

In sum, based on the text of the regulation, the history of the regulation, and the EPA's contemporaneous action to expand the priority list, the EPA interprets subpart Kb to apply to all storage vessels (subject to enumerated exceptions) including but not limited to those located at SOCOMI plants and those not located at SOCOMI plants.

II. Why Are We Proposing Amendments to the Standards and What Amendments Are We Proposing?

Background. In subpart Kb, "storage vessel" is defined as "each tank, reservoir, or container used for the storage of volatile organic liquids," excluding subsurface caverns and porous rock reservoirs, and components not directly involved in the containment of liquids or vapors, such as frames and auxiliary supports (40 CFR 60.111b). A specific issue presented for purposes of this proposal is whether the definition applies to process tanks, which are intermediate tanks within a process that are not used for the storage of raw materials or the product(s) of the process.

The EPA has issued two formal interpretations addressing this question. In an October 29, 1998 letter from the EPA's Office of Enforcement and Compliance Assurance (OECA) to the AF&PA, the EPA stated that the definition of "storage vessel" in subpart Kb does not include "flow-through process tanks," defined in the Underground Storage Tank Program (40 CFR 280.12) as tanks that form an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process, and that are not used for the storage of materials prior to their introduction into the production process or for the storage of finished products or by-products from the production process.

After further evaluation, however, the EPA determined (post-issuance) that the interpretation given in the letter to AF&PA was not the best reading of the rule and that the definition of "storage vessel" in subpart Kb does not exclude process tanks. This interpretation appears in a March 27, 2000 memorandum (2000 Memorandum) from OECA to EPA Region IV.

The EPA continues to believe, as a purely interpretive issue, that the 2000 Memorandum is the better reading of the current rule. For example, there is no mention of intermediate or process tanks in the regulatory text of subpart Kb. The definition of "storage vessel" in subpart Kb is broad and does not specify that only raw material and product

tanks are included. Aside from the exclusions specifically mentioned in the definition of "storage vessel," the only language that limits the applicability of subpart Kb is in § 60.110b(d), which lists vessels to which subpart Kb does not apply (for example, vessels at coke oven by-product plants and vessels located at gasoline service stations). The regulatory history also tends to support the 2000 Memorandum.

On May 26, 2000, the AF&PA filed a petition for judicial review of the 2000 Memorandum in the U.S. District Court of Appeals for the District of Columbia (*AF&PA v. EPA*, No. 00-1218). The petitioner felt that the EPA had inappropriately expanded the scope of "storage vessels" with the interpretation in the 2000 Memorandum.

On August 23, 2001 (66 FR 44342), AF&PA and the EPA signed a settlement agreement which provides that the EPA will propose to amend subpart Kb to exclude from its applicability storage vessels that have a capacity less than 75 cubic meters (m^3) or that contain a liquid with a maximum true vapor pressure below 3.5 kilopascals (kPa), and take final action on that proposal within a reasonable time. Today's proposed amendments fulfill the agreement to propose these amendments to subpart Kb.

Today's proposed amendments also address concerns raised by parties other than the petitioner. One party commented that in addition to the proposed amendments required by the settlement agreement, the EPA should exempt process tanks from subpart Kb. Another party commented that the regulatory overlap between subpart Kb and the National Emission Standards for Hazardous Air Pollutants: Solvent Extraction for Vegetable Oil Production (40 CFR part 63, subpart GGGG) should be addressed.

Proposal to Exempt Certain Storage Vessels by Capacity and Vapor Pressure. The EPA believes that limiting the rule's applicability by vessel size and vapor pressure is reasonable and does not undermine the rule's fundamental basis as reflecting the best system of emissions reductions for volatile organics in storage vessels, taking cost, non-air impacts, and energy into consideration. Presently, subpart Kb does not apply to storage vessels with a capacity less than 40 m^3 . However, the only requirements that apply to storage vessels with a capacity less than 75 m^3 , to storage vessels with a capacity between 75 and 151 m^3 storing liquid with vapor pressure less than 15 kPa, and to storage vessels with a capacity equal to or greater than 151 m^3 storing liquid with vapor pressure less than 3.5

kPa, is minimal recordkeeping (40 CFR 60.110b(b) and (c)). The EPA in essence is proposing to eliminate these recordkeeping requirements in today's proposal. Put another way, the EPA is proposing to exempt from subpart Kb those storage vessels presently subject to recordkeeping requirements only.

Today's proposed amendments to increase the vessel capacity applicability cutoff and to include vapor pressure applicability cutoffs, thus, reduce the burden on sources without sacrificing emissions reductions. As explained above, increasing the vessel capacity applicability cutoff from 40 m^3 to 75 m^3 would decrease the number of sources affected by subpart Kb, but no emissions reductions would be lost because emission control is required only on vessels larger than 75 m^3 . The proposed vapor pressure applicability cutoffs of 3.5 kPa and 15.0 kPa would also decrease the number of affected sources, but, again, no emissions reductions would be lost because emission control is required only for liquids with vapor pressures of at least 5.2 kPa and 27.6 kPa, respectively (40 CFR 60.112b(a)).

Proposal to Exempt Process Tanks. The EPA is also proposing to exempt process tanks from subpart Kb. If the EPA were writing on a blank slate, the EPA would take the view that the better reading of subpart Kb is that process tanks are within the scope of the regulation, as explained earlier. However, the EPA is not writing on a blank slate. The 1998 interpretation of the rule was definitive (in the sense that it was intended to set out the EPA's view and was written by an entity within the EPA with authority to do so), and as such, can only be changed after notice-and-comment rulemaking (see *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F. 3d 579, 586-87 (D.C. Cir. 1997)). That interpretation thus sets out the current scope of the rule with respect to process tanks, the 2000 Memorandum notwithstanding. The question, therefore, becomes whether it is justified to amend subpart Kb to include process tanks within its scope. Moreover, such a rule would apply only to new sources, that is, only to those process tanks for which construction, reconstruction, or modification commenced after the date of proposal of the action (see CAA sections 111(a)(2) and (b)(1)(B)).

The data used in the initial development of subpart Kb indicate that if process tanks were exempted, then about 4 percent of new tanks may go uncontrolled that would otherwise have to be controlled. However, there are several reasons why the actual amount