII. Proposed Rule Provisions: §§ 745.301 - 745.319

A. General

Should today's TSCA proposal and the companion RCRA proposal become effective, the current Federal requirements that generators of LBP debris waste conduct the TCLP test or use their knowledge to determine whether their waste is hazardous, and

Federal requirements that hazardous LBP debris waste be managed and disposed of under RCRA Subtitle C rules would be suspended. Instead, the TSCA standards in today's proposal or the equally (or more) protective standards of an authorized State or Tribal TSCA program would become effective. However, RCRA Subtitle C requirements will remain applicable to LBP debris if it is a hazardous waste by virtue of the presence of any hazardous constituent other than lead or if a State with an authorized RCRA TC program elects not to suspend the applicability of the TC for LBP debris.

The language in TSCA Title IV compelled the Agency to tailor today's proposed standards to specific types of materials generated during the conduct of specific activities in specific structure types. Sections B., C., and D. of this unit outline the applicability of the proposed rule to material type, activity type, and structure type. Those units also explain the Agency's rationale for the scope of the proposal. Sections F., G., and H. of this unit discuss the disposal options, management controls and notification and recordkeeping requirements respectively.

B. What Types of Materials Are Covered?

The proposed TSCA standards and suspension of the RCRA TC rule are limited in applicability to LBP architectural component debris (e.g., doors, windows, etc.) and LBP demolition debris (both terms are defined in § 745.303 of the regulatory text). As noted at the beginning of this preamble, these types of debris are referred to collectively as LBP debris (the term LBP debris is also defined at § 745.303). LBP refers to paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm² or more than 0.5 percent by weight. The definitions and coverage of these terms are designed to capture high-volume LBP materials that are the most difficult to test and most costly to manage and dispose of under RCRA Subtitle C. Other types of LBP waste, which would not be considered to be LBP debris such as LBP chips, dust, blast media, solvents or treatment residues (as outlined in section B.1. and B.2. of this unit) are not covered.

There would be no *de minimis* threshold for the management and disposal standards in this proposal. Therefore, even small amounts of LBP debris would be subject to the standards in the proposal. The Agency believes that improper management or disposal of any amount of LBP debris represents a LBP hazard.

The practical effect of this decision is that LBP debris from very small renovations or abatements should be managed and disposed of subject to today's proposed standards (it should be noted that there is a 72-hour grace period for access limitations as described in section H.4. of this unit). EPA believes this is a common sense approach given the potential for children to chew LBP debris, to track LBP into homes, or to otherwise ingest LBP resulting from improper management. An alternative approach might be to set a *de minimis* level below which LBP debris would not become subject to today's proposed management standards. One option would be to set a *de minimis* threshold based on the amount of LBP disturbed. The Agency seeks comment on its decision not to set a *de minimis* level in these proposed standards and specifically requests suggestions and support for possible *de minimis* levels that could be established in the final rule.

1. *Concentrated LBP wastes not covered.* Many abatement approaches are available to address LBP hazards. These various approaches and the wide range of renovation and remodeling techniques generate a variety of LBP wastes. EPA is not, however, including materials (from any activity) other than LBP architectural component debris and LBP demolition debris in today's proposed rule. LBP wastes, such as paint chips or paint dust, blast media, solvents or treatment residues are homogenous in physical characteristics, easy to test for toxicity using the TCLP, and are easily recognizable. Some of these wastes are more likely than LBP debris to consistently and significantly exceed the TCLP regulatory level for lead (see section B.3. of this unit for a discussion of dust and paint chips generated during demolitions). These wastes, because of their high lead concentration, may pose a higher risk of groundwater contamination than LBP debris if disposed of in nonhazardous solid waste (i.e., C&D) landfills. The analyses described in Unit VI. of this preamble did not study these types of concentrated lead-contaminated wastes. The focus of the Agency's risk analysis was LBP debris, as defined at § 745.303 of the regulatory text.

Given the smaller volume of these concentrated wastes, it is not extremely costly to manage them under RCRA Subtitle C. Also, the regulated community has not identified management and disposal of these wastes as a substantial cost factor in abatement projects. Thus, under today's proposal, waste of this nature would still be subject to RCRA regulations, and

if it fails the TCLP (i.e., exceeds the TC regulatory limit of 5 ppm for lead in TCLP Leachate) or is determined through knowledge to be hazardous, must still be managed as hazardous waste under RCRA Subtitle C. Public comment on this approach and data regarding disposal options for these wastes is encouraged.

2. *Heterogenous/incidental waste not covered.* Another category of waste not covered by today's proposal is heterogenous materials incidental to LBP activities. These wastes may include items such as contaminated HEPA vacuum filters, plastic sheeting, worker clothing, and equipment. These materials would remain subject to RCRA requirements under today's proposal. Because of the lower volume of these wastes, if they are determined to be hazardous, generators can manage and dispose of them without excessive costs. Public comment on this approach and data regarding disposal options for these wastes are encouraged.

3. *LBP demolition debris.* The definition of "LBP demolition debris" in today's proposal includes all materials that result from demolition of target housing, public buildings, or commercial buildings which are coated wholly or in part with or adhered to by LBP at the time of demolition. LBP demolition debris includes dust, paint chips, and other solid wastes which would not be covered under today's proposal if they were generated during a LBP activity other than demolition (for example, abatement or deleading). Quantities of LBP waste are small in proportion to the overall volume of unpainted waste generated during demolition activities. As described in Unit IV. of this preamble, in order to make a RCRA hazardous waste determination, the generator must obtain a representative sample of waste. In the case of demolition debris, a representative sample for a TCLP analysis would represent both painted and unpainted components in the proportion that they are present in the debris. A representative sample of demolition debris subjected to the TCLP, is not likely to exceed the TC regulatory limit for lead because of the small amount of paint in relation to the overall waste stream (Ref. 26). The Agency requests adequate scientific and historical data which would confirm anecdotal evidence that demolition debris never or almost never fails the TC regulatory level for lead.

Separation of dust, particulate matter, and paint chips from other demolition material is virtually impossible and the Agency believes that requiring such a separation would be impractical and

unnecessary. Therefore, all materials generated during demolitions, including dust, paint chips, or other particulate matter are included in the definition of demolition debris and, therefore, covered by today's proposal.

If LBP demolition debris fails the TC regulatory level for a hazardous constituent other than lead, it would remain subject to all applicable RCRA Subtitle C requirements. Thus, this proposed rule would not relieve a generator of LBP demolition debris from requirements related to other kinds of hazardous waste in the debris. He or she must still determine whether any of the regulatory levels for TC hazardous constituents (other than lead) are met or exceeded or if a listed hazardous waste is present.

Today's proposal includes management and disposal of LBP debris from demolitions. The Agency believes that demolition debris is identical to debris generated from other types of LBP activities such as abatements and renovations and that waste transporters and disposal facilities will not be able to distinguish LBP demolition debris from other LBP debris. The Agency requests relevant data and comments on the coverage of LBP demolition debris under today's proposal.

4. *LBP contaminated soil.* LBP contaminated soil is not included in the scope of this proposal and is not addressed in the proposed RCRA suspension of the TC with respect to LBP architectural components. The Agency has not extended this proposal to include LBP contaminated soil, because the analysis to support its inclusion does not exist at this time. Also, EPA believes that the disposal of LBP contaminated soil has already been addressed, for the most part, in the RCRA household waste exclusion.

When a homeowner or contractor removes LBP contaminated soil from residences, the LBP contaminated soil is eligible for the household waste exclusion under the existing RCRA hazardous waste rules if the LBP contaminated soil has been contaminated as a result of routine household maintenance or the weathering or chalking of the paint. EPA believes that this exclusion addresses the disposal of LBP contaminated soil in most instances. EPA is interested in receiving comments and information about the potential impacts of the current regulations and exemptions, as well as alternative approaches related to the disposal of LBP contaminated soil from residences. EPA is also interested in any information about the potential number of soil abatements and costs currently associated with the disposal of

LBP contaminated soil, whether or not the disposal is conducted pursuant to the RCRA exclusion. Because EPA's interim guidance for addressing LBP hazards recommends soil abatements under certain conditions, EPA is particularly interested in receiving comments on whether the completion and implementation of other lead rules promulgated under the LBP Hazard Reduction Act of 1992 or "Title X" (such as 403: Identification of Dangerous Levels of Lead (63 FR 30302, June 3, 1998) (FRL-5791-9); 402: LBP Activities Training and Certification (61 FR 45778, August 29, 1996) (FRL-5389-9); 406: Requirements for Lead Hazard Education before Renovation of Target Housing (63 FR 29908, June 1, 1998) (FRL-5751-7); 1018: Requirements for Disclosure of Known Lead Based Paint and/or Lead Based Paint Hazards in Housing (61 FR 9064, March 6, 1996) (FRL-5347-9)) would have an impact on the number of soil abatements.

As also indicated in the proposed RCRA Suspension of the TC for LBP Debris, the Agency does not currently have a sufficient technical basis for reducing the RCRA subtitle C requirements for LBP contaminated soil. In that proposal, EPA is seeking other data to determine whether there is a sound technical basis for reducing the subtitle C requirements that might apply to some soil removed from residences. (Comments on this issue should be submitted in accordance with the instructions in the RCRA proposal, found elsewhere in today's **Federal Register**). In addition, EPA is interested in receiving information or data on the fate of LBP contaminated soil in landfill environments.

C. What Activities Are Covered?

Today's proposed rule would cover: LBP architectural component debris generated during the following activities: abatement, deleading, renovation, and remodeling at target housing, public buildings, and commercial buildings; and LBP demolition debris generated by demolition of target housing, public buildings and commercial buildings that contain LBP at the time of demolition.

The Agency is including deleading, renovation, and demolition activities in the scope of today's TSCA proposal, because the LBP debris these activities produce is similar and in some cases identical to the LBP debris produced by abatement activities. The analyses conducted for today's proposal show no significant risk associated with disposal of LBP debris (from any activity or structure) in C&D landfills. These analytical conclusions (as discussed in

Unit VI. of this preamble) combined with EPA's desire to subject all LBP debris to one clear regulatory scheme resulted in the inclusion of LBP debris from renovation and remodeling, deleading and demolition activities under today's proposal. While the Agency feels that inclusion of these activities under the proposed standards is a logical decision, public comments on the inclusion of the activities and structures in today's proposal are encouraged.

1. *Catastrophic events.* Catastrophic events (such as fires, hurricanes, floods, tornadoes, earthquakes, etc.) may, in many cases, generate materials similar or identical to those from planned demolitions. Therefore, today's definition of LBP demolition debris includes debris generated by catastrophic events as well as by planned activities.

2. *Deconstruction.* Some stakeholders have brought an activity commonly referred to as "deconstruction" to the Agency's attention. Generally, deconstruction refers to the salvaging of building components by removing them prior to demolition or during remodeling and renovation. The goal of such salvaging is usually to resell the components for reuse. Anecdotal evidence leads the Agency to believe that deconstruction may be a fairly common practice in structures containing LBP architectural components (Ref. 27). LBP architectural components which are removed prior to a demolition, as part of a "deconstruction" or similar activity would be subject to today's proposal under the definition of renovation at § 745.303:

Renovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined in this section. The term renovation includes but is not limited to: the removal or modification of painted surfaces or painted components. . . .

Deconstruction or similar activities would result in the "disturbance" or "removal" of "painted structures" and therefore LBP debris generated during these activities would be subject to this proposal. It should be noted that reuse of LBP debris or transfer of LBP debris for reuse is permitted under this proposal provided that the components are not considered "LBP hazards" at the time of reuse or transfer. Reuse of LBP debris is discussed in more detail in Unit VII.G.1. of this preamble. EPA encourages recycling or reuse of waste products when such activities do not pose health threats.

D. Who Must Comply With This Proposal?

Firms and individuals who generate, store, transport, reuse, offer for reuse, reclaim, or dispose of LBP debris from activities which are covered by this proposal, explained in Unit VI.C. of this preamble, would have to comply with today's proposed regulations. Regulated entities include firms and individuals who offer to conduct, in whole or part, abatement, renovation, remodeling, deleading or demolition in target housing and public and commercial buildings for compensation.

Homeowners who perform abatement, renovation or remodeling work in their own homes are not subject to today's proposed regulations, unless the housing is occupied by persons other than the owner or the owner's immediate family. EPA recognizes, though, that not all abatements, renovation, and remodeling are performed solely by a home owner. In some cases a homeowner may hire a "handyman" to assist in conducting these activities. The Agency believes that the homeowner exclusion would not apply to "handymen" assisting the homeowner in the work unless the homeowner generates the majority of the LBP debris and serves as direct supervisor to the "handyman." EPA encourages comments on this topic as insufficient information is available to determine how often "handymen" are hired to assist in abatements, renovations and remodeling, how much LBP debris is generated by "handymen," and whether or not "handymen" should be subject to today's proposal.

Although homeowners are not subject to today's proposed requirements, EPA encourages homeowners performing work in their own home to follow the management requirements outlined in the proposal. The Agency believes that the management requirements in today's proposal reduce risks to LBP hazards, and homeowners following these management practices will be able to reduce LBP hazards in their home.

The proposal allows the disposal of debris in C&D landfills, as defined at § 745.303. Although these landfills are subject to the RCRA requirements in 40 CFR part 257, subparts A or B, the proposal does not require that, for purposes of these TSCA rules, the landfills in fact be in compliance with 40 CFR part 257, subparts A or B. Because EPA generally lacks the authority under RCRA to enforce the requirements at 40 CFR part 257, subpart A (44 FR 53438, September 13, 1979), EPA requests comment on

whether the final TSCA rule should specify that C&D landfills accepting LBP debris must be in compliance with 40 CFR part 257, subpart A or B.

Being in compliance would require adherence to all or a subset of the provisions in 40 CFR part 257 that are relevant to LBP debris. Examples include limiting access to the landfill and groundwater monitoring requirements. With TSCA authority, EPA would be able to enforce these requirements on any landfill that accepts LBP debris. EPA recognizes that many states already enforce 40 CFR part 257 requirements under their State RCRA programs. EPA expects that, even with Federal TSCA enforcement authority regarding the provisions of 40 CFR part 257, subpart A for C&D landfills accepting LBP debris, most enforcement actions for such landfills would be taken by states. If the proposed rule were modified to provide for Federal enforcement of RCRA 40 CFR part 257, subpart A requirements for C&D landfills accepting LBP debris, a necessary consequence is that, as part of a state approval process, EPA would evaluate each State's program to determine the adequacy of enforcement capability of state requirements that are as least as stringent as those found at 40 CFR part 257. EPA requests public comments on whether landfills that accept LBP debris and are found not to be in compliance with 40 CFR part 257, subpart A or B, should be subject to enforcement under TSCA. EPA would also like comment on whether enforcement of 40 CFR part 257, subpart A or B under TSCA would confuse and complicate the requirements for disposal of LBP debris. For example, a landfill owner or operator may become confused between the requirements under RCRA for landfills, and the requirements under TSCA for disposal, and inadvertently fall out of compliance from lack of understanding of the requirements for disposal of LBP debris. Finally, the Agency requests comment on whether imposition of TSCA enforcement on landfills that accept LBP debris would discourage or deter C&D landfill owners and operators from accepting this material.

E. When Does LBP Debris Become Subject to This Proposal?

In the case of LBP demolition debris, the proposal is designed to cover all material that is created by demolitions when LBP is present in the structure being demolished. The definition of LBP demolition debris at § 745.303 states:

LBP Demolition Debris means any solid material which results from the demolition of target housing, public buildings, or

commercial buildings which are coated wholly or in part with or adhered to by LBP at the time of demolition.

This definition subjects LBP debris generated by demolitions to the standards in this proposal as soon as a demolition occurs.

In the case of LBP architectural component debris, the definition at § 745.303 states:

. . . LBP architectural component debris is generated when an architectural component which is coated wholly or in part with or adhered to by LBP is displaced and separated from commercial buildings, public buildings, or target housing as a result of abatement, deleading, renovation or remodeling activities. . . .

This clause in the definition makes LBP debris subject to today's proposal when it is "separated" from a structure. In the context of this definition, "separated" does not necessarily imply that the component is taken out of the structure, although it may be. For example, doors detached from a structure and stacked inside that structure are considered to be "separated" from the structure. This definition is designed to require that the management controls in today's proposal (particularly access limitations where applicable) take effect as soon as LBP debris is generated.

Under this proposal, if a homeowner hires a individual or firm to perform any of the above activities and LBP debris is created, the individual or firm is considered to be the generator. In such cases, the individual or firm who generated the debris would be responsible for compliance with the requirements in today's proposal rather than the homeowner.

Any generator of LBP debris from the activities covered in this proposal may choose to separate components containing LBP from the rest of the waste stream. LBP debris separated from the rest of the waste stream would be subject to today's proposed standards. However, the remaining wastestream which does not contain LBP would not be subject to today's proposed standards. Although the Agency believes that complying with the requirements in today's proposal would generally be easier than separating LBP debris from the waste stream, the proposal gives the generator of LBP debris the flexibility to determine the best course of action for each individual activity.

During the development of this proposal, the issue of paint chips or dust generated incidentally during the transportation of LBP debris for disposal or reuse was raised. EPA believes that chips or dust generated during

transportation for disposal or reuse should be subject to the provisions of this proposal and disposed of as LBP debris. For example, if LBP debris is transported to a C&D landfill in a covered dumptruck, the whole load (including paint chips that fall off the LBP debris during transport) should be disposed of together. Similarly, chips and dust loosened from debris during storage in a dumpster or during transport is covered by today's proposal. Subjecting such incidentally-generated chips or dust to RCRA Subtitle C requirements would create an impractical waste management scenario requiring separation and TCLP testing of the waste after transportation to the LBP debris disposal site. Given the small volumes of such incidental chips and dust expected to be generated, EPA does not believe that there is any justification for regulation of such waste under RCRA.

The Agency considers chips and dust that fall off of LBP debris during storage and transport for disposal or reuse to continue to be LBP debris. Such waste would therefore be subject to today's proposal. The Agency is seeking comments or relevant data on this subject.

F. What Structure Types Are Covered?

Structures covered under today's proposal include target housing, public buildings, and commercial buildings. Covering target housing and other child-occupied facilities, such as day care centers in today's proposal is expected to reduce the risk of lead exposure to children, who are likely to spend a great deal of time in residences, schools, and day care centers. The term "child-occupied facility" was defined by EPA in the LBP certification and training rule (40 CFR 745.223). For the purposes of today's proposal, child-occupied facilities are considered to be a subset of public buildings and are covered by the definition of that term in today's proposal at § 745.303. Therefore, a separate definition for child-occupied facilities is not included in this proposal.

As noted in Unit VI.C. of this preamble, coverage of LBP debris from activities in structures which are not considered to be target housing or child-occupied facilities (i.e., many commercial buildings and public buildings) is not expected to result in as great a direct reduction of LBP risks to children. The Agency, however, wishes to provide one common sense regulatory scheme for the management and disposal of LBP debris with similar characteristics regardless of the structure from which the debris

originates. Having different management and disposal requirements for identical wastes would likely create enforcement problems as well as confusion for generators, transporters, and landfill facility operators.

LBP debris from only target housing, public buildings, and commercial buildings is included in today's proposal. However, the Agency believes the rulemaking should also cover housing excluded from the definition of target housing such as housing for the elderly, or persons with disabilities and "0 bedroom" dwellings such as dormitories and efficiencies, as well as post-1978 housing that may have LBP hazards. EPA thinks that LBP debris from these dwellings is identical to LBP debris for target housing, public buildings and commercial buildings. Additionally, individuals and firms receiving LBP debris may not be able to distinguish LBP debris from target housing versus LBP debris from non-target housing. In order to provide one common sense regulatory scheme and encourage the reduction of LBP hazards from all housing, the Agency would like to extend today's proposed standards to all housing. The Agency encourages comment on whether LBP debris from non-target housing should be subject to the same requirements as LBP debris in target housing.

The fact that structures other than target housing and child-occupied facilities often produce similar or identical LBP debris made extension of today's proposed standards to all such structures a logical decision. As noted in Unit VI. of this preamble, the analyses conducted for today's proposal show no significant risk associated with disposal of LBP debris (from any activity or structure) in C&D landfills, and, therefore, no need for the stringent and costly RCRA Subtitle C testing, management and disposal requirements. These factors have resulted in the inclusion of LBP debris from public buildings and commercial buildings under today's proposal. Public comment on the decision to cover LBP debris from public buildings and commercial buildings in today's proposal is encouraged.

EPA has not included debris generated during activities in steel structures and superstructures in this proposal. The wastes from steel structures and superstructures are fundamentally different than those from occupied structures. The Agency also believes that most large volume wastes from steel structures will be composed of and recycled as scrap metal and will therefore qualify for the scrap metal exemption from RCRA Subtitle C

requirements (see the RCRA proposed rule published elsewhere in today's **Federal Register** for a discussion of the scrap metal exemption). Even if steel structures and superstructures were covered by today's proposal, the concentrated LBP wastes resulting from deleading of such structures (paint chips, treatment residues, blast media, filters, etc.) would remain subject to RCRA requirements, including possible regulation as hazardous wastes. (See section B.1. of today's preamble). In addition, the risk analyses conducted for this proposal did not study the volume or other characteristics of debris from steel structures and superstructures (e.g., leachability of lead compounds present in the rust-inhibiting paints used on steel structures).

EPA requests comments on whether its assumptions regarding wastes generated at steel structures and superstructures are correct and on whether it is appropriate to exclude LBP debris from such structures from this proposal. To include debris from steel structures and superstructures in the final rule, EPA would need additional information regarding the character of wastes from such structures. The Agency encourages submission of relevant data on this subject.

G. What Are the Proposed Disposal and Reclamation Options for LBP Debris?

Section 745.309 of today's proposed rule requires that LBP debris be disposed in one of the following: (1) A construction and demolition landfill as defined at § 745.303; (2) a landfill subject to the requirements in 40 CFR part 257, subpart B, applicable to non-municipal, non-industrial, non-hazardous waste disposal units receiving conditionally exempt small quantity generated waste (as defined in 40 CFR 261.5); (3) a hazardous waste disposal facility permitted under 40 CFR part 270; (4) a hazardous waste disposal facility authorized to manage hazardous waste by a State that has a hazardous management program approved under 40 CFR part 271; (5) a hazardous waste treatment, storage and disposal facility that has qualified for interim status to manage hazardous waste under RCRA section 3005(e); or (6) RCRA hazardous waste incinerators subject to the requirements of 40 CFR part 60, subparts Cb, Eb, or part 63, subpart X.

These disposal options include all of the categories of solid waste landfills which were identified by the Agency as being safe for the disposal of LBP debris (see Unit VI. of this preamble for a discussion of the analytical basis for

these findings), as well as certain incinerators. Under the proposal, it would still be permissible to dispose of LBP debris in hazardous waste landfills regulated under Subtitle C of RCRA or equivalent State programs if the generator of the LBP debris wishes to do so, or if it is required under State law. Note that the proposal does not preclude the reclamation of lead from LBP debris in secondary lead smelters subject to 40 CFR part 63, subpart X requirements or the reclamation of energy, such as burning in waste-to-energy facilities operated subject to specified Clean Air Act requirements (discussed in Unit VII.G.2. of this preamble).

During the development of today's proposal, some State solid waste officials have raised the issue of separate cells within larger landfill facilities. The officials wanted to know if separate construction and demolition cells of larger non-C&D facilities would be acceptable options for the disposal of LBP debris under the proposed rule. The issue of separate cells of larger landfills is not specifically addressed in the regulatory text. Section 745.309(a)(1) identifies facilities which may accept LBP debris for disposal. If both the separate cell or unit of the larger facility satisfy any of the criteria for an acceptable landfill specified in § 745.309(a)(1), then LBP debris may be disposed in either the separate cell or that facility. For example, a separate cell for construction and demolition debris meeting the criteria specified in § 745.309(a)(1)(iii) within a hazardous waste disposal facility permitted under 40 CFR part 270 would likely be an allowable disposal site for LBP debris. On the other hand, a separate C&D cell within the physical or permitted area of a landfill not included in the proposal as a permissible disposal site for LBP debris (such as an MSWLF permitted under 40 CFR part 258) would not be an allowable disposal option unless the separate cell was permitted separately as a construction and demolition landfill.

H. What Controls on the Management of LBP Debris Are Included in the Proposal?

In addition to the disposal and reclamation standards included in today's proposal, EPA is proposing controls on the management of LBP debris. EPA believes that LBP debris should be subject to common sense management standards in order to minimize risks. The management standards outlined below are designed to be as simple as possible while taking into account safety, effectiveness and

reliability. EPA believes improper reuse, storage or transportation of LBP debris constitute LBP hazards and has included controls on those activities in today's proposal.

To assess the need for management controls, the Agency took a number of steps. First, the Agency identified management alternatives or activities that are currently practiced or may be feasible. Second, the Agency determined whether any of these management practices might pose health risks, particularly from inhalation and direct ingestion of LBP. Third, the Agency ascertained whether practices which might pose health risks are already subject to regulation by EPA or other Federal agencies. Fourth, the Agency assessed whether management practices not subject to current regulation require controls to curb potential health hazards.

The Agency identified the following current or plausible practices as potential public health risks: (1) Application of LBP debris as mulch or wood chips or use of LBP debris as ground cover or for any landscaping purpose; (2) compacting or burying LBP debris for use as fill material, roadbed material, or for site leveling purposes; (3) reuse of LBP debris which has deteriorated paint; (4) reclamation through burning of LBP debris (whether for the purpose of reclamation of lead or reclamation of energy value) in facilities without controls on lead emissions; (5) transporting LBP debris in uncovered vehicles; and (6) storage of LBP debris without access limitations.

The application of LBP debris as mulch, ground cover, or topsoil or for site leveling, fill or roadbed material may cause health risks through ingestion of LBP, dust, or contaminated soil. Such an application is considered improper disposal under today's proposal. The shredding, compacting, burying, or chopping of LBP debris may also make it difficult to identify the presence of LBP, leading to unwitting handling of a potentially hazardous material. Therefore, today's proposal permits these types of applications only if LBP is removed from LBP debris prior to such applications. In cases where LBP is removed, all LBP must be removed (i.e., the level of lead on the substrate must be below 1 mg/cm²) prior to applying it to the ground. See § 745.301(d)) of the regulatory text.

EPA is aware of several States, including Connecticut, New Hampshire, and New Jersey, that have similar regulatory prohibitions. Note that any paint chips, dust, or other stripping waste from LBP debris that may be generated during removal of LBP are

subject to RCRA requirements; chips or flakes that the generator does not contain may be considered illegal hazardous waste disposal under RCRA Subtitle C.

EPA is unaware of data on the prevalence and methods associated with application of LBP debris as landscape material, roadbed material or fill material. Such applications would constitute improper disposal under today's proposal, unless LBP is first removed. The Agency requests data and further information on these practices and encourages public comment on how these activities should be regulated in the final rule.

The remainder of this Unit addresses the management standards included in this proposal to address concerns about the practices noted above.

1. Reuse of LBP debris: § 745.311(a).

The Agency believes that current prevalent practice for managing LBP debris is landfill disposal. However, some LBP debris is being reused and transferred for reuse as architectural components, decorative pieces or in another manner. For the purposes of today's proposal, reuse means "to use again for any purpose other than reclamation or disposal." This definition is intended to capture all potentially hazardous reuses of LBP debris and subject them to the controls in today's proposal.

Reuse of architectural component debris may be a practice in historic building preservation or on occasions when homeowners are replacing hard-to-find doors, windows, or other components. Historic preservation projects have the goal of keeping properties intact, so LBP removal or covering of LBP with protective coating (encapsulation) may be a desirable abatement approach. Even so, there may be benefits to replacement in these properties, such as increased energy efficiency from replaced windows (Ref. 28). The Agency is aware of reuses of LBP debris ranging from the transfer of components for reuse within or between structures, and the application of unique items as decorative pieces or artifacts.

Reuse of LBP debris is not currently subject to Federal regulation. Today's proposal would permit reuse or the transfer for reuse of LBP debris as a building or structural component or artifact (defined in today's proposal at § 745.303) only if the article to be reused does not constitute a "LBP hazard" as defined in § 745.305 of today's proposed regulation. Section 745.305 states that reuse of components with deteriorated LBP is a LBP hazard. Today's proposal defines "deteriorated paint" as paint

that is cracking, flaking, chipping, peeling, or otherwise separating from the substrate of a building component. Today's proposal would prohibit the reuse or transfer for reuse by individuals subject to the rule of components which are identified as LBP hazards at § 745.305 (i.e., components with deteriorated paint) as described above.

The Agency feels that reuse of components with any deteriorated paint would pose a LBP hazard, and should be prohibited unless LBP is first removed.

It is important to note that waste resulting from removal of LBP prior to reuse (e.g., paint chips, paint dust, treatment sludges, solvents and residues) is not covered by today's proposal and would remain subject to RCRA requirements. For example, a generator of such waste would have to make a hazardous waste determination, and if the waste was determined to be hazardous, it would be subject to RCRA Subtitle C requirements.

EPA is aware that the limitations on reuse of LBP debris included in today's proposal would not preclude all reuses of LBP debris. For example, reuse of LBP debris with no deteriorated paint would be permissible under the proposal. EPA considers the standards in today's proposal to be the minimum acceptable limitations on the reuse of LBP debris. Other approaches to the regulation of reuse of LBP debris were considered during the development of this proposal and have not been ruled out by EPA as possible components of a final regulation. The Agency seeks public comment on the prevalence and methods of reuse, the approach contained in this proposal, and other possible approaches to the issue as well as any unintended effects of this proposed rule on the reuse of architectural components.

Some stakeholders have expressed concern that reuse of LBP debris which has no deteriorated paint may pose a future LBP hazard. As noted above, such reuse would be allowed under the proposal, but the Agency is requesting comment on these provisions. Allowing such reuse would be in keeping with EPA's desire to encourage recycling of materials while continuing to protect human health. Perhaps the most relevant question for public comment on the subject is: Do the reuse standards proposed today adequately protect human health?

One possible alternative approach would be to require that warning labels be placed on all components which contain LBP and are destined for reuse. Another possible approach might be to prohibit reuse of all LBP debris

regardless of the condition of the paint, unless all LBP is removed. However, EPA does not believe that components with intact LBP necessarily represent LBP hazards, so such an approach may prohibit reuse of LBP debris which would not pose a hazard. EPA specifically seeks comment, however, on whether the reuse of LBP debris by a homeowner who is not advised of the presence of LBP should be considered a hazard, not because of the present condition of the paint but due to the possibility that an uninformed homeowner may sand or strip the LBP without taking proper precautions.

Many historic preservation projects reuse antique or historically significant architectural components. Since many of these components were created before 1978, they can contain a variable amount of LBP. The Agency is proposing that all LBP should be removed from architectural components which have deteriorated paint before the components are reused in order to reduce the spread of potential LBP hazards. Removal of LBP is especially important on friction or impact surfaces where paint is more likely to wear off, creating lead contaminated dust and exposing the layers of lead paint. The Agency defines "deteriorated paint" as paint that is cracking, flaking, chipping, peeling, or otherwise separating from the substrate of a building component.

However, the Agency recognizes that in order to preserve as much of the original historic fabric and the historic character of the antiques or historical architectural components as possible, removal of all LBP may not be an option. Sometimes the architectural component is too fragile to undergo LBP removal or the process of removing the LBP may damage the design or ornate woodwork which makes the piece an antique or historically significant. The Agency requests information on whether, in these cases, encapsulation or other techniques not allowed under the proposed rule may be less invasive and a better restoration practice when preserving antique and historic architectural components. The Agency would also like information on relevant historic preservation practices used when restoring and fixing architectural components of antique or historic value with LBP.

Under the proposal, generators or transporters of LBP debris, or owners or operators of disposal facilities which accept LBP debris may not transfer LBP debris to entities (such as antique dealers or salvagers) which intend to reuse the debris or offer it for reuse if the LBP debris has deteriorated paint. For example, the proposal is designed to

prevent transfers of LBP debris with deteriorated paint from a generator to a business which then offers the debris for sale. Even though the business selling the LBP debris is not technically using it, the term "transferring for reuse" is defined in today's proposal to prevent generators, transporters, or others from transferring LBP debris with deteriorated paint which will ultimately be reused. Generators and transporters of LBP debris, owners or operators of disposal or reclamation facilities accepting LBP debris, or owners or operators of any enterprise which transfer LBP debris with deteriorated paint for reuse without first removing the LBP would not be in compliance with today's proposal. However, LBP debris may be transferred specifically for the purpose of LBP removal. For example, if a generator of a door with deteriorated LBP gave or sold the door to an individual who then reused it, the generator would be in violation of the transfer-for-reuse restrictions in today's proposal. Generators wishing to avoid this potential liability could remove the LBP prior to transfer of a component, could transport the LBP debris to a reclamation facility for removal of LBP or could decide not to transfer the component for reuse. If the generator transferred the door to a reclamation facility for removal of LBP before reusing or selling the door, the generator would be in compliance with today's rule. Once the LBP is completely removed from an architectural component (as described in § 745.301(d)) it is no longer considered LBP debris and is no longer subject to today's proposed regulations.

EPA is seeking public comment on the provision in today's proposal which would prohibit a generator or transporter from transferring LBP debris with deteriorated paint to antique dealers or other businesses or entities for reuse or to offer for reuse. EPA is concerned that the requirement may prevent transfers of debris to enterprises specializing in paint removal and restoration of building components with a historic value. The Agency would like to know what effect this provision might have on antique and salvaging businesses and what alternatives might be available which would also prevent the transfer of LBP hazards from one structure to another.

2. Reclamation: § 745.309(b).

Companies that reclaim lead waste (either for recovery of lead, or for energy combustion value) have voiced concerns to EPA that the provisions in today's proposed rule would discourage the reclamation of LBP debris by lowering landfill disposal costs. Today's

proposed standards would not preclude the reclamation of LBP debris for lead and/or energy recovery in facilities that meet Clean Air Act requirements. EPA wishes to stress that reclamation can be a viable alternative to landfill disposal and encourages this activity in situations where it is safe and practical. However, estimates have shown that currently, the costs (to a generator) of sending LBP debris to a reclamation facility can be comparable to the cost of disposal in RCRA Subtitle C facilities. Such high costs may lead generators to seek alternatives to reclamation of LBP debris. EPA encourages generators of LBP debris to identify reclamation facilities meeting the requirements described in this unit to determine the feasibility of reclamation as an alternative to disposal.

EPA is concerned about risk of lead exposure from the processing of LBP debris in smelters, combustors, and incinerators without proper controls on emissions. Burning of wooden LBP debris may allow energy recovery facilities or power plants to rely less on fossil fuels and virgin wood. Paint, as noted in a report prepared for EPA's Office of Air Quality and Planning and Standards, makes up a small percentage of the weight of painted wood, and metals (including lead) comprise only a fraction of this percentage (Ref. 29). However, burning or incineration of LBP debris may result in lead releases. Therefore, prior to accepting LBP debris for any of these activities, a facility should ensure that it will not be in violation of Clean Air Act permit conditions.

EPA has promulgated a national emission standard for hazardous air pollutants (NESHAP) that is based on the use of Maximum Achievable Control Technology (MACT) for meeting emission standards for lead compounds released from existing and new secondary lead smelters (40 CFR part 63, subpart X). EPA also has promulgated new source performance standards (NSPS) for new municipal waste combustor (MWC) units, and emission guidelines for existing MWC units, which establish emission limits for nine pollutants, including lead. (See 40 CFR part 60, subparts Eb and Cb, respectively; 60 FR 65389, December 19, 1995). New MWC units are those that either commenced construction after September 20, 1994, or commenced reconstruction after June 19, 1996; existing MWC units are those for which construction commenced on or before September 20, 1994. As a result of a recent Court of Appeals decision, 40 CFR part 60, subparts Cb and Eb apply only to MWC units with individual

capacity to combust more than 250 tons per day of municipal solid waste (large MWC's). See *Davis County Solid Waste Management and Recovery District v. EPA*, 101 F.3d 1395 (D.C. Cir. 1996), amended 108 F.3d 1454 (D.C. Cir. 1997) (the Davis decision).

EPA believes that the NESHAP for new and secondary lead smelters, the NSPS emission standard for lead for large MWCs, and the lead emission guidelines for large MWCs are sufficient to ensure safe management of LBP debris in these facilities. Thus, EPA is proposing to prohibit burning of debris in any facility that does not meet the applicable Clean Air Act standards/guidelines for lead emissions set forth in 40 CFR parts 60, subparts Cb and Eb (as amended by the Davis decision) and part 63, subpart X. LBP debris would be allowed to be incinerated in industrial boilers and furnaces for energy recovery provided that boilers and industrial furnaces are subject to the RCRA 40 CFR part 266, subpart H requirements.

Today's definition of reclamation includes the practice of removing existing LBP from debris in order to reuse or recycle such debris. The Agency encourages the transport of LBP debris to reclamation facilities for removal of LBP before reuse of any components. Reclamation practices employed to remove existing LBP from a component include stripping, blasting, sanding, etc. Once debris has been entirely stripped of LBP as described in § 745.301(d), it would no longer be considered LBP debris, and therefore, would no longer be subject to the requirements in today's proposal. Wastes, such as sludges and concentrated LBP generated by the removal of LBP, continue to be subject to RCRA disposal requirements. Firms and individuals receiving LBP debris for reclamation would be subject to the storage and access limitations in §§ 745.311 and 745.313 of today's proposed rule.

3. *Transportation of LBP debris:* § 745.308. Shipping or transport of LBP debris in uncovered vehicles is a possible source of releases in the form of paint chips or dust. The U.S. Department of Transportation does not specifically regulate the transport of non-hazardous LBP debris. Many individual States or local authorities, however, have requirements for covering vehicles which carry debris or rubble of any kind.

Today's proposed rule would prohibit shipment of LBP debris off-site in vehicles without covers that prevent identifiable releases of material. Proper management requires the covering of vehicles or containers used for

transportation of LBP debris to minimize possible releases of particulate matter. Some practical approaches might include but are not limited to: transportation of LBP debris in a vehicle covered with secured tarp or plastic, transport in covered containers/drum, transport in covered dumpsters, or transport in covered mobile trailers.

Although LBP debris could under today's proposal be moved within a work site without using a covered vehicle, EPA encourages those managing LBP debris to keep LBP debris covered at all times including when moving LBP debris within a site in order to prevent the release of LBP chips, dust or debris.

The HUD "Guidelines for the Evaluation and Control of LBP Hazards in Housing" (hereafter referred to as the HUD Guidelines) recommend wrapping LBP debris in plastic upon generation, and through storage and shipment (Chapter 14) (Ref. 30). Although EPA does not feel that plastic wrap alone represents an adequate access limitation (see Unit VII.G.4. below) during storage, some stakeholders have suggested that plastic wrap used in accordance with the HUD Guidelines may present a satisfactory alternative to covering vehicles for transportation. Although wrapping LBP debris in plastic would not be an allowable transportation method under this proposal (unless the transport vehicle is also covered), the Agency is seeking comment on whether such wrapping would be sufficient to prevent releases of particulate matter during transport as well as on the cost of using plastic wrap. EPA particularly seeks comment from transporters on their experience in delivering plastic-wrapped debris to disposal facilities, and whether or not the plastic wrap is punctured during loading or transport.

4. *Access and storage time limitations: § 745.311(b)—i. Access limitations.* As explained in Unit V.F. of this preamble, the Agency considers improper management and disposal of LBP debris to be a LBP hazard. As discussed in detail earlier in Unit V.F. of this preamble, improper storage pending disposal of LBP debris can cause a LBP hazard by allowing the storage or deterioration of LBP in locations, such as uncontrolled waste piles, where it may be accessible to children or contaminate the soil. Therefore, EPA is proposing common sense access limitations for LBP debris, with the exception of LBP debris generated from demolitions, which is stored for more than 3 days (72 hours). The access limitations in today's proposal are designed to ensure safe

management of LBP debris while minimizing dispersal of and access to LBP debris by anyone other than persons performing work, or managing or otherwise needing access to the debris.

Under today's proposal, acceptable access limitations (described at § 745.311(b) of the regulatory text) include:

- Enclosing LBP debris in closed or covered receptacles (e.g., containers, drums, mobile trailers, covered dumpsters or covered transport vehicle.).
- Keeping LBP debris in a dumpster or container which is at least 6 feet tall.
- Keeping LBP debris in fenced areas that are locked when work activities are not being performed on the site.
- Keeping LBP debris in an unoccupied structure which is locked when work activities are not being performed on the site.
- Keeping LBP debris on an unoccupied level of a multi-story structure and keeping the level locked when work activities are not being performed on the site.

Access and storage limitations do not apply to debris which is reused in compliance with this rule. See Unit VII.G.1. entitled Reuse of LBP Debris for a detailed discussion of reuse.

Access limitations apply to LBP Architectural Component Debris (LBPACD) which is transferred for reuse but has not yet been reused. LBPACD must be stored in a fenced or enclosed area such as within a store or salvage yard and locked when not monitored. Cases where LBPACD have been transferred for reuse but have not yet been used include mantles, doors, windows, banisters, cabinets or any other type of LBPACD offered for sale in an antique store or a salvage yard. Once the LBPACD has been reused it is no longer subject to these access limitations.

While common sense dictates some degree of control on the storage of LBP debris, the Agency has attempted to identify logical measures which would impose the least burden while still taking into account safety, effectiveness, and reliability. For example, item b. above allows use of the standard type of large dumpster which is generally used at renovation or abatement projects which last more than a few days. The Agency encourages comments on current "real world" practices which may represent adequate access limitations, but are not included in this proposal. EPA does not want to preclude from a final rule any access limitations which may be appropriate

but have been inadvertently omitted from those being proposed today.

The Agency is exempting demolitions from access limitation requirements in this proposed rule. Many demolition projects require a permit issued by local governments which require some type of access limitations. In addition, EPA believes that demolitions, due to liability from other type of hazards such as falling debris, are required to prevent access to these hazards. In places where access limitations are not required by the permitter, EPA believes that the permitter would have sufficient justification, such as demolitions in remote areas, not to require these access limitations. Therefore, EPA is not requiring any further access limitations for demolitions. EPA encourages comments on the adequacy of the proposed access restrictions, the types of access requirements needed for obtaining a demolition permit, and whether demolition permits generally require access limitations.

Access limitations for LBP debris which are more stringent than the disposal requirements at C&D landfills are necessary for safety, effectiveness, and reliability. The Agency believes that most LBP debris is generated in residential areas where children and adults may have access to an uncontrolled LBP debris wastepile as opposed to C&D landfills which EPA believes are located in less populated areas. The Agency requests more information on controlling public access to and the location of C&D landfills.

LBP debris which is stored for less than 3 days is not required to have access limitations under today's proposal. This *de minimis* cut-off level is intended to allow small renovation and abatement projects to accumulate LBP debris prior to disposal without incurring the expense of implementing additional access limitations. While investigating the issue of access limitations, the Agency determined that as many as 51% of renovation and remodeling projects last less than 3 days (Ref 31). The Agency believes that the access limitations which are prescribed in today's proposal represent common practice in these smaller projects, and would not therefore impose significant additional costs.

The Agency is aware that alternative approaches to setting a *de minimis* level for requiring access limitations exist. Some alternative approaches might be based on: (1) The volume of waste produced; (2) square footage of paint surface disturbed; or (3) time limits other than 3 days. The Agency chose 3 days as the *de minimis* level for access limitations because it appeared to

represent a natural dividing line between smaller projects and projects which last significantly longer. EPA factored in the resources needed to implement access limitations for these smaller jobs and concluded that the costs associated with access limitations for short timeframes less than 72 hours outweighed the potential benefits. Risk-benefit analysis is the principle analytical tool available to the Agency to measure the effectiveness of using resources to reduce human health risks. EPA feels that the 72-hour threshold for access limitations represents a clear and logical standard for the regulated community to comply with and will be safe and effective. EPA solicits comment on this approach and suggested alternative approaches to establishing a *de minimus* exclusion for access limitations.

The Agency would like interested parties to comment on or submit data related to the appropriateness of the proposed access limitations. Specific design requirements for fencing or containers are not, with a few exceptions, detailed in today's proposal. The Agency believes that the general descriptions provided in the proposal are sufficient and would result in adequate access limitations; however comments or relevant data on alternative approaches including additional design criteria are encouraged.

ii. *Storage time limitations.* Today's proposal establishes a 180-day time limit on the storage of LBP debris. EPA believes that the access limitations in this proposal would minimize risk; however, access limitations can and do fail. The cumulative probability of access limitation failure increases the longer LBP debris is in storage. The management and disposal options for LBP debris presented in this proposal are numerous and inexpensive. Therefore the Agency believes that lengthy storage of LBP debris will be unnecessary. The 180-day time limitation for storage of LBP debris contained in today's proposal is the same as the minimum storage time limit for generators of between 100 and 1,000 kilograms of hazardous waste per month (51 FR 10148; March 24, 1986).

The storage time limit begins on the date of generation of the LBP debris. Transfer of LBP debris to a different storage site is permitted under the proposal, but the storage time limit remains 180 days from the date of generation regardless of the number of storage sites for any given LBP debris.

Situations may occur for which generation of LBP debris at one site occurs over an extended time period

and the debris is commingled (e.g., debris is disposed of in a dumpster at different times over a 90-day period). In such cases, the 180-day storage time limit would begin on the date that LBP debris was first generated, and that limitation would apply to all of the commingled LBP debris. EPA believes that 180 days provides an adequate amount of time to arrange for the transport and disposal of LBP debris but encourages public comment on the length of this proposed storage limitation.

5. *Size reduction/processing of LBP debris.* It is possible that a generator may need to chop, trim, or otherwise reduce in size LBP debris to fit it in storage containers, drums or transport vehicles. EPA believes there is the possibility of a release of dust, LBP chips, or particulate matter during this activity. Generators working where LBP is present should use processing or size reduction techniques that will control releases, such as use of a plastic contained area with a plastic floor, top and sides, or a mobile enclosure. As noted, previously, paint chips and dust generated during such activities are still subject to RCRA requirements under today's proposal and may be considered hazardous waste.

Today's proposal does not include standards regulating size reduction of LBP debris or other similar activities. The Occupational Safety and Health Administration (OSHA) Lead in Construction standards, however do apply to the following:

- Alteration, renovation, or repair of substrates containing lead.
- Removal of materials containing lead.
- Transportation, disposal, storage, or containment of materials containing lead on the site.
- Maintenance activities associated with the construction activities listed above.

The OSHA standard establishes maximum limits of exposure to lead for all workers covered, including a permissible exposure limit (PEL) and an action level. Under the standard, no employee may be exposed to lead at airborne concentrations greater than 50 g/m averaged over an 8-hour period (58 FR 26598; May 4, 1993).

EPA believes that compliance with the OSHA Lead in Construction standards represents sufficient controls on LBP debris size reduction activities and that additional regulation under today's proposal would be duplicative. The Agency requests comment, however, on whether TSCA standards for such activities are warranted.

I. What Are the Notification and Recordkeeping Requirements? § 745.313

In order to ensure that LBP debris is managed and disposed of properly, the Agency is proposing a requirement that when LBP debris is transferred from one party to another, the recipient should be notified in writing of the presence of LBP debris (§ 745.313(a)). The notification document should: (1) Disclose the presence of LBP debris; (2) indicate the date of generation of the LBP debris; (3) be signed and dated by the recipient; (4) be signed and dated by the transferor; (5) contain the generator's name and address; and (6) notify the recipient of the need to comply with LBP debris management and disposal standards. The proposal requires both parties (the transferor and the recipient) to any transfer of LBP debris to retain a record of the notification for 3 years (§ 745.313(b)).

LBPACD transferred for reuse, including components intended for sale, are also subject to notification and recordkeeping requirements at § 745.313. Notification requirements begin upon generation of the debris intended for reuse and terminate at the point at which the LBPACD is reused. For example, a salvage yard which sells LBPACD generated by an abatement, renovation, or demolition must notify, in writing, any purchaser or user of any LBPACD of the presence of LBP debris and keep records of the notification and transfer as required by this proposed rule § 745.313. Once the LBPACD is reused further notification is not required.

Without notification requirements, a recipient (e.g., transporter or owner/operator of a disposal facility) might unknowingly accept LBP debris and then violate the provisions of today's proposal by improperly managing or disposing of the material. For example, if a generator transferred LBP debris to a transporter for disposal without notifying the transporter of the presence of LBP debris, the transporter might not cover the vehicle or might dispose of the LBP debris in a facility not allowed to receive LBP debris under this proposal.

The effect of the notification requirement will be that each person who receives LBP debris for any reason would be aware that they are receiving LBP debris and will be referred to the requirements for LBP debris management and disposal in this proposal. Any person who manages LBP debris in compliance with this proposal, including proper notification, will generally be deemed to have fulfilled their responsibilities under the proposal. EPA would view any

noncompliance with the proposed requirements subsequent to a transfer (which included proper notification) to be the responsibility of the person who is not in compliance with the requirements, not of any person who had prior possession of the LBP debris. However, a party in prior possession may be in noncompliance if the party knew or had reason to know that the person receiving the LBP debris would not handle it properly. In addition, a generator who incorrectly determines that LBP debris is not present, would be liable for any and all subsequent violations of today's proposal.

EPA believes a recordkeeping requirement is a necessity from the standpoint of enforcement because it establishes a clear chain-of-custody. This would allow inspectors to identify and locate the generators and recipient(s) of LBP debris for

questioning and to gather further material evidence from them to aid an investigation, if necessary. In addition, the recordkeeping requirement would result in the retention of important evidence that is likely to be used should an enforcement action be necessary. The notification document contains information needed to establish a foundation for enforcement actions.

The Agency would like comment on whether there are less expensive or more efficient ways that maintain safety, reliability, and effectiveness of notifying and keeping records of LBP debris for transport and disposal than the one outlined in the proposal. An example of an alternative to the suggested paper notification and recordkeeping may be a system of notification and recordkeeping with electronic signature and storage. Any type of alternative notification and recordkeeping system

should: (1) Disclose the presence of LBP debris; (2) indicate the date that the LBP debris was generated; (3) be signed and dated by the recipient; (4) be signed and dated by the transferor; (5) contain the generator's name and address, and (6) notify the recipient of the need to comply with LBP debris management and disposal standards.

A sample notification which meets the requirements of proposed § 745.313 is included at the end of this unit. The sample is intended to serve as an example and does not represent the only format or wording that might meet the requirements of the proposal. The sample is not included in the regulatory text itself and nothing in the proposal would require the use of any specific form or format. Instead, the regulatory text, at § 745.313 contains the specific information which must be included in the notification.

SAMPLE NOTIFICATION

NOTIFICATION OF THE PRESENCE OF LBP DEBRIS

Lead Warning Statement

Lead from paint can pose health hazards if not managed, transported and disposed of properly. Lead exposure is especially harmful to young children and pregnant women. Before transferring LBP (LBP) debris to any party for any reason, transferors must notify recipients of the presence of LBP debris.

Notification of Presence of LBP Debris

LBP debris is present in the materials being transferred from

_____ (Transferor name) to _____ (Recipient name).

When Was this Lead-Based Paint Generated?

This LBP debris was generated on _____ (Date).

**Who Generated this Lead-Based Paint Debris?
(Name and Address of Generator)**

John Doe
1000 Main Street
Hope, Arkansas 12345

Requirements for the Management and Disposal of LBP Debris

LBP debris is subject to EPA regulations found at 40 CFR 745.301–745.319. See those regulations for further details. Requirements and restrictions on the MANAGEMENT OF LBP debris include the following:

- (1) LBP debris MUST BE COVERED when it is transported.
- (2) LBP debris stored for more than 72 hours after initial generation MUST HAVE ACCESS LIMITATIONS (except for demolition debris).
- (3) LBP debris MAY NOT BE STORED for more than 180 days after it is generated.
- (4) LBP debris with deteriorated paint MAY NOT BE REUSED or TRANSFERRED FOR REUSE.

Requirements and restrictions on the DISPOSAL OR RECLAMATION of LBP debris include the following:

- (1) LBP debris MAY NOT be disposed of in any landfill which accepts municipal or industrial waste.
- (2) LBP debris MAY ONLY be reclaimed, incinerated or recycled at facilities subject to the regulations specified at 40 CFR 745.309(b).

Transferor

Date

Recipient

Date

NOTE: Both parties (transferor and recipient) must keep a copy of this Notification for at least 3 years from the date it is signed.

VIII. State and Tribal Programs

This section outlines the State and Indian Tribe (including Alaskan Native Villages where appropriate) program approval process for today's proposed rule.

A. General

Section 404(a) of TSCA Title IV provides that any State which seeks to administer and enforce the standards, regulations, or other requirements established under TSCA section 402 may submit an application to EPA for approval of such a program. TSCA section 404(b) states that EPA may approve such an application only after finding that: (1) The State program is at least as protective of human health and the environment as the Federal program; and (2) that the program provides adequate enforcement. Although TSCA does not specifically address Tribal lead programs; EPA is extending to Tribes the same opportunity as States to apply for authorization (see section G. of this unit for further discussion.)

EPA's final rule addressing LBP training and certification (61 FR 45778), outlined specific procedures for program approval under the authority of TSCA section 402 at 40 CFR 745.320. Today's proposed rule adopts a similar process with some alterations including specific requirements for LBP debris management and disposal program applications. A State or Tribe may apply for LBP debris management and disposal program authorization if it does not have an authorized LBP training and certification program.

Political subdivisions of States or Tribes (e.g., cities, towns, counties, etc.), are not eligible for authorization.

B. Submission of an Application

Under this proposal, before developing an application for authorization, a State or Indian Tribe would have to distribute publicly a notice of intent to seek such authorization and provide an opportunity for a public hearing. The State or Indian Tribe is free to conduct this hearing and provide an opportunity for comment in any manner it chooses. Upon completion of an application that reflects this public participation, the State or Indian Tribe may submit the application to the appropriate EPA Regional Office.

As proposed at § 745.344, an application for program authorization should include the following seven elements: (1) A transmittal letter from the Governor or Tribal Chairperson (or equivalent official); (2) a summary of the State or Tribal program; (3) a

description and analysis of the program; (4) a statement which identifies resources the State or Tribe intends to devote to the administration of its compliance and enforcement program; (5) a statement agreeing to submit to EPA the Summary on Progress and Performance of LBP debris management and disposal compliance and enforcement activities as described at § 745.355(b)(2); (6) an Attorney General or Tribal equivalent's statement attesting to the adequacy of the State or Indian Tribe's program authority; and (7) copies of all applicable State or Tribal statutes, regulations, standards and other materials that provide the State or Indian Tribe with the authority to administer and enforce a LBP debris management and disposal program.

Sections B.1., B.2., and B.3. of this unit outline the application elements.

1. *Program description: § 745.346.* A program application should contain information, specified in § 745.346, that describes the program. The program description is the portion of the application that the State or Indian Tribe will use to characterize the elements of their program. The Agency would use this information to make an approval or disapproval decision on a State or Indian Tribe's application. The program description contains four distinct sections (five in the case of Tribal applications).

In the first section (§ 745.346(a)), the State or Indian Tribe should list the name of the State or Tribal agency that will administer and enforce the program and the name of a contact at that agency, and if there will be more than one agency administering or enforcing the program, describe the relationship between or among these agencies.

Second (§ 745.346(b)), the State or Indian Tribe should demonstrate that the program has all of the required program elements specified in § 745.350. These elements represent the minimum elements or requirements a State or Tribal program should have to be considered for authorization.

Third (§ 745.346(c)), the application should provide an analysis of the entire State or Tribal program that describes any dissimilarity from the Federal requirements in §§ 745.301 through 745.319. The analysis should explain why, considering these differences, the State or Tribal program is at least as protective as the provisions outlined at §§ 745.301 through 745.319 and provides adequate enforcement. The Agency would like to be as flexible as possible in reviewing applications which contain provisions different from the Federal requirements; however in such cases, the State or Tribe should

demonstrate in its program analysis that its program is at least as protective as the Federal program and provides for adequate enforcement. The Agency will use this analysis, along with its own comparison, to evaluate the protectiveness of the State or Tribal program.

Fourth (§ 745.346(d)), the State or Tribal application should demonstrate that the program meets the compliance and enforcement requirements at § 745.352. This section of the application is discussed in more detail in section H. of this unit.

In addition to the above, the program description for a Tribe should also include the information required by § 745.346(e) (special requirements for Tribal Program Descriptions).

2. *Attorney General's Statement: § 745.347.* The State or Indian Tribe should provide an assurance that it has the legal authority necessary to administer and enforce the LBP debris management and disposal program. The State or Tribal Attorney General (or equivalent Tribal official) should sign this statement.

3. *Public availability of application: § 745.344(c)-(d).* Section 404(b) of TSCA requires EPA to provide notice and an opportunity for a public hearing on a State or Tribal application for authorization. Accordingly, the Agency will publish in the **Federal Register** a notice announcing the receipt of a State or Tribe's application, a summary of the State or Tribal program (to be provided by the applicant (§ 745.344(b)(2))), the location of copies of the application available for public review, and the dates and times that the application will be available for public review. Individuals may at that time submit a request to the Agency for a public hearing on the State or Tribal application. It should be noted that this opportunity for public hearing is separate and distinct from the public comment, discussed in section B. of this unit, that the State or Indian Tribe should seek before preparing an application for program approval.

C. State Program Certification

Pursuant to TSCA section 404(a), at the time of submitting an application for program authorization, a State may also certify to the Administrator that the State program is at least as protective as the Federal program proposed at §§ 745.301 - 745.319 and that it provides adequate enforcement.

If this certification is contained in a State application, the program will be deemed authorized until/unless EPA disapproves the program's application or withdraws the program's

authorization. This certification should be contained in a letter from the Governor or the Attorney General, to EPA, and should reference the program analysis contained in the program description portion of the application as the basis for concluding that the State program is at least as protective as the Federal program and provides for adequate enforcement. If a State application does not contain such certification, the State program will be considered authorized only after EPA approves the State application.

This program certification provision is not available to Indian Tribes because Indian Tribes should first demonstrate to the Agency that they meet the criteria proposed at § 745.324(b)(4) for treatment in the same manner as a State (TAS). Although Indian Tribes may be able to demonstrate that they have been approved for TAS for another environmental program (satisfying two of the four TAS criteria), the Agency must make a separate determination that an Indian Tribe has adequate jurisdictional authority and administrative and programmatic capability regarding its LBP debris management and disposal program before it can determine that the Tribe should be treated in the same manner as a State. These criteria are discussed in greater detail in section F. of this unit.

TSCA section 404(b) limits Agency review of program applications to 180 days. EPA encourages States and Indian Tribes to submit their authorization applications as soon as possible after the final rule is promulgated. Because the Agency anticipates needing the full 180 days allowed under today's proposal to properly review and act on an application, States and Indian Tribes are strongly encouraged to work with the appropriate EPA Regional office to develop and submit a complete application before promulgation of the final rule.

D. EPA Approval

Within 180 days following receipt of a complete State or Tribal application, EPA will approve or disapprove the application. EPA will authorize a program only if, after notice and opportunity for public hearing, EPA finds that:

(1) The program is at least as protective of human health and the environment as the Federal program contained at §§ 745.301 - 745.319.

(2) The program provides adequate enforcement of the appropriate State or Tribal regulations.

The Agency will notify the State or Indian Tribe in writing of the decision. As described in proposed

§ 745.354(a)(4), upon authorization of a State or Tribal program, it will be unlawful under TSCA section 15 and section 409, for any person to violate, fail or refuse to comply with any requirements of such a program.

The Agency believes that TSCA section 404 and the decision criteria above give it reasonably broad latitude in approving or disapproving State and Tribal programs. EPA interprets the TSCA section 404(b) standard "... at least as protective as ..." to mean that a program need not be identical to, or administered and enforced in a manner identical to, the Federal program for that program to be authorized. The Agency expects to receive applications for State and Tribal programs that will differ in some respects from the Federal program established in this proposed rulemaking. This is unavoidable (and even desirable) given the differences that undoubtedly exist between LBP debris management and disposal programs at the State and Tribal level. The Agency will make every attempt to accommodate these differences while following the statutory requirement of ensuring that every State or Tribal program is at least as protective as the Federal program and provides for adequate enforcement.

1. *Establishment of the Federal program.* If a State or Indian Tribe does not have a program authorized under this proposed rule and in effect by the date that is 2 years from the promulgation date of the final regulation, EPA will, as of such date, establish the Federal program under 40 CFR part 745, subpart P in that State or Indian Country.

Although the definition of Indian Country is contained in a criminal statute, 18 U.S.C. 1151 (1994), it "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Ct.*, 420 U.S. 425, 427 n. 2 (1975). In addition, several cases have interpreted its scope, including the Supreme Court's recent decision, *Alaska v. Native Village of Venetie*, No. 96-1577, 1998 U.S. LEXIS 1449 (S.Ct. February 25, 1998) finding that an Alaska Native Village's lands held in fee simple were not Indian country; *Solem v. Bartlett*, 465 U.S. 463 (1984).

2. *EPA overfiling authority.* The Agency reserves the right to bring an enforcement action against a violator if a State or Indian Tribe fails to impose the proper penalty against a violator. However, before doing so, the Agency will notify the State or Indian Tribe in writing of its failure to impose the appropriate penalty. The State or Indian Tribe will have 30 days from receipt of such notice from the Administrator to

adjust the improper penalty amount. In the event that the State or Indian Tribe fails to rectify the situation, the Agency may issue an administrative penalty order against the violator with the appropriate penalty amount. In addition, if a State or Indian Tribe fails to bring an action against a violator, then the Agency has the authority to commence the appropriate action after giving the State 30 days notice to bring an action against the violator.

E. Withdrawal of Authorization: § 745.356

As required by section 404 of TSCA, if a State or Indian Tribe is not administering and enforcing its authorized program according to the standards, regulations, and other requirements of TSCA Title IV, including section 404(b)(1) and (b)(2), the Agency will so notify the State or Indian Tribe. If corrective action is not completed within a reasonable time, not to exceed 180 days, EPA will withdraw authorization of such program and establish a Federal LBP debris management and disposal program pursuant to TSCA Title IV in that State or Tribal land. Procedures for withdrawal of authorization can be found at § 745.356 of the regulatory text.

F. Model State and Tribal Program

Section 404(d) of TSCA directs the Agency to promulgate a model program that may be adopted by any State or Tribe that seeks to administer and enforce a LBP debris management and disposal program. For the purposes of this proposal, the Federal requirements at proposed §§ 745.301 through 745.319 serve as the model State and Tribal program.

G. Tribal LBP Debris Management and Disposal Programs

Today's action proposes a system that would provide Federally-recognized Indian Tribes the opportunity to apply for program authorization in a manner similar to States. Providing Indian Tribes with this opportunity is consistent with EPA's Policy for the Administration of Environmental Programs on Indian Reservations (hereinafter referred to as EPA's Indian Policy). This policy, formally adopted in 1984 and reaffirmed on March 14, 1994, by the Administrator, "... view[s] Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace," consistent with Agency standards and regulations.

A major goal of EPA's Indian Policy is to eliminate statutory and regulatory barriers to Tribal administration of Federal environmental programs to the greatest extent possible. Today's proposal represents another step in the Agency's continuing commitment toward achieving this goal. However, EPA recognizes that some eligible Indian Tribes may choose not to apply for program authorization. Regardless of the choice made by a Tribe, the Agency remains committed to providing technical assistance and training when possible to Tribal entities as they work to resolve their LBP management and disposal concerns.

1. *EPA's authority to review and approve Tribal LBP debris management and disposal programs.* EPA believes it has adequate authority under TSCA to allow Indian Tribes to seek LBP debris management and disposal program authorization. EPA's interpretation of TSCA is governed by the principles of *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Where "Congress has not directly addressed the precise question at issue" in a statute, *Id.* at 843, the Agency charged with implementing that statute may adopt any interpretation which, in the Agency's expert judgment, is reasonable in light of the goals and purposes of the statute as a whole. *Id.* at 844. Interpreting TSCA to allow Indian Tribes to apply for program authorization satisfies the Chevron test.

TSCA, including sections 402 and 404, does not explicitly define a role for Indian Tribes. Therefore, Congress did not directly address the precise question at issue. Indian Tribes' status as sovereign governments, see, e.g., *Worcester v. Georgia*, 31 U.S. (10 Pet.) 515 (1832); *United States v. Wheeler*, 435 U.S. 313 (1978), precludes the operation of State law within Tribal jurisdictions except in very limited circumstances. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). There is no indication in TSCA or its legislative history that Congress intended to abrogate any sovereign Tribal authority by extending State jurisdiction into Indian Country. The Supreme Court has stated that the "choice between [possible statutory constructions] must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 268 (1992). Further, any statutory limitations on Tribal sovereignty must be stated explicitly. *Santa Clara Pueblo v. Martinez*, 436

U.S. 49 (1978); *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985) (Congressional intent must be "unmistakably clear"). In addition, the Supreme Court has consistently admonished that Federal statutes and regulations relating to Tribes and Tribal activities must be construed generously in order to comport with traditional notions of Indian sovereignty and with the Federal policy of encouraging Tribal independence. *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (internal quotations, ellipsis and brackets removed).

A recent decision of the U.S. Court of Appeals for the D.C. Circuit found that RCRA did not authorize EPA to review and approve certain Tribal solid waste programs in the same manner as States. *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (9th Cir. 1996). In that case, the court found under the first step of the Supreme Court's analysis in *Chevron*, that RCRA was "neither silent nor ambiguous" on the role of Tribes. *Id.* at 151. The inclusion of Indian Tribes in the definition of "municipality" and the absence of Indian Tribes from the definition of "State" precluded EPA from interpreting RCRA section 4005(c)(1)(C) to authorize review and approval of Tribal programs. *Id.*

Importantly, however, the court noted that "if Indian Tribes were not defined anywhere in the statute . . . we would move to Chevron's second step." *Id.* Because Indian Tribes are not defined or even mentioned in TSCA, *Backcountry Against Dumps* supports EPA position that the Agency may, under step two of *Chevron*, adopt a reasonable interpretation of TSCA.

The D.C. Circuit held up *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981), as an example of such a case. *Backcountry* at 151. The *Nance* court recognized the reasonableness of EPA's actions in filling regulatory gaps on Indian Country. In *Nance*, the U.S. Court of Appeals for the Ninth Circuit upheld EPA's regulations which authorized Indian Tribes to redesignate the level of air quality applicable to Indian Country under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act similar to the manner in which States could redesignate other lands. The Court found that EPA could reasonably interpret the Clean Air Act to allow for Tribal redesignation, rather than allowing the States to exercise that authority or exempting Indian Country from the redesignation process. *Nance*, 645 F.2d 713. The Court noted that EPA's rule was reasonable in light of the general existence of Tribal sovereignty over activities in Indian Country. *Id.* at 714.

Interpreting TSCA to allow EPA to review and approve Tribal LBP debris management and disposal programs is reasonable. Today's proposed rule is analogous to the rule upheld in *Nance*. Failure to authorize Tribal LBP debris management and disposal programs would deny Indian Tribes the option available to States to administer their programs in lieu of the Federal program. As with the redesignation program at issue in *Nance*, this proposal, however, would enable the most direct regulation of LBP debris management and disposal in Indian Country. Today's proposed rule would conform with the Congressional intent that the local sovereigns with program and enforcement authority--the States and Tribes--rather than the Federal government regulate. Approving Tribal regulation by eligible Tribes in lieu of Federal regulation also follows general principles of Federal Indian law and the Agency's Indian Policy. EPA believes that allowing Indian Tribes to apply for program authorization is consistent with the sovereign authority of Indian Tribes. EPA also has allowed Indian Tribes to seek program approval despite the lack of an explicit Congressional language in the past. (61 FR 45778, August 29, 1996 and 55 FR 30632, July 26, 1990) *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) and (CAA PSD Program). Furthermore, EPA has broad expertise in reconciling Federal environmental and Indian policies. *Washington Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (1985).

For a more detailed discussion of EPA's authority to treat Tribes in the same manner as States under TSCA, see 61 FR 45778, 45805-07, August 29, 1996, LBP activities.

2. *Tribal eligibility requirements.* Under several environmental statutes, including the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA), Congress specified certain criteria for EPA to determine whether it may treat an Indian Tribe in the same manner as a State. These criteria generally require that the Indian Tribe:

- Be recognized by the Secretary of the Interior.
- Have an existing government exercising substantial governmental duties and powers.
- Have adequate civil regulatory jurisdiction over the subject matter and entities to be regulated.
- Be reasonably expected to be capable of administering the Federal environmental program for which it is seeking approval.

EPA proposes to require Indian Tribes seeking program authorization and grants under TSCA section 404 to demonstrate in the program description

that they meet the four criteria listed above. The Agency has simplified its process for determining Tribal eligibility to administer environmental programs under several other environmental statutes (59 FR 64339; December 14, 1994). The proposed process for determining eligibility for TSCA section 404 programs parallels the simplification rule. Generally, the fact that an Indian Tribe has met the recognition or governmental function requirement under another environmental statute allowing for Tribal assumption of environmental programs (e.g., the CWA, SDWA, CAA) will establish that it meets those particular requirements for purposes of TSCA section 404 authorization. To facilitate review of Tribal applications, EPA requests that the Indian Tribe demonstrate that it has been approved for "TAS" (under the old TAS process) or been deemed eligible to receive authorization (under the simplified process) for any other program.

If an Indian Tribe has not received TAS approval or been deemed eligible to receive authorization, the Indian Tribe must demonstrate, pursuant to § 745.324(b)(5)(ii), that it meets the recognition and governmental function criteria described above. A discussion on how to make these showings can be found at 59 FR 64339, December 14, 1994.

EPA believes, on the other hand, that the Agency must make a separate determination that an Indian Tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each Tribal LBP debris management and disposal program. To have its LBP debris management and disposal program authorized by EPA under today's proposed rule, an Indian Tribe would need adequate authority over the regulated activities.

EPA proposes to require under § 745.346(e) that Indian Tribes provide a discussion of their jurisdiction to run a LBP debris management and disposal program. The Tribe should include copies of all documents, such as treaties, statutes, executive orders, constitutions, bylaws, charters, codes, ordinances, and/or resolutions which support the Indian Tribe's assertions of jurisdiction. EPA will review this documentation and comments submitted by appropriate governmental entities during the public comment period, and then will make a determination whether the Tribe has adequately demonstrated its jurisdiction over LBP debris activities in Indian Country. The Indian Country standard provides the guideline of the areas over

which a Tribe may demonstrate jurisdiction for purposes of Tribal programs. EPA, however, will not rely solely on the Indian Country standard, but will consider, on a case-by-case basis whether a Tribe has demonstrated its jurisdiction over LBP debris management and disposal in particular areas under principles of Federal Indian law.

The jurisdiction of Indian Tribes generally extends "over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). However, Indian reservations may include lands owned in fee by nonmembers. "Fee lands" are privately owned by nonmembers and title to the lands can be transferred without restriction. The Supreme Court, in *Montana v. U.S.*, 450 U.S. 544, 565-66 (1981) noted that Tribes may have authority over nonmember activities on reservation fee lands in certain circumstances, including when the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Indian Tribe."

The Supreme Court in several cases since *Montana* has explored several criteria to assure that the impacts upon Indian Tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than *de minimis*. To date, however, the Court has not agreed in a case on point on any one reformulation of the test. In response to this uncertainty, in 1991 EPA decided in the context of a regulation under the CWA that it would apply a more rigorous formulation of the *Montana* test, establishing an "operating rule" that requires Tribes seeking eligibility to set water quality standards governing activities of nonmembers on fee lands to show that the effects are "serious and substantial" (56 FR 64878). EPA noted that "[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Since 1991, however, the Supreme Court has reaffirmed *Montana's* impacts test verbatim without addressing the need for "serious" or "substantial" impacts. e.g., *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993). While it appears that the *Montana* test may not require "serious and substantial" impacts, for the time-being, as a matter of prudence, EPA will continue to look to see whether such impacts exist when evaluating Tribal authority over LBP debris activities under the *Montana* test.

In *Strate*, 117 S.Ct. at 1414, the Supreme Court made clear that *Montana* remains the controlling standard for evaluating Tribal authority over nonmember activities on fee lands. The Court emphasized in *Strate* that the purpose of *Montana's* impacts test is to ensure that Tribes retain their powers of self-government. EPA believes that protecting the public through environmental protection programs from serious and substantial effects on health and welfare is a core governmental function whose exercise is critical to self-government. (see 56 FR 64879).

Whether an Indian Tribe has jurisdiction over activities of nonmembers on fee lands, will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances and will likely vary from Indian Tribe to Indian Tribe. The Agency believes, however, that the activities regulated under the various environmental statutes, including TSCA, generally have the potential for direct impacts on human health and welfare that are serious and substantial. See 56 FR 64878.

The process that the Agency will use for Indian Tribes to demonstrate their authority over nonmembers on fee lands includes a submission of a statement pursuant to §§ 745.346 and 745.347 explaining the legal basis for the Indian Tribes' regulatory authority. The Indian Tribe must explicitly assert and demonstrate jurisdiction, i.e., show that LBP debris management and disposal activities conducted by nonmembers on fee lands could have impacts on the health and welfare of the Indian Tribe and its members that are serious and substantial. The Tribal submission should make a showing of facts that there are or may be activities regulated under TSCA Title IV by nonmembers on fee lands within the territory for which the Indian Tribe is seeking authorization, and that the Indian Tribe or Tribal members could be subject to exposure to LBP hazards from such activities through, e.g., dust, soil, air, and/or direct contact.

As noted above, the Supreme Court emphasized in *Strate* that the purpose of the *Montana* test is to ensure that Tribes retain their powers of self-government. While EPA believes generally that protecting Tribal health and welfare from serious and substantial environmental effects is essential to Tribal self-government, the Tribal submission should also discuss the extent to which Tribal implementation of the LBP debris management and

disposal program over nonmembers on fee lands is essential to Tribal self-government. However, EPA will also rely on its generalized findings regarding the relationship of LBP activities and related hazards to Tribal health and welfare.

Appropriate governmental entities (e.g., an adjacent Indian Tribe or State) will have an opportunity to comment on the Indian Tribe's jurisdictional assertions during the public comment period prior to EPA's action on the Indian Tribe's application.

The Agency recognizes that jurisdictional disputes between Indian Tribes and States can be complex and difficult and that it may, in some circumstances, be most effective to address such disputes by attempting to work with the parties in a mediative fashion. However, EPA's ultimate responsibility is protection of human health and the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection.

Finally, capability is a determination that will be made on a case-by-case basis. Ordinarily, the information regarding programmatic capability provided in the application for program approval submitted under proposed §§ 745.350 and 745.352 will be sufficient. Nevertheless, EPA may request, in individual cases, that the Indian Tribe provide a narrative statement or other documents showing that the Indian Tribe is capable of administering the program for which it is seeking approval. See 59 FR 64341.

Consistent with the simplification rule, no pre-qualification process will be required for Indian Tribes to obtain program approval for the LBP debris management and disposal program. EPA will evaluate whether Indian Tribes have met the four eligibility criteria listed above during the program approval process.

H. Enforcement and Compliance Provisions

1. *General.* As noted above, before approving a State or Tribal application for authorization to run a LBP debris management and disposal program, the Agency is required to determine that a State or Tribe will provide for the adequate enforcement of its regulations.

The Agency has developed, at proposed § 745.352, minimum requirements that a State or Tribal LBP debris management and disposal compliance and enforcement program should meet in order to receive authorization. The Agency believes that

a State or Indian Tribe that develops an enforcement program based on these requirements would provide "adequate enforcement" as that term is used in TSCA section 404(b)(2).

These requirements were developed based on the Agency's experience evaluating and approving other State and Tribal compliance and enforcement programs, as well as the Agency's experience in enforcing its own regulations. These requirements are also generally consistent with those found in the LBP certification and training rule (61 FR 45778, August 29, 1996). Further, the Agency's own compliance and enforcement program for these LBP debris management and disposal regulations will contain most of the elements described at § 745.352.

The compliance and enforcement portion of a State or Tribal LBP debris management and disposal program application should be submitted simultaneously with the other required elements. Today's proposal does not provide separate or interim approval procedures for compliance and enforcement portions of State or Tribal applications. This represents a notable distinction between the compliance and enforcement components in today's proposal and those found in the LBP certification and training rule. The Agency believes that because LBP debris is currently regulated by many authorized State RCRA programs, most States already have the necessary infrastructure in place to administer and enforce a LBP debris management and disposal program. In comparison, relatively few States had LBP certification and training programs in place at the time of the promulgation of that rule (August 29, 1996). EPA believes that the compliance and enforcement application procedures in today's proposal are simpler and will be easier to complete than those in the LBP certification and training rule. Comments from States and Tribes on this issue are encouraged.

Approval will be given to any State or Indian Tribe which has in place all of the elements of proposed § 745.352, provided the program is also found to be "at least as protective as" the Federal program. If a State or Indian Tribe does not have a LBP debris management and disposal program authorized by the Agency within 2 years after final promulgation of the LBP Debris Management and Disposal Rule, the Agency will enforce the provisions at proposed §§ 745.301 through 745.319 as the Federal program.

In order for a LBP debris management and disposal compliance and enforcement program to be considered

adequate for approval, the State or Indian Tribe should certify it has the legal authority and ability to immediately implement the elements at proposed § 745.352. States or Indian Tribes should submit copies of all applicable State or Tribal statutes, regulations, standards and other material that provide the State or Indian Tribe with authority to administer and enforce the lead debris compliance and enforcement program, and copies of the policies, certifications, plans, reports, and any other documents that demonstrate that the program meets the requirements established at proposed § 745.352.

Finally, the State or Indian Tribe must agree to submit to EPA the Summary on Progress and Performance as described at § 745.355(b)(2). This report should be submitted to EPA by the primary agency for each authorized State or Indian Tribe beginning 12 months after the date of program authorization. Each authorized program will be required to submit the report to the EPA Regional Administrator for the Region in which the State or Indian Tribe is located. The report should be submitted at least once every 12 months for the first 3 years after program approval. As long as these reports indicate that the authorized program is successful, the reporting interval will automatically be extended to every 2 years. If the reports demonstrate problems with implementation, EPA will revert to annual reporting in order to assist the State or Indian Tribe in resolving the problems. These programs will return to biannual reporting after demonstration of successful program implementation.

2. *Required enforcement and compliance elements.* The remainder of this Unit describes in more detail the required enforcement and compliance elements at proposed § 745.352. Section 745.352 "State and Tribal Compliance and Enforcement" requires that a State or Indian LBP debris management and disposal program should at a minimum have the compliance and enforcement elements discussed below.

i. *Authority to enter (§ 745.352(a)(1)).* State or Tribal officials should be able to enter premises or facilities where LBP debris management or disposal violations may occur. A State or Tribe must be able to subpoena any person who has possession of records or reports pertaining to LBP debris to produce such documents; in addition, a State or Tribe must be able to compel the appearance of any person to testify concerning any matter relating to LBP debris. A State or Tribe must also designate a judicial body that will have the authority to hold any person in

contempt who fails or refuses to obey such a duly issued subpoena. They should have the authority to take samples, if necessary, as part of the inspection process. A State or Indian Tribe should have the authority to seek a warrant if access is denied to inspect any place or vehicle.

ii. *Flexible remedies* (§ 745.352(a)(2)). State or Tribal LBP debris management and disposal programs should provide for a diverse and flexible array of enforcement remedies, which must be reflected in a Standard Enforcement Response Policy. A LBP debris management and disposal program should be able to select from among the available alternatives an enforcement remedy that is particularly suited to the gravity of the violation, taking into account potential or actual risk, including:

- Warning letters, or notices of noncompliance, or notices of violation, or the equivalent.
- Administrative or civil actions (e.g., administrative or civil penalty assessment).
- Authority to apply criminal sanctions or other criminal authority using existing State or Tribal laws, as applicable.

The Agency understands that Indian Tribes may have restrictions on their ability to levy criminal sanctions. e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); 25 U.S.C. 1302(7). This limitation will not necessarily have a negative impact on the ability of an Indian Tribe to receive program authorization. The Indian Tribe should, however, explain in its application the nature and extent of any limitation on its ability to levy criminal sanctions.

The Agency realizes that requiring Indian Tribes to demonstrate the same criminal authority as States might effectively prohibit any Indian Tribe from obtaining program authorization. The Agency, in Unit VII.F. of this preamble has stated that Indian Tribes are not required to exercise comprehensive criminal enforcement jurisdiction as a condition for LBP debris management and disposal program authorization. Under this proposal, Indian Tribes are required to provide for the timely and appropriate referral of criminal enforcement matters to the EPA Regional Administrator when Tribal enforcement authority does not exist or is not sufficient. Section 745.352(b) of today's proposal requires that such procedures be established in a formal Memorandum of Agreement with the Regional Administrator. This approach is the same as that which the Agency has taken in the context of Tribal programs under the Safe Drinking

Water Act and the Clean Water Act. EPA emphasizes that this referral mechanism is not available where limitations on Tribal enforcement arise under purely Tribal law, for example, the Tribal constitution or statutes. It should be further noted that, as in authorized States, EPA retains the authority to take enforcement action if an authorized Indian Tribe does not (or cannot) take such action or fails to enforce adequately.

iii. *Training for compliance and enforcement personnel* (§ 745.352(a)(3)). A LBP debris management and disposal program should offer training for compliance/enforcement personnel to ensure that the personnel are well trained. Enforcement personnel should understand case development procedures and the maintenance of proper case files. Inspectors should successfully demonstrate knowledge of the requirements of the particular discipline for which they have compliance monitoring and enforcement responsibilities. Inspectors should also be trained in violation discovery, evidence gathering, preservation of evidence and chain-of-custody, and sampling procedures. Instruction should take the form of both hands-on or on-the-job training and the use of prepared training materials. A State and Tribal LBP debris management and disposal program should also implement a process for continuing education of enforcement and inspection personnel.

iv. *Compliance assistance* (§ 745.352(a)(4)). LBP debris management and disposal compliance and enforcement programs should provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with the State or Indian Tribe's LBP debris management and disposal program(s).

v. *Sampling techniques* (§ 745.352(a)(5)). A State or Tribal compliance and enforcement program should show that the State or Indian Tribe is technologically capable of ensuring compliance with LBP debris management and disposal compliance and enforcement program requirements. As a result, an authorized program should have access to the facilities and equipment necessary to conduct the proper analysis of samples gathered from inspections of sites such as waste facilities, reclamation facilities, and vehicles. A State or Indian Tribe should use a laboratory facility as defined at 40 CFR 745.223 or implement a quality assurance program that ensures appropriate quality of laboratory

personnel and protects the integrity of analytical data.

vi. *Handling tips and complaints* (§ 745.352(a)(6)). An authorized LBP debris management and disposal program should have a method in place to respond to tips from the general public. The compliance and enforcement program should demonstrate the ability to process and react to tips and complaints or other information indicating a violation. EPA expects that the ability to process and react to tips and complaints would, as appropriate, include:

- A method for funneling complaints to a central organizational unit for review.
- A logging system to record the receipt of complaints and to track the stages of a follow-up investigation.
- A mechanism for referring complaints to the appropriate investigative personnel.
- A system for allowing a determination of the status of cases and ensuring correction of any violations.
- A procedure for notifying citizens of the ultimate disposition of their complaints.
- A procedure to conduct swift preliminary investigations of complaints, especially those that allege serious threats to public safety and the environment.
- A pledge of confidentiality to all informants, to encourage members of the public to come forward with tips and complaints.

vii. *Targeting inspections* (§ 745.352(a)(7)). LBP debris management and disposal compliance and enforcement programs should demonstrate the ability to target inspections to ensure compliance with the LBP debris management and disposal program requirements.

viii. *Follow-up to inspection reports* (§ 745.352(a)(8)). A State or Indian Tribe should develop a quick turnaround time to review and follow-up on identified violations and information that are gathered from inspections. Such information should be processed within a reasonable time to avoid risks associated with a stagnant investigation. The State or Indian Tribe should be in a position to ensure correction of violations, and, as appropriate, develop and issue enforcement remedies/responses in follow-up to the identification of violations.

ix. *Compliance monitoring and enforcement* (§ 745.352(a)(9)). A compliance and enforcement program should ensure correction of violations, and encompass either planned and/or responsive lead hazard reduction inspections and development/issuance

of State or Tribal enforcement responses which are appropriate to the violations.

x. *Tribal memorandum of agreement (MOA)* (§ 745.352(b)). Indian Tribes should enter into an MOA with the appropriate EPA Regional Administrator regarding criminal enforcement. The MOA should be executed by the Indian Tribe's counterpart to the State Director; e.g., the Director of Tribal Environmental Office, Program or Agency. The MOA should include a provision for timely and appropriate referral to the Regional Administrator of criminal enforcement matters for which the Indian Tribe does not have authority.

3. *Summary on progress and performance.* An authorized State or Indian Tribe should provide periodic reports to EPA as specified in § 745.355(b)(2). Section 745.355(b)(2) requires authorized States or Indian Tribes to submit a report which summarizes the results of implementing the State or Indian Tribe's LBP debris management and disposal compliance and enforcement program, including: (1) A summary of the scope of the regulated community within the State or Indian Tribe; (2) the inspections conducted; (3) Enforcement actions taken; (4) compliance assistance provided; and (5) the level of resources committed by the State or Indian Tribe to these activities and any other LBP debris management and disposal administrative and compliance/enforcement activities.

The report should describe any significant changes in the enforcement of the State or Tribal LBP debris management and disposal program implemented during the last reporting period. The report should also summarize the results of the State or Indian Tribe's implementation activities and what the State or Indian Tribe discovered, in general, with regard to compliance and enforcement in the State or Indian Tribe as a result of these activities. The report should also describe how any measures of success were achieved, and directly assess the impact of compliance/enforcement activities on reducing threats to public health.

IX. Rulemaking Record

EPA has established a record for this proposed rule under docket control number OPPTS-62160. A public version of the record without any information claimed to be confidential is available in the TSCA Non-Confidential Information Center (NCIC) from noon to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA NCIC is located at EPA headquarters, Rm. NE-B607, 401 M St., SW., Washington, DC 20460.

The rulemaking record contains information considered by the EPA in developing this proposed rule. The record includes: (1) All **Federal Register** notices, (2) relevant support documents, (3) reports, (4) memoranda and letters and (5) other documents related to this proposed rulemaking.

Unit X. of this preamble contains the list of documents which the Agency relied upon while developing today's regulation and can be found in the docket. Other documents, not listed there, such as those submitted with written comments from interested parties, are contained in the TSCA Docket office as well. A copy of today's proposed rule is also contained in the public record.

X. References

The following books, articles, reports and sources were used in preparing this notice and were cited in this proposal by the number indicated below:

1. U.S. Department of Health and Human Services, Centers for Disease Control. February 21, 1997. "Update: Blood Lead Levels- United States, 1991-1994." *Morbidity and Mortality Weekly Report*. Vol. 46, No. 7.
2. HUD. 1994. Department of Housing and Urban Development, *National Housing Survey*. Washington, DC.
3. Lead-Based Paint Hazard Reduction and Financing Task Force. July 1995. *Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing*. HUD-1547-LBP.
4. Task Force on Lead-Based Paint Hazard Reduction and Financing. April 13, 1994. Letter to Honorable Carol Browner, Administrator, USEPA. Washington, DC.
5. USEPA. March 1993. *Applicability of RCRA Disposal Requirements to Lead-Based Paint Abatement Wastes; Final Report*. EPA 747-R-93-006.
6. HUD. April 1991. "The HUD Lead-Based Paint Abatement Demonstration (FHA)." Office of Policy Development and Research.
7. USEPA. September 1998. TSCA Title IV, §§ 402/404: Lead-Based Paint Debris Management and Disposal Standards Proposed Rule Economic Analysis. Office of Pollution Prevention and Toxics.
8. Stedman's Medical Dictionary. 1976. William and Wilken Co., Baltimore.
9. Rabinowitz, Michael. 1987. "Stable Isotope Mass Spectrometry in Childhood Lead Poisoning." *Biological Trace Element Research*. Vol. 12: 223-229.
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XI. Regulatory Assessment Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has determined that this action is an "economically significant regulatory action" under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), because EPA estimates that this action may result in annual cost savings exceeding \$100 million. The Agency submitted today's proposed rule, along with the proposed Suspension under RCRA, to OMB for review under this Executive Order. Any changes made in response to OMB suggestions or recommendations have been documented in the public record for this proposal.

EPA has prepared an economic analysis of the impact of this action, which is contained in a document entitled, "TSCA Title IV, Sections 402/404: LBP Debris Management and Disposal Proposed Rule: Economic Analysis." This document is also available in the public record for this proposal.

The goal of the economic analysis was to identify, quantify, and value the cost savings associated with exempting LBP debris from RCRA Subtitle C and allowing for disposal in C&D landfills, and the incremental costs of compliance with the LBP debris management provisions of the proposed rules. Insofar as the cost savings and reduction in the price of abatements stimulates demand for additional LBP hazard-reducing activities, the analysis identified potential social benefits associated with those cost reductions.

The following is a brief summary of that analysis.

1. *Costs of the regulatory action.* The proposed TSCA rule imposes three new compliance requirements on regulated entities: notification and recordkeeping when LBP debris is transferred, access limitations for LBP debris stored longer than 72 hours, and covering of LBP debris during transport. The compliance costs associated with the new notification and recordkeeping requirements total \$30.86 million annually. The access limitation requirement imposes no new compliance costs, because EPA believes that all affected projects are: (1) Completed within the 72 hour timeframe, (2) presently using containers that meet the access limitations requirements (by virtue of their height or use of covers), or (3) capable of using compliant containers at no additional cost. The requirements for covering LBP debris during transport are expected to impose no new costs because transporters generally cover debris already or can provide covered vehicles or containers at no additional cost.

In addition to these compliance costs, EPA estimates that LBP debris generators, transporters, and disposers will incur \$21.61 million in the first year following promulgation of the rule to familiarize themselves and their employees with the requirements of the proposed rules, and \$1.08 million in subsequent years to familiarize new hires with the provisions of the proposed rules. Finally, as discussed in Section XI.A.3. of this preamble, states incur costs to apply for EPA approval to administer the proposed rules at the state level. EPA estimates that states will incur \$0.95 million in the first year

to apply for EPA approval and then \$0.06 million in the second and third years and biennially thereafter to submit annual reports. Thus, total costs for regulated entities in the first year will be \$53.42 million in the first year, \$32.00 million in years that states submit annual reports (second and third years and biennially thereafter), and \$31.94 million in years that state reports are not required.

The renovation and remodeling sector incurs the largest share of first year compliance costs at \$29.34 million, followed by waste transporters, who will incur \$15.86 million in the first year. Waste disposal facilities are expected to incur compliance costs of \$3.98 million in the first year, while abatement and demolition contractors will each incur \$1.38 and \$1.91 million in first year compliance costs, respectively. States incur the least compliance costs in the first year with \$0.95 million.

2. *Benefits of regulatory action.* The benefits of the proposed rule are two-fold. First, the proposed rule would result in significant cost savings for consumers of abatement, renovation, remodeling and demolition. These savings would be achieved by allowing the use of C&D landfills as an option for the disposal of LBP debris, and eliminating the hazardous waste determination currently required for LBP debris under RCRA Subtitle C. Second, the cost savings and reduced costs of abatements, renovation, remodeling and demolitions would stimulate demand for those services. The additional activities (in particular abatements) would serve to mitigate the economic impacts of lead risk, including: reduced lifetime earnings due to diminished intelligence, increased educational costs, increased health care costs, costs associated with increased morbidity and mortality, lost work days and lost productivity, and pain and suffering associated with adverse health effects.

The primary objective of the benefit analysis was to estimate the potential cost savings that would arise from relief from the expensive requirements of hazardous waste analysis, management, transportation, and disposal for LBP debris. Waste generators, in the short-term, would be relieved of the costly burden of managing LBP debris under RCRA Subtitle C. In the long-term, the economic benefits to waste generators are expected to be passed on to the consumers of abatement, renovation, remodeling, and demolition services in the form of lower costs. The net cost savings from the proposed rule are calculated as the baseline costs

associated with managing and disposing of LBP debris under current requirements minus the proposed rule compliance costs and the costs of disposing of the LBP debris as a nonhazardous waste. The net cost savings represent the potential magnitude of savings that would be passed on to consumers.

The cost-savings (reduced disposal costs minus new compliance costs) of the proposal are estimated at \$97.91 million in the first year. In subsequent years, the estimated cost savings increases to approximately \$119 million annually as initial compliance costs are reduced. The demolition sector is estimated to realize the most benefit with a \$78.95 million cost savings in the first year. The estimated savings for abatement activities is \$36.99 million in the first year and the savings for renovation and remodeling are estimated at \$2.75 million in the first year. The cost savings in these three sectors are then partially offset by increased costs incurred by waste transporters, waste disposal facilities, and states. The waste transportation sector is estimated to incur an additional \$15.86 million in costs and the waste disposal industry is estimated to incur new costs totaling \$3.98 million. States applying for EPA approval to administer the proposed rules will incur \$0.95 million in the first year.

When the net savings are divided by the baseline number of activities, the demolition sector is expected to see the largest per activity cost-savings with an average savings of \$272.50 per project in the first year. The average first year savings in the abatement sector (including target housing, public housing, and commercial buildings) and the renovation and remodeling sector are \$176.26 and \$0.62 per activity respectively. Waste transporters and waste disposal facilities are expected to incur costs of \$3.19 and \$0.80, respectively, for each transaction involving LBP debris.

The secondary objective of the benefit analysis was to determine how a potential change in demand for abatement, renovation, remodeling, and demolition activities associated with a reduction in the costs of those services would reduce the social costs of LBP risk. To the extent that the costs of abatement, renovation, remodeling and demolition decline as an outcome of this proposed rule and these savings are passed on to consumers, there will be a corresponding increase in demand for these activities.

This increase is likely to be particularly evident in the public

housing sector where local housing authorities operate under fixed budgets that often include funds which are earmarked specifically for abatement activity. Thus, any decrease in the cost of abatements should lead to a direct increase in abatement activity in public housing, and a subsequent accelerated depletion of the stock of public housing with LBP hazards. The benefits analysis estimates that if promulgated, the proposed rule would reduce the cost of public housing abatements from a current average of \$3,650 per unit to \$3,444 per unit, a decline of \$206 or 5.6%. In aggregate, the proposal would generate \$17.13 million per year in cost savings for public housing abatements. Under the assumption that public funding for LBP abatement remains stable, all public housing units will be abated within 12 years. The estimated \$17.13 million in cost savings per year to public housing could be used to fund additional abatements, shortening the time frame for completing all remaining abatements. The analysis estimates that the number of abatements in public housing will increase by 5,454 per year (an increase of 6.6% from the current baseline), eliminating the stock of public housing containing LBP 1 year earlier than predicted in the absence of the proposed rule.

In the target housing and child-occupied facility sectors, the decreased price of abatement activities is expected to also stimulate demand for abatement, R&R and demolition services. Data on the potential change in the demand for those services is not available, however, and therefore it is not possible to determine the magnitude of the potential benefits.

For each additional abatement, renovation, remodeling, and demolition activity demanded as a result of the proposed rule, there would be an additional reduction in LBP exposure. The elimination of exposures to LBP hazards associated with these additional activities will reduce the baseline number of cases of adverse health effects such as childhood lead poisoning and increased hypertension among adults.

In addition to the measured benefits of additional abatement, renovation, remodeling, and demolition activities described in the base analysis, other qualitative benefit categories exist. These categories include reductions in neonatal mortality, adult resident health effects such as hypertension, coronary heart disease and stroke, infant/child neurological effects, and occupational health effects such as hypertension, coronary heart disease, and stroke. Due

to data limitations, however, it was not possible to value these benefits.

3. *Costs to States.* Under the proposed rules, States, Territories and Tribes may incur costs associated with adopting and implementing both the RCRA TC suspension rule and the TSCA LBP debris management and disposal program. States are not required to implement these rules, and States that do not do so will not incur any costs. Despite the optional nature of the State requirements, EPA considers these costs attributable to the proposed rules and has prepared estimates of the potential costs that will be incurred by States.

Under the proposed TSCA rule, States would need to demonstrate and certify to EPA that they have adopted requirements at the State level that are at least as protective as the proposed Federal LBP debris program. As a conservative assumption (from a cost standpoint), EPA has assumed that 55 States, Tribes and Territories apply for such authorization. EPA estimates that each entity would incur costs of approximately \$9,900 in the first year to modify State laws, assemble an application package, and make the necessary certifications to EPA. States receiving authorization would be required to submit progress reports in the first 3 years after receiving authorization and biennially thereafter on their LBP management programs, which would cost them an estimated \$1,100 for each report, or a total of \$0.06 million for all States. In total, the highest costs to States would occur in the first year, when the combined State costs would total \$0.55 million.

Under the proposed RCRA TC suspension rule, States that are authorized for TC and that have an approved LBP debris management program in place (or that have certified to EPA that their programs are as protective as the Federal requirements) would be eligible to implement the TC rule at the State level. Presently, there are 35 States with authorized TC programs and another 10 States with TC rules adopted that are awaiting EPA authorization. Assuming again a conservative scenario (from a cost standpoint), if all 45 States eventually apply and incur costs similar to those incurred to implement the LBP debris program (approximately \$8,800 per State), the total costs of the TC rule to States would be \$0.40 million in the first year.

The combined costs incurred by States to implement both the LBP debris program and the TC suspension rule would be \$0.95 million in the first year under worst-case assumptions. In the second and third years and biennially

thereafter, States would only incur \$0.06 million to prepare and submit the required LBP debris management progress report.

4. *Sensitivity analysis.* Sensitivity analyses were prepared to examine the effects of key assumptions and modeling parameters on the pre- and post-regulatory costs, and their impact on the cost savings of the proposed rule. These analyses considered the effects of alternative TCLP failure rates for LBP debris, alternative assumptions concerning how frequently generators perform TCLP testing on LBP debris, alternative estimates of how often generators rely on relevant knowledge rather than TCLP testing to make hazardous waste determinations, how commonly generators use XRF testing to make hazardous waste determinations instead of TCLP, the time required to perform notifications under the proposed rule, and the number of States that will apply for EPA approval to administer the proposed TC suspension and LBP debris management and disposal program. In total, 16 different scenarios were generated by varying these assumptions.

In the sensitivity analysis, the net impact of the rule varies from a net savings of \$295.25 million in the first year to a net savings of \$46.04 million in the first year. The upper bound represents over a 300% increase over the results obtained using all of the baseline assumptions (\$97.91 million in the first year) while the lower bound represents a 53% decrease from the baseline cost savings. The upper bound scenario assumed more frequent use of XRF testing in the baseline scenario, which increased the baseline level of testing costs. The lower bound assumed that less testing and less reliance on relevant knowledge is used in identifying LBP debris compared to assumptions used in the baseline scenario. These two assumptions combined to reduce the baseline costs of waste disposal, thus reducing the potential cost savings of the proposed rules. The median estimate among the sensitivity analyses was \$107.70 million in the first year (this scenario assumes a only 23 states would apply for EPA approval under the TC suspension and 28 states would apply under the TSCA rule). Six of the sensitivity analyses generated lower cost savings estimates and 10 scenarios generated higher cost savings estimates compared to the baseline scenario.

B. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that

this action will not have a significant adverse economic impact on a substantial number of small entities. The factual basis for this certification is included in the small entity analysis that was conducted as part of the economic analysis. This proposed rule will result in substantial cost and burden savings for all of the entities involved in LBP activities, regardless of the size of the entity. EPA's analysis, as summarized above, shows that this proposed rule consistently imposes compliance costs that are less than 1% of any industry's revenues, and in many cases, less than 0.1% of the industry's revenues. Information relating to this determination is provided upon request to the Chief Counsel for Advocacy of the Small Business Administration, and is included in the docket for this rulemaking.

C. Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and in accordance with the procedures at 5 CFR 1320.11. An Information Collection Request (ICR) document has been prepared by EPA (EPA ICR No. 1822.01) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division (2137), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, by calling (202) 260-2740, or electronically by sending an e-mail message to, "farmer.sandy@epamail.epa.gov." An electronic copy of the ICR has also been posted with the **Federal Register** notice on EPA's homepage at "www.epa.gov/icr." The information requirements contained in this proposal are not effective until promulgation and OMB approval, which is presented by a currently valid OMB control number. An agency may not conduct or sponsor and a person is not required to respond to a collection of information subject to OMB approval under the PRA unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations after initial publication in the **Federal Register** are maintained in a list at 40 CFR part 9.

Under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), EPA is required to estimate the notification, reporting and recordkeeping costs and burdens associated with the requirements specified in the proposed rule. The proposed rules contain three requirements that would impose paperwork burdens: reading and interpreting the proposed rules, the notification and recordkeeping

requirement of the TSCA rule, and the state application requirement under both rules. In addition to these new burdens, exempting LBP debris from RCRA subtitle C will reduce the burden associated with manifesting for LBP debris handled as hazardous waste. Paperwork burdens are estimated to be 1.6 million hours annually, with a total costs of \$36.9 million annually.

Under the Paperwork Reduction Act "burden" means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Unfunded Mandates Reform Act (UMRA)

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4), EPA has determined that this proposed action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. The cost associated with this action are described in the Executive Order 12866 section above.

UMRA generally excludes from the definition of a "Federal intergovernmental mandate" (in sections 202, 203, and 205) duties that arise from participation in a voluntary Federal program. Adoption by States or Indian Tribes of today's proposed rule and the companion RCRA temporary TC suspension is voluntary and imposes no Federal intergovernmental mandate within the meaning of the Act. Because any possible burden on such governmental units would be incurred

as a result of voluntary action by those governmental units, there is not an unfunded mandate.

In addition, EPA has determined that today's proposed rule will not significantly or uniquely affect small governments, including Tribal governments, so no action is needed under section 203 of the UMRA. As indicated in Unit XI.B. of this preamble, if small governments, such as small municipalities or Tribes, are generators of LBP debris covered under today's proposed standards, then they will save the costs of complying with the RCRA TC rule and any costs of complying with RCRA Subtitle C standards when LBP debris is determined to be hazardous.

As a result, this proposed action is not subject to the requirements of sections 202, 203, 204, or 205 of UMRA.

E. Executive Order 12875

Under Executive Order 12875, entitled "Enhancing Intergovernmental Partnerships" (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's proposed rule does not create a mandate on State, local or tribal governments. The proposed rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this proposed rule. Nevertheless, EPA has consulted with these governmental entities. Throughout the development of today's proposed rules, the Agency has worked closely with States, Tribal, and local governments. A more detailed discussion of these activities has been included in Unit V.A. of this preamble on stakeholder consultation. In working with these various governmental entities, EPA has provided notice to

small governments of the provisions of today's proposed rule and obtained meaningful and timely input from them. Furthermore, EPA will continue these outreach efforts during the comment period and subsequent to promulgation.

F. Executive Order 13084

Under Executive Order 13084, entitled "Consultation and Coordination with Indian Tribal Governments" (63 FR 27655, May 19, 1998), 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. If the mandate is unfunded, EPA must 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 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 proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. The proposed rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule. Nevertheless, as indicated above and discussed in more detail in Unit IV.A. of this preamble, EPA has consulted with State, local and Tribal governments during the development of these proposed rules. EPA will continue these outreach efforts during the comment period and subsequent to promulgation.

G. Executive Order 12898

Pursuant to Executive Order 12898 entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994), the Agency has considered environmental justice related issues with regard to the potential impacts of this proposed action on the environmental and health conditions in low-income and minority communities.

This examination shows that existing LBP hazards are a risk to all segments of the population living in pre-1978 housing. However, literature indicates that some segments of our society are at relatively greater risk than others.

A recent study by NHANES indicates that children of urban, minority (e.g., African American, Asian Pacific American, Hispanic American, American Indian), or low-income families, or who live in older housing, continue to be most vulnerable to lead poisoning and elevated blood-lead levels. The February 21, 1997 Center for Disease Control's Morbidity and Mortality Weekly Report states that: "Despite the recent and large declines in BLLs [blood lead levels], the risk for lead exposure remains disproportionately high for some groups, including children who are poor, non-Hispanic black, Mexican American, living in large metropolitan areas, or living in older housing."

Although the baseline risks from LBP fall disproportionately on poorer sub-populations, it may be more likely that abatements will take place in residential dwellings occupied by mid- to upper-level income households. Abatements are voluntary, and wealthier households are more likely to have the financial resources to abate an existing problem in their home, or to avoid LBP hazards by not moving into a residential dwelling with LBP. Even though a national strategy of eliminating LBP hazards targets a problem affecting a greater share of poor households and minorities, the impact of income on the ability to undertake voluntary abatements may result in an inequitable distribution of LBP risks.

By making abatements more affordable, today's proposal helps to address this situation. To the extent that the proposal results in additional abatements, renovations, remodeling, and demolitions that reduce LBP hazards, there is a likelihood that poor and minority populations will benefit the most from risk reductions. This potential will likely be realized to the greatest extent in the case of public housing units with LBP hazards. The decrease in the cost of abatements in public housing will lead to an increase in abatement activity in public housing and a subsequent acceleration in the depletion of public housing with LBP hazards. The occupants of these public housing units are disproportionately lower income and minority populations. As the price of abatements is lowered as a result of cost savings associated with today's proposed rule, more low-income families will be able to afford to make

the decision to remove LBP hazards from their homes.

EPA also determined that the potential impact on minority-owned businesses in industries affected by the proposed rule would be minimal. Available information suggests that minority-owned business would not particularly benefit from this proposed rule, since minority ownership rates for firms that generate LBP debris are no higher than average.

H. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act, the Agency is directed 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, etc.) that are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

EPA is not proposing any new test methods or other technical standards as part of today's proposed TSCA rule for LBP debris. Thus, the Agency has no need to consider the use of voluntary consensus standards in developing this proposed rule. EPA invites public comment on this analysis.

I. Executive Order 13045

This proposed rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks," (62 FR 19885, April 23, 1997), because this proposal is not an economically significant regulatory action as defined by E.O. 12866. The environmental health or safety risks addressed by this action have a beneficial effect on children. This proposal will benefit children by allowing less costly management and disposal of LBP therefore lessening the cost of abatements. Reducing the costs of abatements will also reduce the amount of time needed to complete abatements in public housing. Lower abatement costs will increase the amount of private homes undergoing abatements. By reducing costs associated with management and disposal of LBP debris, the Agency believes that the number of abatements will increase thus resulting in a

reduction of children exposed to LBP. Children are the primary beneficiaries of this proposed rule as well as from the entire Lead Program.

List of Subjects in 40 CFR Part 745

Environmental protection, Hazardous substances, Hazardous waste, Lead poisoning, Management and disposal of LBP, Reporting and recordkeeping requirements.

Dated: December 9, 1998.

Carol M. Browner,
Administrator.

Therefore, 40 CFR part 745 is proposed to be amended as follows:

PART 745—[AMENDED]

1. The authority citation for part 745 is revised to read as follows:

Authority: 15 U.S.C. 2605, 2607, 2681–2692, and 42 U.S.C. 4852d.

2. By adding a new subpart P to read as follows:

Subpart P—Management and Disposal of Lead-Based Paint Debris

Sec.

- 745.301 Scope and applicability.
- 745.303 Definitions.
- 745.305 Lead-based paint hazards.
- 745.307 Generator responsibilities.
- 745.308 Transporter responsibilities.
- 745.309 Disposal and reclamation facility owner or operator responsibilities.
- 745.311 General requirements for the reuse and storage of lead-based paint debris.
- 745.313 Notification and recordkeeping requirements.
- 745.315 Certification of workers.
- 745.317 Enforcement.
- 745.318 Inspections.
- 745.319 Effective dates.

Subpart P—Management and Disposal for Lead-Based Paint Debris

§ 745.301 Scope and applicability.

(a) *Regulated entities.* Except as provided in paragraphs (b) and (d) of this section, this subpart applies to all persons, individuals, and firms, who generate, store, transport, reuse, offer for reuse, reclaim and/or dispose of lead-based paint debris.

(b) *Exclusion of homeowners.* This subpart does not apply to lead-based paint debris generated by persons who conduct abatement or renovation and remodeling activities themselves in target housing that they own, unless the housing is occupied by a person or persons other than the owner or the owners' immediate family while the lead-based paint debris is being generated.

(c) *Other regulatory authorities.* Lead-based paint debris subject to this

subpart may also be subject to additional requirements under other regulatory authorities (e.g., the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA)).

(d) *Lead-based paint removal.* If lead-based paint is removed from lead-based paint debris and the remaining material has levels of lead less than 1 mg/cm², the material is no longer subject to the requirements in this subpart. Waste products generated during removal of lead-based paint (e.g., paint chips, paint dust, solvents) may be subject to other regulatory authorities (e.g., RCRA, CAA, non-Title IV TSCA authorities).

§ 745.303 Definitions.

The definitions in subparts A and L of this part apply to this subpart. In addition, the following definitions apply:

Abatement means any measure or set of measures designed to permanently eliminate lead-based paint hazards. Abatement includes, but is not limited to:

(1) The removal of lead-based paint and lead-contaminated dust, the permanent enclosure or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil.

(2) All preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures.

(3) Specifically, abatement includes, but is not limited to:

(i) Projects for which there is a written contract or other documentation, which provides that an individual or firm will be conducting activities in or to a residential dwelling or child-occupied facility that:

(A) Shall result in the permanent elimination of lead-based paint hazards; or

(B) Are designed to permanently eliminate lead-based paint hazards and are described in paragraphs (1) and (2) of this definition.

(ii) Projects resulting in the permanent elimination of lead-based paint hazards, conducted by firms or individuals certified in accordance with § 745.226, unless such projects are covered by paragraph (4) of this definition.

(iii) Projects resulting in the permanent elimination of lead-based paint hazards, conducted by firms or individuals who, through their company name or promotional literature, represent, advertise, or hold themselves out to be in the business of performing lead-based paint activities as identified and defined by this section, unless such

projects are covered by paragraph (4) of this definition; or

(iv) Projects resulting in the permanent elimination of lead-based paint hazards, that are conducted in response to State or local abatement orders.

(4) Abatement does not include renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint hazards. Furthermore, abatement does not include interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards.

Artifact means an item that is not used as a structural or utility (e.g., electrical, plumbing, heating, air conditioning) component of a building or other structure but is used for decorative or other purposes.

Commercial building means any building which is used primarily for commercial or industrial activity including but not limited to manufacturing, service, repair, or storage.

Construction and demolition (C&D) landfill means a solid waste disposal facility subject to the requirements in part 257, subparts A or B of this chapter that does not receive hazardous waste (defined in § 261.3 of this chapter) (other than conditionally exempt small quantity generator waste (defined in § 261.5 of this chapter)) or industrial solid waste (defined in § 258.2 of this chapter). A C&D landfill typically receives any one or more of the following types of solid wastes: roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste. Municipal solid waste landfill units as defined in § 258.2 of this chapter are not C&D landfills.

Deleading means activities conducted by a person who offers to eliminate lead-based paint or lead-based paint hazards or to plan such activities in public buildings, commercial buildings, or steel structures.

Demolition means the wrecking, razing, or destroying of any building or significant element thereof using a method that generates undifferentiated rubble.

Deteriorated paint means paint that is cracking, flaking, chipping, peeling, or otherwise separating from the substrate of a building component.

Dispose means intentionally or accidentally to discard, throw away, or otherwise undertake any action resulting in the placement of lead-based paint debris in any location where it is not destined to be stored, reused, or reclaimed in accordance with this subpart. Application of lead-based paint debris as mulch, topsoil, ground cover, landscaping material, roadbed material, fill material or for any purpose which would require shredding, grinding, compacting, burying or mixing with soil is disposal. Any burning of lead-based paint debris that is not reclamation is disposal.

Encapsulation means the application of a substance that forms a barrier between lead-based paint and the environment, using a liquid-applied coating (with or without reinforcement materials) or an adhesively-bonded covering material.

Generator means any person, by site, whose act or process produces lead-based paint debris or whose act first causes lead-based paint debris to become subject to this part.

Indian Country means:

(1) All land within the limits of any American Indian reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of any patent, and including rights-of-way running throughout the reservation.

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or outside the limits of a State.

(3) All Indian allotments, the Indian titles which have not been extinguished, including rights-of-way running through the same.

Indian Tribe or Tribe means any Indian Tribe, band, nation, or community recognized by the Secretary of the Interior and exercising substantial governmental duties and powers.

Lead-based paint means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligrams per centimeter squared or more than 0.5 percent by weight.

Lead-based paint architectural component debris (LBPACD) means:

(1) Elements or fixtures, or portions thereof, of commercial buildings, public buildings, or target housing that are coated wholly or in part with or adhered to by lead-based paint. These include, but are not limited to interior components such as: ceilings, crown molding, walls, chair rails, doors, door trim, floors, fireplaces, radiators and other heating units, shelves, shelf supports, stair treads, stair risers, stair stringers, newel posts, railing caps,

balustrades, windows and trim, including sashes, window heads, jambs, sills, stools and troughs, built-in cabinets, columns, beams, bathroom vanities, and counter tops; and exterior components such as: painted roofing, chimneys, flashing, gutters and downspouts, ceilings, soffits, facias, rake boards, cornerboards, bulkheads, doors and door trim, fences, floors, joists, lattice work, railings and railing caps, siding, handrails, stair risers and treads, stair stringers, columns, balustrades, window sills or stools and troughs, casings, sashes and wells.

(2) LBPACD is generated when an architectural component which is coated wholly or in part with or adhered to by lead-based paint is displaced and separated from commercial buildings, public buildings, or target housing as a result of abatement, deleading, renovation or remodeling activities. LBPACD does not include other types of lead-based paint waste such as paint chips, paint dust, sludges, solvents, vacuum filter materials, wash water, contaminated and decontaminated protective clothing and equipment except that paint chips and dust which are created after LBPACD is placed in a container or vehicle for transport to a disposal or reclamation facility specified in § 745.309 is considered LBPACD.

(3) LBPACD which is reused in compliance with this subpart is no longer LBPACD.

Lead-based paint demolition debris means lead-based paint demolition debris or lead-based paint architectural component debris.

Lead-based paint demolition debris means any solid material which results from the demolition of target housing, public buildings, or commercial buildings which are coated wholly or in part with or adhered to by lead-based paint at the time of demolition.

Person means any natural or judicial person including any individual, corporation, partnership, or association; any Indian Tribe, State or political subdivision thereof; any interstate body; and any department, agency or instrumentality of the Federal government.

Public building means any building constructed prior to 1978 which is generally open to the public or occupied or visited by the public, including but not limited to schools, daycare centers, museums, airport terminals, hospitals, stores, restaurants, office buildings, convention centers, and government buildings. Note: "child-occupied facilities" as defined at § 745.223 are included in the definition of public building.

Reclaim or reclamation means to procure usable substances from lead-based paint debris. Examples of reclamation include the burning of lead-based paint debris for energy value, processing of lead-based paint debris in a smelter to obtain lead, or removing lead-based paint from debris prior to reuse of a component.

Remodeling means any construction-related work on an existing property intended to either maintain or improve the property that results in the disturbance of painted surfaces.

Renovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined in this part. The term renovation includes but is not limited to: the removal or modification of painted surfaces or painted components (e.g., modification of painted doors, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of large structures (e.g., walls, ceiling, large surface replastering, major re-plumbing); and window replacement.

Reuse means to use again for any purpose other than reclamation or disposal. Examples of reuse include moving doors, windows or other components from one structure to another to be put to a similar use.

Site means the same or geographically contiguous property which may be divided by public or private right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, are considered part of a single site.

Storage means the holding of lead-based paint debris for a temporary period.

Target housing means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age or under resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling.

Transfer for reuse means to physically relocate, or convey ownership of a building component prior to reuse.

§ 745.305 Lead-based paint hazards.

The following are lead-based paint hazards:

(a) Management or disposal of lead-based paint debris not in compliance with this subpart.

(b) Reuse or transfer for reuse of lead-based paint debris which is coated in part or in whole with deteriorated paint.

§ 745.307 Generator responsibilities.

(a) *Determination of presence of lead-based paint debris.* (1) Generators of lead-based paint debris are responsible for determining if lead-based paint debris is present. To make this determination, generators may:

(i) Test the waste for the presence of lead-based paint.

(ii) Use their knowledge of the waste.

(iii) Assume that lead-based paint debris is present.

(2) Generators incorrectly determining that lead-based paint debris is not present are liable as separate violations of TSCA for any subsequent storage, transportation, disposal, reclamation or reuse of lead-based paint debris not in compliance with this subpart.

(b) *Other generator responsibilities.*

Generators of lead-based paint debris must comply with §§ 745.311 and 745.313 and may not:

(1) Transport, or arrange for the transportation of lead-based paint debris in any manner other than specified in § 745.308.

(2) Dispose of, or arrange for the disposal of, lead-based paint debris at any facility not specified in § 745.309(a).

(3) Reclaim, or arrange for the reclamation of, lead-based paint debris at any facility not specified in § 745.309(b).

(4) Transfer lead-based paint debris to any party other than for reuse, storage, transport, disposal or reclamation in compliance with this subpart.

§ 745.308 Transporter responsibilities.

Transporters of lead-based paint debris must comply with §§ 745.311 and 745.313 and may not:

(a) Transport or arrange for the transportation of lead-based paint debris off-site in any vehicle without a cover that prevents visibly identifiable releases of dust or debris.

(b) Dispose of, or arrange for the disposal of, lead-based paint debris at any facility not specified in § 745.309(a).

(c) Reclaim, or arrange for the reclamation of, lead-based paint debris at any facility not specified in § 745.309(b).

(d) Transfer lead-based paint debris to any party other than for reuse, storage, transport, disposal or reclamation in compliance with this subpart.

§ 745.309 Disposal and reclamation facility owner or operator responsibilities.

(a) *Disposal facility responsibilities.* Owners or operators of waste disposal facilities must comply with §§ 745.311 and 745.313 and may not:

(1) Accept lead-based paint debris for disposal in any facility other than:

(i) A construction and demolition landfill as defined in this subpart.

(ii) A facility which does not accept industrial waste but is subject to the requirements in part 257, subpart B of this chapter applicable to non-municipal, non-hazardous waste disposal units receiving conditionally exempt small quantity generated waste (as defined in § 261.5 of this chapter).

(iii) A hazardous waste disposal facility permitted under part 270 of this chapter.

(iv) A hazardous waste disposal facility that is authorized to manage hazardous waste by a State that has a hazardous waste management program approved under part 271 of this chapter.

(v) A hazardous waste disposal facility that has qualified for interim status to manage hazardous waste under RCRA section 3005(e).

(vi) A facility subject to the requirements of part 60, subparts Cb, Eb, or part 63, subpart X (such as a secondary lead smelter or a municipal combustor) of this chapter.

(2) Transport or arrange for the transportation of lead-based paint debris in any vehicle without a cover that prevents any visibly identifiable release of dust or debris.

(3) Reclaim lead-based paint debris except in a facility subject to the requirements of § 745.309(b).

(4) Transfer lead-based paint debris to any party other than for reuse, storage, transport, disposal, or reclamation in compliance with this subpart.

(b) *Reclamation facility responsibilities.* An owner or operator of a reclamation facility must comply with §§ 745.311 and 745.313. Reclamation facilities burning, incinerating or smelting may accept lead-based paint debris for reclamation only in a facility subject to the requirements of part 60, subparts Cb, Eb, or part 63, subpart X of this chapter.

(1) An owner or operator of a reclamation facility may not transport or arrange for the transportation of lead-based paint debris in any vehicle without a cover that prevents any visibly identifiable release of dust or debris.

(2) An owner or operator of a reclamation facility may not dispose of, or arrange for the disposal of, lead-based paint debris at any facility not specified in § 745.309(a).

(3) An owner or operator of a reclamation facility may not transfer lead-based paint debris to any party other than for reuse, storage, transport, disposal or reclamation in compliance with this subpart.

§ 745.311 General requirements for the reuse and storage of lead-based paint debris.

Generators and transporters of lead-based paint debris, owners or operators of disposal or reclamation facilities accepting lead-based paint debris, or owners or operators of any enterprise offering lead-based paint debris for reuse may not reuse, offer for reuse, or store lead-based paint debris, or transfer lead-based paint debris to other parties for reuse or storage unless the reuse or storage is in compliance with all requirements in this subpart.

(a) *Reuse.* Lead-based paint debris that is coated in part or whole with deteriorated paint identified as a lead-based paint hazard at § 745.305(b) may not be reused or offered for reuse as a building or structural component or artifact or transferred to another party for such reuse unless the lead-based paint is completely removed. Lead-based paint debris may be transferred to a reclamation facility for removal of lead-based paint prior to reuse.

(b) *Storage.* (1) With the exception of demolition debris, may not be stored at any site (including the site where the lead-based paint debris was generated) for more than 72 hours from the time of generation without one of the following access limitations:

(i) Enclosing lead-based paint debris in closed or covered receptacles (e.g., containers, drums, mobile trailers, or covered dumpsters).

(ii) Keeping lead-based paint debris in a dumpster or container which is at least 6 feet tall.

(iii) Keeping lead-based paint debris in fenced areas that are locked when work activities are not being performed on the site.

(iv) Keeping lead-based paint debris in an unoccupied or non-residential structure which is locked when work activities are not being performed on the site.

(v) Keeping lead-based paint debris on an unoccupied or non-residential level of a multi-story structure and keeping the level locked when work activities are not being performed on the site.

(2) May not be stored at any site or combination of sites for a period exceeding 180 days.

(3) May be stored in a covered transport vehicle for all or a portion of this 180-day period.

§ 745.313 Notification and recordkeeping requirements.

(a) *Notification.* When generators and transporters of lead-based paint debris, owners or operators of disposal or reclamation facilities accepting lead-based paint debris, or owners or

operators of any enterprise offering lead-based paint debris for reuse transfer lead-based paint debris (transferor) to any other person (recipient), for any reason, the transferor must notify the recipient in writing of the presence of lead-based paint debris. The Notification must:

(1) Disclose the presence of lead-based paint debris.

(2) Indicate the date of generation of the lead-based paint debris.

(3) Be signed and dated by the recipient.

(4) Be signed and dated by the transferor.

(5) Contain the generator's name and address.

(6) Include a citation referring the recipient to this subpart.

(b) *Recordkeeping.* The transferor and the recipient must each retain a copy of the Notification for a minimum of 3 years from the date that the Notification is signed by the recipient.

§ 745.315 Certification of workers.

Individuals and firms engaged in the transport, reuse, storage, disposal or reclamation of lead-based paint debris or in offering lead-based paint debris for any such activity whose practices are in compliance with the requirements of this subpart are deemed certified by this section to engage in the transport, reuse, storage, reclamation or disposal of lead-based paint debris pursuant to section 402 of the Toxic Substances Control Act.

§ 745.317 Enforcement.

(a) Failure or refusal of any person to comply with §§ 745.307, 745.308, 745.309, 745.311, 745.313 or 745.315 is a prohibited act under 15 U.S.C. 2689 of the Toxic Substances Control Act and may subject a violator to civil and criminal sanctions pursuant to 15 U.S.C. 2615 for each violation.

(b) Failure or refusal of any person to establish, maintain, provide, copy, or permit access to records or reports as required by § 745.313 is a prohibited act under 15 U.S.C. 2689 of the Toxic Substances Control Act.

(c) Failure or refusal of any person to permit entry or inspection as required by § 745.318 or 15 U.S.C. 2610 of the Toxic Substances Control Act is a prohibited act under 15 U.S.C. 2689 of the Toxic Substances Control Act.

§ 745.318 Inspections.

EPA may conduct reasonable inspections pursuant to 15 U.S.C. 2610 of the Toxic Substances Control Act to ensure compliance with this subpart.

§ 745.319 Effective dates.

EPA will begin enforcement of the provisions at §§ 745.307 through 745.318 on [insert the date 2 years after date of publication of the final rule in the **Federal Register**] in any State or Indian Country which does not have a lead-based paint debris management and disposal program authorized under subpart Q of this part in effect by that date.

3. By revising the heading for subpart Q to read as follows:

Subpart Q—State and Tribal Lead-Based Paint Debris Management and Disposal Programs

4. In § 745.320, by adding paragraph (h) to read as follows:

§ 745.320 Scope and purpose.

* * * * *

(h) For State or tribal lead-based paint management and disposal programs, a State or Indian Tribe may seek authorization to administer and enforce §§ 745.307 through 745.315. The provisions of §§ 745.301, 745.303, 745.317, 745.318 and 745.319 shall be applicable for the purposes of such program authorization.

5. By adding new §§ 745.341 through 745.359 to subpart Q to read as follows:

§ 745.341 Options for lead-based paint debris management and disposal programs in States and Indian Country.

(a) *State and Tribal programs.* A State or Indian Tribe may apply to EPA for authorization to administer and enforce a lead-based paint debris management and disposal program. No program application will be approved unless EPA finds that the program is at least as protective as the Federal requirements in §§ 745.307 through 745.319 and that it provides adequate enforcement.

(b) *EPA administration and enforcement in States and Tribes without authorized programs.* If a State or Indian Tribe does not have a lead-based paint debris management and disposal program authorized under this subpart and in effect on or before the date which is 2 years after the date the final rule is published in the **Federal Register**, EPA will on such date, begin enforcement of the provisions at §§ 745.307 through 745.319 as the Federal program for that State or Indian Country.

§ 745.344 Application for authorization of State and Tribal programs.

This section establishes requirements for State or Tribal applications to EPA to administer and enforce a lead-based paint debris management and disposal program under TSCA section 404. This section also establishes the public

participation procedures EPA will follow as part of its review of State or Tribal applications.

(a) *Public comment.* Before submitting an application to EPA for program authorization, a State or Indian Tribe must:

(1) Issue in the State or Indian Country a public notice of intent to seek authorization. The comment period on the public notice must be at least 30 days.

(2) Provide an opportunity for public hearing.

(b) *Application contents.* A State or Tribal application must include:

(1) A transmittal letter from the State Governor or Tribal Chairperson (or equivalent official) requesting program authorization.

(2) A program summary that will be published in the **Federal Register** by EPA to provide notice to residents of the State or Tribe that EPA will review the application.

(3) A description of the program in accordance with § 745.346.

(4) An Attorney General's or Tribal Counsel's (or equivalent) statement in accordance with § 745.347.

(5) A statement which identifies resources the State or Tribe intends to devote to the administration of its compliance and enforcement program.

(6) A statement agreeing to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at § 745.355(b)(2).

(7) Copies of all applicable State and Tribal statutes, regulations, standards, and other materials that provide the State or Indian Tribe with the authority to administer and enforce a lead-based paint debris management and disposal program.

(c) *Public comment on applications.* After receipt of a State or Tribal application, EPA will publish a **Federal Register** notice containing:

(1) An announcement of the receipt of the application.

(2) The program summary provided by the State or Tribe in accordance with paragraph (b)(2) of this section.

(3) A request for public comments to be mailed to the appropriate EPA Regional Office. The comment period will last at least 45 days. EPA will consider public comments during its review of the application.

(d) *Public hearing.* EPA will, if requested, conduct a public hearing in the State or Indian Country of the Tribe seeking program authorization and will consider all comments submitted at that hearing during its review of the State or Tribal application.

§ 745.346 State or Tribal Program Description

A State or Tribe applying to administer and enforce a program under this subpart must submit a description of its program. The State or Tribal program description must include the following components:

(a) *Primary agency and contact.* A designation of the agency or agencies responsible for administering and enforcing the program and an agency contact. This designation must be in accordance with the specifications at § 745.324(b)(1).

(b) *Program elements.* A description of the program demonstrating that it contains all of the elements specified in § 745.350.

(c) *At least as protective as.* An analysis of the State or Tribal program that compares the program to the Federal provisions in §§ 745.307 through 745.319. This analysis must demonstrate how the program is, in the State's or Indian Tribe's assessment, at least as protective as the Federal provisions in this subpart. EPA will use the analysis to evaluate the program in making its determination pursuant to § 745.354(a)(2)(i).

(d) *Adequate enforcement.* A description of the State or Tribal compliance and enforcement program demonstrating that the program contains all of the enforcement requirements specified at § 745.352. This description must include copies of all policies, certifications, plans, reports, and other materials that demonstrate that the State or Tribal program contains all of the requirements specified at § 745.352.

(e) *Special requirements for tribal program descriptions.* The program description for an Indian Tribe must also include the information and documents specified in § 745.324(b)(4)(i) through (b)(4)(iii).

§ 745.347 State or Tribal Attorney General's statement.

An application for program authorization by a State or Indian Tribe must include a written statement signed by the Attorney General or Tribal Counsel (or equivalent). The statement must include all information and certifications as specified in § 745.324(c)(1) through (c)(3).

§ 745.348 State program certification/ interim approval.

(a)(1) When submitting an application, a State may also certify to EPA that the State program meets the requirements in §§ 745.350 and 745.352 of this subpart.

(2) If a State application contains this certification, the program will be

considered authorized until EPA disapproves the program or withdraws the authorization. A program will not be considered authorized to the extent that jurisdiction is asserted over Indian Country, including non-member fee lands within an Indian reservation.

(3) If the application does not contain such certification, the State program will be authorized only after EPA approves it in accordance with § 745.354.

(4) This certification must be contained in a letter from the Governor or the Attorney General to the EPA.

(5) The certification must reference the analyses required in § 745.346(d) as the basis for concluding that the State program is at least as protective as the Federal program and provides adequate enforcement.

(b) [Reserved]

§ 745.350 State or Tribal programs: required program elements.

To receive authorization from EPA, a State or Tribal program must contain at least the following program elements for lead-based paint debris management and disposal activities:

(a) *Requirements for reuse and storage.* The State or Tribe must have requirements for the reuse and storage of lead-based paint debris including but not limited to:

(1) Standards that prevent reuse of hazardous lead-based paint debris.

(2) Standards that limit access to and prevent dispersal of lead-based paint debris which is being stored.

(b) *Requirements for transportation.* The State or Tribe must have requirements for the transportation of lead-based paint debris including but not limited to measures to prevent the release of dust or paint chips from lead-based paint debris while it is being transported. Requirements for disposal or reclamation. The State or Tribe must have requirements for the disposal or reclamation of lead-based paint debris including but not limited to:

(1) Clear standards identifying disposal facilities which may safely accept lead-based paint debris. These standards must reference any State or Federal regulations which govern the disposal facilities.

(2) Clear standards identifying reclamation facilities which may safely accept lead-based paint debris. These standards must reference any State or Federal regulations which govern the reclamation facilities.

(c) *Notification and recordkeeping.* The State or Tribe must have notification and recordkeeping standards which at a minimum include the requirements found at § 745.313 or their functional equivalent.

§ 745.352 State or Tribal compliance and enforcement.

(a) *Compliance and enforcement program elements.* For the compliance and enforcement portion of a State or Tribal program to be considered adequate, a State or Indian Tribal application must demonstrate the following elements:

(1) *Authority to enter.* State or Tribal officials must be able to enter premises or facilities where lead-based paint debris management or disposal violations may occur. A State or Tribe must be able to subpoena any person who has possession of records or reports pertaining to lead-based paint debris to produce such documents; in addition, a State or Tribe must be able to compel the appearance of any person to testify concerning any matter relating to lead-based paint debris. A State or Tribe must also designate a judicial body that will have the authority to hold any person in contempt who fails or refuses to obey such a duly issued subpoena. A State or Indian Tribe should have the authority to seek a warrant if it is denied access to inspect any place or vehicle where lead-based paint is being generated or stored.

(i) State or Tribal officials must be able to enter and inspect premises, facilities, or vehicles where lead-based paint debris is generated or transported.

(ii) State or Tribal officials must be able to enter and inspect disposal and reclamation facilities.

(iii) State or Tribal officials must have authority to take samples and review records as part of the inspection process.

(2) *Flexible remedies.* A State or Tribal compliance and enforcement program must provide for a diverse and flexible array of enforcement remedies. At a minimum, the program must authorize the remedies specified at § 745.327(b)(3). Indian Tribes are not required to exercise criminal enforcement jurisdiction as a condition for program authorization.

(3) *Training.* A State or Tribal compliance and enforcement program must include a process for training enforcement and inspection personnel. The training must include case development procedures, proper case files, and methods of conducting inspections and gathering evidence.

(4) *Compliance assistance.* A State or Tribal compliance and enforcement program must provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with State or Tribal requirements governing lead-based

paint debris management and disposal activities.

(5) *Sampling techniques.* A State or Tribal application for program approval must show that the State or Indian Tribe is technologically capable of conducting a lead-based paint debris management and disposal compliance and enforcement program. The State or Tribal program must have access to the facilities and equipment necessary to perform sampling and laboratory analysis as needed. This laboratory facility must be a recognized laboratory as defined at 40 CFR 745.223, or the State or Tribal program must implement a quality assurance program that ensures appropriate quality of laboratory personnel and protects the integrity of analytical data.

(6) *Tracking tips and complaints.* A State or Tribal compliance and enforcement program must include a process for reacting to tips and complaints or other information indicating a violation.

(7) *Targeting inspections.* A State or Tribal compliance and enforcement program must demonstrate the ability to target inspections to ensure compliance with the lead-based paint debris management and disposal program requirements. A State or Tribe should have the ability to conduct consensual inspections in places where records or reports are stored, but where no lead debris is present. Such consensual inspections should include the authority of State or Tribal officials to physically appear at such places or to issue a consensual Information Request Letter to gather records or reports on lead debris.

(8) *Follow up to inspection reports.* A State or Tribal compliance and enforcement program must demonstrate the ability to reasonably, and in a timely manner, process and follow-up on inspection reports and other information generated through enforcement-related activities. The State or Tribal program must be in a position to ensure correction of violations and, as appropriate, effectively develop and issue enforcement remedies/responses to follow up on the identification of violations.

(9) *Compliance monitoring and enforcement.* A State or Tribal compliance and enforcement program must demonstrate in its application for approval that it is in a position to implement a compliance monitoring and enforcement program. Such a program must ensure correction of violations, and encompass either planned and/or responsive inspections and development/issuance of State or

Tribal enforcement responses which are appropriate to the violations.

(b) *Memorandum of Agreement.* An Indian Tribe which obtains program approval must establish a Memorandum of Agreement with the appropriate Regional Administrator. The Memorandum of Agreement must meet the requirements at § 745.327(e).

§ 745.354 EPA review of State or Tribal program applications.

(a) EPA approval.

(1) EPA will fully review and consider all portions of a State or Tribal application.

(2) Within 180 days of receipt of a complete State or Tribal application containing all elements specified in this subpart, EPA must authorize the program or disapprove the application. EPA will authorize the program only if it finds that:

(i) The State or Tribal program is at least as protective of human health and the environment as the corresponding Federal provisions at §§ 745.307 through 745.319.

(ii) The State or Tribal program provides adequate enforcement.

(3) EPA will notify the State or Tribe in writing of its decision to authorize or disapprove the State or Tribal application.

(4) Upon authorization of a State or Tribal program pursuant to this subpart, it will be an unlawful act under sections 15 and 409 of TSCA for any person to fail or refuse to comply with any requirements of such program.

(b) [Reserved]

§ 745.355 Oversight and reporting requirements.

(a) *Oversight.* EPA will periodically evaluate the adequacy of a State or Indian Tribe's implementation and enforcement of its authorized program.

(b) *Reports.* Beginning 12 months after the date of program authorization, the primary agency for each State or Indian Tribe must submit a written report to the EPA Regional Administrator for the Region in which the State or Indian Tribe is located. The report must be submitted at least once every 12 months for the first 3 years after program approval. If these reports demonstrate successful program implementation, the Agency will extend the reporting interval to every 2 years. If the subsequent reports demonstrate problems with implementation, EPA will require a return to annual reporting until the reports demonstrate successful program implementation. The report must include the following information:

(1) Any significant changes in the content, administration, or enforcement

of the State or Tribal program implemented since the previous reporting period.

(2) A Summary on Progress and Performance which summarizes the results of implementing the State or Tribal lead-based paint debris management and disposal compliance and enforcement program, including a summary of the scope of the regulated community within the State or Indian Tribe, the inspections conducted, enforcement actions taken, compliance assistance provided, and the level of resources committed by the State or Indian Tribe to these activities.

§ 745.356 Withdrawal of State or Tribal Program authorization.

(a) *Withdrawal of authorization.* (1) If EPA concludes that a State or Tribe is not administering or enforcing an authorized program in compliance with the standards, regulations, and other requirements of Title IV of TSCA and this part, EPA will notify the primary agency for the State or Tribe in writing and indicate EPA's intent to withdraw authorization of the program.

(2) The Notice of Intent to Withdraw Authorization will comply with the specifications at § 745.324(i)(2).

(3) Any actions taken by EPA related to withdrawal of State or Tribal program authorization will follow the procedures specified at § 745.324(i)(3) through (i)(7).

(4) If EPA issues an order withdrawing the authorization of a State or Tribal program, EPA will establish and enforce the provisions at §§ 745.307 through 745.319 as the Federal program for that State or Indian Country. The Federal program will be established and enforced as of the effective date of the order withdrawing authorization of the State or Tribal program.

(b) [Reserved]

§ 745.358 Overfiling.

(a) *Failure to impose adequate penalty.* If EPA finds that a violator of a State or Indian Tribal lead-based paint debris management and disposal program approved under this subpart has not been adequately penalized, EPA will notify the State or Indian Tribe of this finding. If EPA finds that the penalty against the violator has not been adjusted appropriately within 30 days after such notice, EPA may issue an appropriate administrative penalty order against the violator.

(b) *Failure to penalize.* If upon receipt of any complaint or information alleging or indicating a significant violation, a State or Tribal Program has not commenced appropriate enforcement action, EPA may act upon the complaint

or information by instituting an appropriate action order against the violator.

§ 745.359 Effective dates.

States and Indian Tribes may seek authorization to administer and enforce a lead-based paint debris management and disposal program under this subpart effective on [insert date 60 days after date of publication of the final rule in the **Federal Register**].

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260 and 261

[FRL-5783-7]

RIN 2070-AC72

Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a rule which would suspend temporarily the applicability of the Resource Conservation and Recovery Act (RCRA) Toxicity Characteristic (TC) Rule (40 CFR 261.24) to debris generated during lead-based paint (LBP) abatements conducted at target housing; deleading projects conducted at public or commercial buildings; and renovation or remodeling and demolition activities at target housing, public buildings, or commercial buildings. Instead of being subject to the TC Rule, LBP debris resulting from the above-mentioned activities would be subject to the management and disposal standards being proposed today under Title IV of the Toxic Substances Control Act (TSCA). EPA is proposing this temporary suspension of the TC rule in accordance with RCRA sections 1006(b)(1) and 2002 to avoid duplication and inconsistent regulation of LBP debris and to allow the Agency sufficient time to assess whether any RCRA requirements, in addition to TSCA Title IV requirements, are necessary to assure proper management and disposal of such debris.

DATES: Comments on this proposed rule must be submitted on or before February 16, 1999.

ADDRESSES: Commenters must send an original and two copies of their comments to: Docket Clerk, Mail Code 5305W, Docket No. F-98-LPDP-FFFFF,

U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Comments should include the docket number F-98-LPDP-FFFFF.

Hand deliveries of comments should be made to the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. Comments may also be submitted electronically through the Internet to: rcra-docket@epamail.epa.gov. Comments in electronic format should also be identified by the docket number F-98-LPDP-FFFFF. All electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Commenters should not submit electronically any confidential business information (CBI). An original and two copies of CBI must be submitted under separate cover to: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. For additional information on electronic submissions refer to Unit VII. of the preamble.

FOR FURTHER INFORMATION CONTACT: For general information about this proposed rule, contact the RCRA Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, Washington, DC 20460, (800) 424-9346 (toll free); TDD (800) 553-7672 (hearing impaired); in Washington, DC metropolitan area the number is (703) 412-9810; TDD (703) 486-3323 (hearing impaired).

For technical information on this proposed rule, contact Ms. Rajani D. Joglekar in the Office of Solid Waste at (703) 308-8806; and for technical information on the proposed TSCA Title IV disposal and management standards, contact Tova Spector in the Office of Pollution Prevention and Toxics at (202) 260-3467. To obtain copies of the reports or other materials referred to in this proposal, contact the RCRA Docket at the telephone number or address listed above.

SUPPLEMENTARY INFORMATION: Regulated Entities

Entities potentially regulated by this action include:

Category	Examples of Regulated Entities
Abatement Industry	Firms contracted to abate lead-based paint in target housing and public and commercial buildings where children under the age of 6 may be exposed to lead hazards.