



US Army Corps
of Engineers

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HTRW CX Regulatory Fact Sheet FY 04-01

Title: Revisions to the Definition of Solid Waste		Date: Oct 28, 2003
SARS RIN#: 2050-AE98	Action Type: Proposed Rule	Cite: 68 FR 61557

Executive Summary: EPA has responsibility for regulating wastes and has historically taken the position that discarded materials, even if recycled, are under their jurisdiction. This was challenged in court, and the Court held that "discarded materials" could not include materials destined for beneficial reuse or recycling in a continuous process by the generating industry. This is because they are not yet part of the waste disposal problem. In response, EPA proposes to modify the definition of solid waste to make clear that secondary materials generated and reclaimed in a "continuous process" within the "same industry" are not solid waste. If not solid wastes, by definition, they also would not be subject to hazardous waste regulation.

Other topics addressed in this proposal include the following:

- Proposed one-time notification regarding newly excluded waste.
- Discussion on whether to require periodic reporting of recycling activities to provide information such as types and volumes recycled, where shipments were sent, types of reclamation processes used, types of products produced from the reclamation process, etc.
- Discussion on whether to require generators and reclaimers to keep records regarding types and volumes of materials handled.
- Proposed criteria for establishing legitimate recycling as opposed to "sham" recycling.
- Proposed conforming changes to remove sections made obsolete as a result of the modified definition of solid waste.
- Request for input regarding other actions that may be necessary to encourage recycling of materials that otherwise remain regulated as solid/hazardous waste.

Impact: This proposed rule is primarily deregulatory in nature but has potential impacts to DoD. Changes to the scrap metal exclusion proposed in 40 CFR 261.4(a)(13) would allow scrap metal to be either excluded under 40 CFR 261.4 or 261.2(g). Where the latter exclusion is used, there may be a need for additional recordkeeping to ensure processed scrap metal is not being speculatively accumulated. Another potential impact would be the precedent setting enforcement strategy suggested in this proposal. EPA proposes that were a secondary material loses its exclusion anywhere in the handling process, that it be subject to hazardous waste management standards retroactively to the point the material was first generated.

USACE POC: Beverly VanCleaf, USACE HTRW CX, 402 697 2559, or by email at Beverly.D.VanCleaf@USACE.Army.mil

Comments Due To EPA: January 26, 2004

Full Text Document Location:

Key Elements of the Proposed Rule:

Modification of Definition of Solid Waste

This proposes to modify the definition of solid waste regarding hazardous secondary materials. Under this proposal, provided the secondary materials are not inherently waste-like, used in a manner constituting disposal, or burned for energy recovery, they are not solid waste when generated and reclaimed in a "continuous process" within the "same industry".

Another approach discussed in the preamble, but not proposed, would allow materials generated and reclaimed in a continuous process at the same site to be excluded from the definition of solid waste regardless of whether different industries were involved. EPA is also accepting comments on this approach.

Determining "Same Industry"

The North American Industry Classification System (NAICS) is proposed as the basis for determining whether secondary materials remain within the same industry. For the most part, industries with the same first four digits of this six digit classification system would be considered to be within the same industry. These industry codes are listed in proposed Appendix X to Part 261. Exceptions are discussed in the preamble regarding the primary mineral processing industry, the petroleum industry, NAICS classification 3256 (soap, cleaning compound, and toilet preparation manufacturing), NAICS classification 3259 (other chemical product and preparation manufacturing), and waste management and remediation services.

Determining "Continuous Process Within the Same Industry"

To be considered "generated and reclaimed in a continuous process within the same industry", material can not be handled by any entity or facility outside of the generating industry (except for a transporter) and the materials can not be speculatively accumulated. This means that handlers other than transporters must have the same 4 digit NAICS industry classification.

Two approaches for determining eligibility of reclamation facilities are proposed.

Under Option 1:

- Both generation and reclamation would need to occur within the same industry (same 4 digit NAICS)
- Reclamation would be allowed to involve one or more processing steps, provided that all steps take place within the same industry in which the secondary material was generated
- The reclamation would be required to produce a product or ingredient that is used or reused without further reclamation.
- The reclamation steps would not be required to take place at the site where the material was generated, provided such reclamation activities take place within the generating industry.

Option 2 is identical to option 1, but would make a reclamation facility ineligible for the solid waste exclusion if it also recycles hazardous waste from a different industry.

EPA requests comments on both approaches.

Notifications

Proposed 40 CFR 261.2(g)(4) would require generators of secondary materials that have previously been subject to regulation as hazardous wastes, but which are newly excluded via 40 CFR 261.2(g), to submit a one-time notice to the Regional Administrator. The notification would include the name, address, and EPA ID number (if applicable) of the generating facility; the name and telephone number of the contact person; the type of material subject to exclusion; and the industry that generated the material as classified according to NAICS in Appendix X of part 261. In addition, preamble discussion solicits comments on requiring persons using the 40 CFR 261.2(g) exclusion to submit periodic reports detailing recycling activities and to maintain records documenting the conditions of the exclusion have been met.

Legitimate Recycling vs Sham Recycling

Historically, EPA has provided regulatory relief for legitimate recycling, but not for "sham recycling" where wastes are treated or disposed under the guise of recycle. This has been the subject of EPA memorandums, but was not formally codified. EPA now proposes to establish formal regulations within 40 CFR 261.2(h) to address legitimate recycling. This proposes "Hazardous waste must be legitimately recycled to qualify for special management standards under 40 CFR 261.6 and 40 CFR 266." This includes recyclables such as scrap metal, precious metals, lead-acid batteries, etc.

The four proposed criteria to be considered when determining legitimacy of recycling and are as follows:

- Criterion 1: The secondary material to be recycled is managed as a valuable commodity. Where there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material. Where there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment.
- Criterion 2: The secondary material provides a useful contribution to the recycling process or to a product of the recycling process and evaluating this criterion should include consideration of the economics of the recycling transaction. The recycling process itself may involve reclamation, or direct reuse without reclamation.
- Criterion 3: The recycling process yields a valuable product or intermediate that is: (i) Sold to a third party; or (ii) Used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process.
- Criterion 4: The product of the recycling process:(i) Does not contain significant amounts of hazardous constituents that are not found in analogous products; and (ii) Does not contain significantly elevated levels of any hazardous constituents that are found in analogous products; and (iii) Does not exhibit a hazardous characteristic that analogous products do not exhibit.

Conforming Changes

The revised definition of solid waste will cause several other portions of regulations to

become obsolete or to require conforming changes. EPA discusses and/or proposes potential conforming changes to the following existing regulations.

- 261.2(e)(1)(iii) - regarding solid wastes recycled by being returned to the original process from which they were generated without first being reclaimed or land disposed. This is proposed to be removed.
- 261.4(a)(6) - regarding pulping liquors reclaimed in a pulping liquor recovery furnace and then reused in pulping process. This is proposed to be removed.
- 261.4(a)(7) - regarding spent sulfuric acid used to produce virgin sulfuric acid. This is proposed to be modified.
- 261.4(a)(8) - for secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process. This is proposed to be removed.
- 261.4(a)(9) - regarding spent wood preserving solutions that have been reclaimed and are reused for their original intended purpose. This is proposed to be modified.
- 261.4(a)(10) - regarding certain types of hazardous wastes that are recycled to coke ovens or to produce coal tar. This is proposed to be modified.
- 261.4(a)(11) - regarding conditional exclusion of non-wastewater splash condenser dross residue from treatment of K061. This is proposed to be modified
- 261.4(a)(13) - regarding excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being recycled. This is proposed to be modified.
- 261.4(a)(14) - regarding shredded circuit boards. This is proposed to be modified.
- 261.4(a)(17) - regarding spent materials generated within the primary mineral processing industry. This is proposed to be modified.
- 261.4(a)(19) - regarding spend caustic solutions from petroleum refining liquid treating processes used as a feedstock to produce cresylic or naphthenic acid. This is proposed to be modified.
- 260.30(b) and 260.31(b) - regarding variances from classification as solid waste if materials are reclaimed under the exclusion in 261.2(g). This is proposed to be modified.

Enforcement

EPA proposes that if material fails to be consistently managed within the boundaries of the 261.2(g) exclusion, the material is not excluded and is a hazardous waste for Subtitle C purposes from the time the generator first generated it. Therefore, each person who manages a hazardous secondary material that loses its exclusion would have to manage it consistently with hazardous waste management requirements from the point when the material was first generated, regardless of whether the person is the one who actually caused the loss of the exclusion.

State Authority and Interstate Transport

According to preamble discussion, this proposal is less stringent than the current federal program so states are not required to adopt these changes, and materials may be regulated differently from state to state. However, this logic is questionable in light of the Court decision which held secondary materials generated and recovered in the

same industry are not wastes. Thus it would seem that this would also be outside the scope of States to regulate as hazardous waste.

