



US Army Corps
of Engineers

EM CX Information - Fact Sheets

US Army Corps of Engineers

HTRW Center of Expertise Fact Sheet FY 08-02

Revisions to the Definition of Solid Waste

Purpose

This summary provides basic information about regulatory changes made under the Resource Conservation and Recovery Act (RCRA) that may impact DOD hazardous waste management operations.

Rule/ Regulation Identification

Title: Revisions to the Definition of Solid Waste

- Status: Final Rule
- Date: 30 October 2008
- Reference: 73 Federal Register 64668
- Affected regulations: 40 CFR Parts 260, 261, and 270
- Link: <http://edocket.access.gpo.gov/2008/pdf/E8-24399.pdf>
- Related Rulemaking References:
 - Proposed Rule, 68 FR 61558, 28 Oct 2003;
<http://edocket.access.gpo.gov/2003/pdf/03-26754.pdf>
 - Supplemental Proposed Rule, 71 FR 14172, 26 Mar 2007;
<http://edocket.access.gpo.gov/2007/pdf/E7-5159.pdf>

Effective Date

December 29, 2008

Potential Impact

This rule is deregulatory in nature. If finalized, secondary hazardous materials may be eligible to be recycled without being considered either solid waste or hazardous waste.

Executive Summary

This rule defines "hazardous secondary material (HSM)" as "a secondary material (e.g., spent material, by-product, or sludge) that when discarded, would be identified as hazardous waste" and specifies conditions by which reclaimed HSM is neither regulated as solid waste nor as hazardous waste under RCRA.

This rule accomplishes the following:

- It excludes certain HSM that is (1) reclaimed under the control of the generator in non-land based units; (2) reclaimed under the control of the generator in land-based units; (3) transferred to another person for the purpose of legitimate reclamation; and (4) exported and reclaimed in a foreign country.
- It codifies factors for evaluating whether recycling of HSM is

	<p>legitimate (40 CFR 260.43).</p> <ul style="list-style-type: none"> • It establishes procedures for seeking formal non-waste determinations from regulators for reclaimed hazardous secondary materials (40 CFR 260.34). <p>It addressed financial assurance for management of excluded HSM.</p>
Potential Impact	<p>This rule is deregulatory in nature. It is of interest to DOD because</p> <ul style="list-style-type: none"> • DOD actively participated in the rule development process by commenting on both the proposed and supplemental proposed rule; and • there may be opportunities for DOD to reduce hazardous waste management costs by pursuing recycling of HSM under the provisions of this rule.
Key Elements of the Final Rule	<p>This rule establishes that legitimately recycled HSM meeting certain conditions and that is not inherently waste-like, used in a manner constituting disposal, nor burned for energy recovery is not regulated as solid waste nor as hazardous waste.</p> <p><u>HSM Reclaimed Under the Control of the Generator</u> "HSM generated and reclaimed under the control of the generator" includes:</p> <ul style="list-style-type: none"> • HSM reclamation at the generating facility; • HSM generated and reclaimed at different facilities if the reclaiming facility is controlled by the generator or both the generating facility and the reclaiming facility are controlled by the same "person; and • HSM generated under a contract between a tolling contractor and a tolling manufacturer. <p>The concept of "person", as it pertains to the Federal government, is discussed in the preamble (73 FR 64727). It states "For purposes of RCRA, the federal government is not a single "person"; rather, each agency or department would be considered a separate "person"." "Control" is explained within 40 CFR 260.10 as meaning the power to direct the policies of the facility. Therefore, conceivably, HSM legitimately reclaimed within the Department of the Army, but at different physical locations, could qualify as "reclaimed under the control of the generator."</p> <p><u>HSM Reclaimed Under the Control of the Generator in Non-Land-Based Units</u> This rule modifies the definition of solid waste (40 CFR 261.2(a)(2)) and provides that HSM managed in non-land based units is not solid waste nor hazardous waste provided that:</p> <ul style="list-style-type: none"> • The HSM is generated and reclaimed under the control of the HSM generator as defined in 40 CFR 260.10. (This imposes certification requirements when reclamation is occurring at a different facility or under a tolling contract.)

- The HSM is not speculatively accumulated.
- The HSM is handled only in non-land-based units and is contained in such units.
- The HSM is generated and reclaimed within the United States and its territories.
- The HSM is not otherwise subject to material-specific management conditions when reclaimed, is not a spent lead-acid battery, K171, or K172 waste. (These K listed wastes pertain to the petroleum refining industry.)
- The reclamation is legitimate.
- HSM generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities claiming the exclusion comply with EPA notification requirements.

HSM Reclaimed Under the Control of the Generator in Land-Based Units

This rule adds an exclusion (40 CFR 261.4(a)(23)) and provides that HSM managed in land based units is not solid waste nor hazardous waste provided that:

- The HSM is generated and reclaimed within the United States and its territories.
- The HSM is contained.
- The HSM is generated and reclaimed under the control of the HSM generator as defined in 40 CFR 260.10. (This imposes certification requirements when reclamation is occurring at a different facility or under a tolling contract.)
- The HSM is not speculatively accumulated.
- The HSM is not otherwise subject to material-specific management conditions when reclaimed, is not a spent lead-acid battery, K171, or K172.
- The reclamation is legitimate.
- Persons claiming the exclusion must comply with EPA notification requirements.

Exclusion for Hazardous Secondary Materials That are Transferred for the Purpose of Legitimate Reclamation

This rule adds an exclusion (40 CFR 261.4(a)(24)) and provides that HSM transferred to another "person" for reclamation is not solid waste nor hazardous waste provided:

- The HSM is not speculatively accumulated.
- The HSM is not handled by any other person or facility other than the HSM generator, transporter, an intermediate facility or reclaimer, and that while in transport the HSM is not stored for more than 10 days at a transfer facility.
- The HSM is packaged according to Department of Transportation regulations.

- The HSM is not otherwise subject to material-specific management conditions when reclaimed.
- The HSM is not a spent lead-acid battery, K171, or K172.
- The reclamation is legitimate.
- The HSM generator must contain the HSM.
- Prior to arranging for transport of HSM to a facility where management is not addressed under a RCRA Part B permit or interim status standards, the HSM generator must do the following:
 - Make "reasonable efforts" to ensure reclamation facilities and intermediate facilities intend to properly and legitimately reclaim the HSM and will manage the HSM in a protective manner. This must be repeated at least every three years to claim the exemption.
 - Make contractual arrangements with intermediate facilities to ensure HSM will be sent to the reclamation facility identified by the HSM generator.
 - Maintain documentation and certification for at least 3 years that "reasonable efforts" were made.
 - Maintain shipping records for no less than 3 years.
- The HSM reclaimers and intermediate facilities satisfies the following:
 - Maintains records of shipments received.
 - Provides the HSM generators with confirmation of receipt of shipments.
 - Manages HSM at least as protectively as analogous raw material.
 - Contains HSM.
 - Manages reclamation residuals in a protective manner and as hazardous waste if listed or characteristic.
 - Meets financial assurance requirements.
- All persons claiming the exclusion must comply with EPA notification requirements.

Exclusion for Hazardous Secondary Materials Exported from the United States and Reclaimed in a Foreign Country

Export is prohibited without receiving country consent. Generators must:

- Notify EPA of intended export 60 days in advance.
- Ensure Acknowledgement of Consent accompanies shipments.
- Maintain copies of Notification of Intent to Export and Acknowledgement of Consent for at least 3 years.
- File annual reports on exported HSM by 1 March of each year.

Additional conditions:

- The HSM is not speculatively accumulated.
- The HSM is not handled by any other person or facility other than the

HSM generator, transporter, an intermediate facility or reclaimer, and that while in transport the HSM is not stored for more than 10 days at a transfer facility.

- All persons claiming the exclusion must notify EPA. The HSM is packaged according to Department of Transportation regulations.
- The HSM is not otherwise subject to material-specific management conditions when reclaimed.
- The HSM is not a spent lead-acid battery, K171, or K172.
- The reclamation is legitimate.
- The HSM generator must contain the HSM.
- Prior to arranging for transport of HSM to a facility where management is not addressed under a RCRA Part B permit or interim status standards, the HSM generator must do the following:
 - Make "reasonable efforts" to ensure reclamation facilities and intermediate facilities intend to properly and legitimately reclaim the HSM and will manage the HSM in a protective manner. This must be repeated at least every three years to claim the exemption.
 - Make contractual arrangements with intermediate facilities to ensure HSM will be sent to the reclamation facility identified by the HSM generator.
 - Maintain documentation and certification for at least 3 years that "reasonable efforts" were made.
 - Maintain shipping records for no less than 3 years.

Determining Legitimacy

This rule establishes four factors (40 CFR 260.43) for determining if HSM is legitimately recycled. HSM that is not legitimately recycled is solid waste. In making a determination that a HSM is legitimately recycled, persons must evaluate all factors and consider legitimacy as a whole. The first two factors must be met for recycling to be legitimate. The second two factors must be considered, but do not necessarily preclude a legitimacy determination if site-specific circumstances adequately address concerns.

Factors:

- Useful contribution - Legitimate recycling provides a useful contribution to the recycling process or to a product or intermediate of the recycling process, and the recycling process must produce a valuable product or intermediate. The HSM provides useful contribution to a product or intermediate if it contributes valuable ingredients to a product or intermediate; or replaces a catalyst or carrier in the recycling process, or is the source of a valuable constituent recovered in the recycling process, or is recovered or regenerated by the recycling process or is used as an effective substitute for a commercial product.
- Valuable product or intermediate - A product or intermediate is

valuable if sold to a third party or used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

- Managed as a valuable commodity - Consider whether the generator and recycler manage the material as a valuable commodity. (Hazardous secondary materials that are released to the environment and not recovered immediately are discarded.)
- Comparison of toxics in the product - Consider whether the product of the recycling process does not contain significant concentrations of hazardous constituents listed in appendix VIII of 40 CFR 261 not found in analogous products; whether the product of the recycling process contains significantly elevated concentrations of any appendix VIII hazardous constituent found in analogous products, or whether the product of the recycling process exhibits a hazardous waste characteristic.

Reasonable Efforts

This rule includes five questions that generators must answer affirmatively to demonstrate "reasonable efforts" have been made to ensure reclamation and intermediate facilities intend to properly reclaim and manage HSM. See 40 CFR 261.4(a)(24)(B) for specific details. In summary, questions pertain to whether the reclamation process is legitimate, whether regulator notification requirements have been satisfied, whether there are no formal enforcement actions against the facility in the previous three years, whether the facility has equipment and trained personnel to safely recycle the materials, and whether permits or contracts are in place to manage residuals from the reclamation.

Notification Requirements

HSM generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities must submit EPA Form 8700-12 to EPA prior to operating under a HSM exclusion and by 1 March of each even numbered year. Another Form 8700-12 must be submitted within 30 days of ceasing to manage HSM under an exclusion.

Non-Waste Determination Process

Under this rule, a formal HSM non-waste determination can be requested from EPA or an authorized state. The non-waste determination may be granted on the basis of (1) HSM being reclaimed in a continuous industrial process or (2) HSM being indistinguishable in all relevant aspects from a product or intermediate.

Factors for evaluating whether HSM is reclaimed in a continuous industrial process:

- The HSM is part of the continuous primary production process and is not waste treatment.

	<ul style="list-style-type: none"> • The capacity of the production process would use the HSM in a reasonable time frame to ensure material will not be abandoned. • The hazardous constituents in the HSM are reclaimed rather than released at significantly higher levels than would otherwise be released by the production process. • Other relevant factors. <p>Factors for evaluating whether HSM is indistinguishable from product or intermediate:</p> <ul style="list-style-type: none"> • Whether market participants treat the HSM as a product or intermediate rather than as a waste • Whether the chemical and physical identity of the HSM is comparable to commercial products or intermediates. • Whether the capacity of the market would use the HSM in a reasonable time frame and ensure the material will not be abandoned. • Whether the hazardous constituents in the HSM are reclaimed rather than released at significantly higher levels than would otherwise be released by the production process. • Other relevant factors.
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