



Wastes - Hazardous Waste - Definition of Solid Waste

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Final Definition of Solid Waste Rule Frequent Questions

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Q: What does this rule do?

A: This rule establishes two self-implementing exclusions from the definition of solid waste for certain hazardous secondary materials that are legitimately recycled. One exclusion streamlines management requirements for hazardous secondary materials legitimately reclaimed under the control of the generator. The other exclusion streamlines requirements for hazardous secondary materials that are transferred for legitimate reclamation, provided certain conditions are met. The rule also contains a procedure for applying for a case-by-case non-waste determination. Finally, the rule also includes provisions for assessing the "legitimacy" of hazardous secondary material recycling practices under the new exclusions.

Q: What is the "Definition of Solid Waste," and what is the intent of this final rule?

A: The "definition of solid waste" is contained in the hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA). Under RCRA, to be considered a hazardous waste, a hazardous secondary material must first be determined to be a solid waste. With regard to recycling, the existing definition classifies some materials, but not others, as wastes when they are recycled. This final rule is intended to modify the existing definition to exclude some additional hazardous secondary materials that are recycled from being regulated as solid (and therefore hazardous) wastes. The rule also contains provisions for assessing the "legitimacy" of hazardous secondary material recycling practices under the new exclusions.

Q: How would this final rule encourage industrial recycling?

A: The rule will modify the current hazardous waste regulations under RCRA to encourage recycling of hazardous secondary materials, while ensuring protection of human health and the environment. Currently, some recycling is discouraged partly because of the high costs associated with meeting the Subtitle C hazardous waste requirements, such as facility permits. To address this issue, the rule excludes from the definition of solid waste those hazardous secondary materials that are generated and reclaimed under the control of the generator. It also excludes hazardous secondary materials that are transferred by a generator to a reclamation facility (or to an intermediate facility prior to recycling at a reclamation facility), provided certain conditions are met. The rule also provides a case-by-case petition process for "non-waste determinations," for recycling operations that closely resemble normal manufacturing processes.

Q: When was this rule first proposed, and why is EPA not finalizing that proposal?

A: EPA first proposed changes to the definition of solid waste, as well as regulatory criteria for determining when recycling is legitimate, on October 28, 2003 (68 FR 61558). After evaluating the comments received on the October 2003 proposal and conducting independent analyses, EPA decided to restructure its approach. We issued a supplemental proposal on March 26, 2007 (72 FR 14172) which discussed changes we were considering to the approach we proposed in October 2003. This final rule builds on both the October 2003 and March 2007 actions.

Q: What is the scope of the exclusion for hazardous secondary materials that are generated and legitimately reclaimed under the control of the generator?

A: The scope of this exclusion includes: (1) recycling onsite at the generating facility; (2) off-site recycling within the same company; and (3) recycling through a "tolling" agreement. All materials under this exclusion must be reclaimed within the United States. Under this exclusion, notification to EPA or the authorized state would be required, speculative accumulation would not be allowed, and the hazardous secondary material must be legitimately reclaimed. All hazardous secondary materials must be contained when they are stored.

Q: What information is required in notifications?

A: Generators, intermediate facilities, and reclaimers must provide the name, address, and EPA ID number of the facility (if applicable); the name and phone number of a contact person; the NAICS code of the facility; the exclusion under which the hazardous secondary materials will be managed; whether the reclaimer or intermediate facility has financial assurance; when the facility expects to begin managing the hazardous secondary materials under the exclusion; a list of hazardous secondary materials that will be managed; whether the hazardous secondary material is being managed in a land-based unit; and the quantity of hazardous secondary material that is managed annually. The notifications must be submitted prior to operating under the exclusions and by March 1st every two years thereafter. Notifications are submitted using the RCRA Subtitle C Site Identification Form (EPA Form 8700-12) and are processed in the same manner as is currently used for site identification information.

Q: How does the exclusion for certain tolling arrangements work?

A: This exclusion addresses a particular type of recycling contract between two companies. Specifically, the exclusion applies in situations where a "tolling" company certifies that it has a contract with a manufacturer to produce a product, and that manufacturing process generates a residual material that can be recycled by the tolling company. If the tolling company certifies that the contract specifies that the tolling company owns and has responsibility for the recyclable material once it is generated, and the material is returned to the tolling company for reclamation, and subsequently recycled, the material is excluded from regulation. In these situations, management and recycling of the material are in essence done under the control of the tolling company, even though the material is physically generated by another company.

Q: What is the scope of the conditional exclusion for hazardous secondary materials that are

generated and then transferred for the purpose of legitimate reclamation (i.e., the "transfer-based" exclusion)?

A. Under this exclusion, materials that are generated by one company and then transferred to an intermediate facility or to another company for legitimate reclamation are excluded from regulation, as long as all parties comply with certain conditions. The materials must be legitimately recycled to qualify for the exclusion.

Q: What conditions must generators meet to qualify for the transfer-based exclusion?

A. Under this exclusion, generators must provide the same notification required for materials reclaimed under the exclusion for onsite, same-company, and tolling arrangements. They must also make reasonable efforts to ensure that their materials are safely and legitimately reclaimed, they must contain all hazardous secondary materials managed under the exclusion, and they must maintain records of off-site shipments for three years. In addition, the material must not be speculatively accumulated.

Q: What kind of "reasonable efforts" must generators make for intermediate facilities and for reclaimers?

A: Under the regulations, a generator makes reasonable efforts by addressing a series of questions for each reclamation facility and any intermediate facility to which hazardous secondary materials are sent. The questions include an evaluation of the facility's environmental compliance history, technical capacity for safely managing and recycling the hazardous secondary material as well as any residuals generated, and notifications to appropriate authorities, including whether the facility has financial assurance. Such inquiries, which can be thought of as a kind of "environmental due diligence," are currently conducted as a normal business practice by many generators. Under the new rule, generators do not have to make "reasonable efforts" if they ship materials to a RCRA permitted reclamation facility. We believe that RCRA permits provide adequate assurance that reclamation facilities will manage and reclaim excluded materials safely and legitimately.

Q: What conditions must reclamation facilities meet to qualify for the "transfer-based" exclusion?

A: Reclamation facilities must meet the following conditions: (1) maintain shipping records for excluded hazardous secondary materials for at least three years; (2) contain hazardous secondary materials managed under the exclusion; (3) manage the residuals from the reclamation process in a manner that protects human health and the environment; and (4) comply with financial assurance requirements. In addition to these conditions, reclamation facilities must also submit the same notification required of generators and intermediate facilities, comply with restrictions on "speculative accumulation" of excluded materials, and ensure that the excluded hazardous secondary materials they receive are legitimately recycled.

Q: Are conditionally exempt small-quantity generators (CESQGs) required to make "reasonable efforts"?

A: No. Conditionally exempt small-quantity generators (i.e., those who generate less than 100 kg of hazardous waste in a calendar month) are not affected by today's rule under the federal program, since their wastes are already excluded from regulation. Thus, these generators may continue to send their wastes to the same types of facilities that are currently eligible to receive their wastes (see 40 CFR 261.5).

Q: What reclaimed materials might be eligible for the case-specific non-waste determination petition process?

A. The case-specific non-waste determination petition process allows petitioners to demonstrate that their hazardous secondary material is not a solid waste because: (1) it is legitimately recycled in a continuous industrial process; or (2) it is indistinguishable in all relevant aspects from a product or intermediate. This

regulatory mechanism is intended to address recycling practices that do not involve discard of materials, and in essence can be considered normal manufacturing processes, rather than waste management operations.

Q: What is the procedure for obtaining a non-waste determination?

A: To request a non-waste determination, the facility must submit a petition to the authorized state or to EPA, if the state is not authorized for this regulatory provision. The petition must demonstrate that the specific recycling practice is consistent with the criteria specified in the regulations. The state or the Administrator will then evaluate the application and provide notification to the public in a newspaper or radio broadcast. After evaluating any public comments on the application, the state or the Administrator will make a determination granting or denying the petition. States that have not been formally authorized for the non-waste determination process may still participate if the following conditions are met: (1) the state determines that the hazardous secondary material meets the specified criteria; (2) the state requests EPA to review its determination; and (3) EPA approves the state determination.

Q: What types of hazardous waste are not eligible for the new exclusions?

A: Hazardous secondary materials that are burned for energy recovery, that are used "in a manner constituting disposal," or that are inherently waste-like under the current regulations are not eligible for the exclusions.

Q: What does the final rule say about legitimacy?

A: This new final rule contains provisions that address the "legitimacy" of recycling practices under the new exclusions to clarify and provide additional guidance for making these determinations. Legitimate recycling is real recycling as opposed to sham treatment or disposal in the guise of recycling. Two of the legitimacy factors are mandatory requirements. These are: (1) the hazardous secondary material being recycled must provide a useful contribution to the recycling process or to the product of the recycling process; and (2) the recycling process must produce a valuable intermediate or final product. The other two factors, which address management of materials prior to recycling, and "toxics along for the ride" in recycled products, must also be considered and taken into account in making a determination that recycling is legitimate. The preamble to the final rule also contains a discussion of how economic factors can be considered in making legitimacy determinations under the new exclusions. This rule will not result in changes to any existing legitimacy determinations.

Q: Why is EPA codifying the legitimacy provisions in the new exclusions?

A: Many public comments submitted in response to the October 2003 and March 2007 proposals (particularly those from states) stressed the need for clarity, predictability, and consistency in enforcing legitimacy criteria. We generally agree with these commenters, and believe that explicit regulatory provisions for addressing the legitimacy of recycling practices under the new exclusions and non-waste determinations are the best means of meeting these objectives. However, to avoid confusion among the regulated community and state and other implementing agencies about the status of recycling under existing definition of solid waste exclusions, we have decided that the focus of this rule should be the new recycling exclusions and non-waste determinations. Because the legitimacy provision being finalized today is substantially the same and no more stringent than the existing regulatory scheme under which all recycling must be legitimate, if a state adopted the four legitimacy factors for all recycling, EPA would consider its regulation to be equivalent to the federal program .

Q: How is this rule different from the March 26, 2007 supplemental proposal?

A: This rule contains the following changes from the March 2007 supplemental proposal:

1. Hazardous secondary materials sent to intermediate facilities are eligible for the exclusion for materials transferred for reclamation. Intermediate facilities are those managing hazardous

secondary materials for more than 10 days (other than generators or reclaimers). Generators must perform reasonable efforts on intermediate facilities, which are subject to the same conditions as those applicable to reclaimers, including financial assurance.

2. Notifications from generators, intermediate facilities, and reclaimers must be submitted every two years using EPA Form 8700-12.
3. Facilities must maintain confirmations of receipt for off-site shipments and documentation and certification of reasonable efforts for three years.
4. Exporters must submit annual reports for hazardous secondary materials sent outside the U.S.
5. Reasonable efforts questions have been codified in the regulations and reasonable efforts must be repeated every three years.
6. Legitimacy requirements have been codified as conditions for the new exclusions and non-waste determinations.
7. Financial assurance requirements have been tailored to facilities managing hazardous secondary materials.

Q: How has EPA addressed financial assurance in the final rule?

A: EPA is finalizing a financial assurance requirement for reclamation and intermediate facilities as a condition of the transfer-based exclusion. The condition is functionally equivalent to the financial assurance requirements for hazardous waste facilities, but has been tailored to apply to hazardous secondary materials recycling. For the convenience of the regulated community, the new financial assurance provisions are located in 40 CFR 261 Subpart H.

Q: What would be the economic impacts of this final rule?

A: We estimate that this rule will affect approximately 5,600 facilities, will de-regulate or subject to reduced regulation approximately 1.5 million tons of hazardous waste annually, and will provide cost savings to industry of approximately \$95 million per year. The hazardous secondary materials that will be de-regulated or subject to reduced regulation include those which already are being reclaimed under the current regulatory scheme, as well as hazardous secondary materials that will be shifted from disposal or incineration to reclamation. The final rule will provide environmental benefits by decreasing pollution and energy consumption that would otherwise be needed to extract raw materials for use in manufacturing.

Q: How do I submit a notification?

A: Notifications are submitted using the RCRA Subtitle C Site Identification Form (EPA Form 8700-12) and are processed in the same manner as is currently used for site identification information. EPA plans to issue further guidance regarding the use of the Site Identification Form.