

participation in developing future updates to the CPG.

EPA also proposed to delete the outdated guidance in 40 CFR part 247, which pre-dated the 1984 amendments to the Resource Conservation and Recovery Act and to consolidate the existing five procurement guidelines and new item designations into a new part 247. The proposed new part 247 consisted of two subparts: Subpart A—General, which included the general requirements of RCRA section 6002 and definitions, and Subpart B—Item Designations (see 59 FR 18862, April 20, 1994). As explained in the preamble to the proposed CPG, EPA did not seek comment on the existing item designations for paper and paper products, re-refined lubricating oil, building insulation, cement and concrete containing fly ash, or retread tires.

The legal basis, methodology, and factual conclusions that formed the basis of the proposal were described in substantial detail in the notice of proposed rulemaking (see 59 FR 18853–18882).

Interested persons were invited to participate in the rulemaking by submitting written comments by June 20, 1994.

### III. Comment Summary and Agency's Response

EPA received submittals from over 300 commenters in response to the proposed CPG. These commenters represented various interests, including Federal agencies, State agencies, local governments, product manufacturers, product users, public interest groups, waste management companies, and members of Congress. EPA has carefully considered all of these comments. A discussion of the major comments follows.

#### A. General Comments

##### 1. Designation of Material Specific Items

*Comment:* One commenter suggested that EPA designate items in a material neutral manner. In other words, rather than designating items made of specific materials (e.g., "plastic" trash bags), EPA should simply designate the items in generic terms (e.g., trash bags).

*Response:* EPA believes that such an approach is not appropriate for all items. Under RCRA section 6002(c)(1), each procuring agency which procures "any items" designated by EPA is required to procure such items composed of the highest percentage of recovered materials practicable. As a result, if EPA designates a generic category of items, procuring agencies are

obligated to try to purchase all items within that category containing recovered materials. For example, when EPA designated "paper and paper products" or "building insulation products," procuring agencies were obligated to purchase all types of paper products or building insulation containing recovered materials, even though EPA did not provide content recommendations for all products within these categories. In other instances, where EPA is not aware that items manufactured from other types of materials are made with or could contain recovered materials, EPA has limited its designations so as not to create an unnecessary burden on agencies to try to purchase an item that is not available. When EPA learns that the generic item is being made with additional recovered materials, EPA will evaluate the new information and consider amending the item designation accordingly.

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

##### 2. Purpose, Scope, and Applicability

*Comment:* A commenter inquired about the applicability of RCRA section 6002 to designated items that are leased rather than purchased by a procuring agency.

*Response:* Section 6002 applies to "any purchase or acquisition" in excess of \$10,000 by a procuring agency. The Federal Acquisition Regulation (FAR) defines "acquisition" to include the acquiring of supplies or services (including construction) by means of a lease (48 CFR 2.101). Therefore, RCRA section 6002 and the procurement guidelines developed under its authority apply to a procuring agency's lease contracts for designated items. Under the definition of "procuring agency," lessor contractors are subject to the section 6002 requirements for work performed under the lease contract.

*Comment:* Commenters inquired when RCRA section 6002 applies to contractors.

*Response:* The requirements of RCRA section 6002 apply to contractors in the following circumstances. A contractor must comply with section 6002 with respect to work under the contract if the contractor is (1) contracting with a Federal agency or a State agency which is using appropriated Federal funds for a procurement and (2) purchasing or acquiring a designated item whose purchase price exceeds \$10,000 or the quantity of the item purchased in the previous year was \$10,000 or more.

Under both circumstances, it is immaterial for purposes of the \$10,000 threshold whether the contractor purchased or acquired the designated items as a "procuring agency" (with respect to work performed under a contract with a Federal or State agency) or in its private capacity. All the purchases of a designated item should be aggregated in order to determine whether the \$10,000 threshold for section 6002 applicability is met. However, the obligations of section 6002 are prospective. The contractor must determine whether the \$10,000 threshold is met *only* after it is a "procuring agency." That is, purchases exceeding the \$10,000 threshold in the year prior to the year in which a contractor becomes a "procuring agency" do not trigger section 6002(a) requirements. Furthermore, while the contractor is subject to section 6002 requirements once it exceeds the threshold, the RCRA requirements apply only with respect to work performed under the contract (i.e., when supplying the designated item to any State or Federal agency).