units, as well as any future releases, would be as part of corrective action for all releases at the facility—an approach that the Agency believed would achieve the same environmental results and would provide the owner or operator the option of integrating the cleanup more closely into the broader facility response.

Some commenters on the March 26, 2007, supplemental proposal objected to this approach of addressing releases from units that previously managed hazardous wastes and, as a result of today's rule, would subsequently only receive hazardous secondary materials excluded from Subtitle C control. These commenters requested that EPA expressly recognize that units storing or managing hazardous secondary materials excluded as a result of this rule would no longer be regulated as solid waste management units and are not subject to RCRA's corrective action requirements. EPA disagrees with this approach, as we have discussed previously in this section and as discussed below, and continues to believe that the best approach to addressing releases from conditionally excluded units is, generally, to address them as part of corrective action for all releases at the facility.

The Agency discussed the issue of its corrective action authority to address non-SWMU-related releases at RCRA treatment, storage, or disposal facilities in the May 1, 1996, Advance Notice of Proposed rulemaking (*see* 61 FR 19442–3). There, the Agency stated, ''[g]iven the legislative history of RCRA section 3004(u), which emphasizes that RCRA facilities should be adequately cleaned up, in part, to prevent the creation of new Superfund sites, EPA believes that corrective action authorities can be used to address all unacceptable risks to human health and the environment from RCRA facilities. In the permitting context, remediation of non-SWMU related releases may be required under the ''omnibus'' authority * * * In other contexts, orders under RCRA sections 3008(h) or 7003 may require remedial action to address releases regardless of whether a SWMU is present.''

The Agency envisions three scenarios that might apply to units from which releases have occurred. The first will arise in situations where an owner or operator fails to comply with the applicable conditions and limitations of the exclusion, and the unit consequently loses its exemption. In these situations, the unit itself will once again become a hazardous waste management unit, and the unit, as well as materials in the unit, will become subject to all requirements that were applicable prior to this final rule. Not only will corrective action authority be available at such a unit, but the closure requirements of 40 CFR part 264 or 265 will once again apply at the unit as well, and releases from that unit may be addressed through either the corrective action or the closure process.

The second scenario will arise in situations where releases occur at an excluded unit but, based on the site-specific factors, the Agency does not consider the release to be significant and, therefore, the release does not cause the unit to lose its exclusion. Failure on the part of the owner or operator to respond to such releases could be considered an act of illegal disposal. The Agency generally would address these situations by issuing an enforcement action under RCRA section 3008(a), or other applicable authorities, to compel cleanup actions and/or impose penalties. It should be noted that this approach is consistent with the approach taken by the Agency in a July 2002 final rule, in which the Agency excluded hazardous secondary materials used to make zinc fertilizers from the definition of solid waste (*see* ''Zinc Fertilizers Made from Recycled Hazardous Secondary Materials,'' 67 FR 48400, July 24, 2002).

The third scenario will arise in situations where releases from the unit, of either the now excluded hazardous secondary material and/or other hazardous or solid wastes previously managed in the unit, were not addressed prior to the unit obtaining its exclusion. At permitted and interim status facilities, the status of those releases is unaffected by this rulemaking, and the Agency retains its authority to address them under all authorities applicable to them prior to this final rule, including sections 3004(u) and (v), and section 3008(h).

D. Financial Assurance Obtained for Closure at Newly-Excluded Units

The requirements in 40 CFR parts 264 and 265 subpart H, which applied at these units prior to their exclusion under this final rule, provide for the release of financial assurance upon certification by the facility owner or operator that closure has been completed in accordance with the approved closure plan, and after the Agency has verified that certification (*see* 40 CFR 264.143(i) and 265.143(h)).[17]

Under the approach discussed in section VII.D. and VIII.D. of this preamble, hazardous waste management units that convert to managing only hazardous secondary materials that are excluded under this final rule will no longer be subject to the 40 CFR part 264 or part 265 closure requirements. Further, while reclaimers who receive hazardous secondary materials that have been excluded under the new 40 CFR 261.4(a)(24) are required to meet financial assurance requirements,[18] persons who recycle hazardous secondary materials under the exclusions for materials recycled under the control of the generator (§ 261.2(a)(2)(ii) and § 261.4(a)(23)) are not required to meet the financial assurance requirements.

Under the requirements of 40 CFR parts 264 and 265 subpart G, owners and operators of units now eligible for the exclusion of § 261.2(a)(2)(ii) and § 261.4(a)(23) would have been required to remove and decontaminate all contaminated structures, equipment, and soils (*see* § 264.114 and § 265.114). The financial assurance provided under 40 CFR parts 264 and part 265 subpart H was designed to assure that funds would be available for these activities. In the case of generator controlled units, where financial assurance is no longer required, previous releases from the unit, which would have been addressed during closure and for which financial assurance was obtained will, as a result of this rule, now be addressed through corrective action authority. The question raised by the Agency in the March 26, 2007, supplemental proposal was whether funds obtained for closure should, therefore, be directed to corrective action activities at the unit.

Commenters on the March 26, 2007, supplemental proposal generally agreed that funds obtained for closure at units excluded under § 261.2(a)(2)(ii) and § 261.4(a)(23) (under the control of the generator) should be directed to address releases from the unit. The Agency agrees with these commenters, and encourages regulators to work with owners and operators that seek to modify their permits to remove conditions applicable to these units that will operate under the exclusion of § 261.2(a)(2)(ii) and § 261.4(a)(23), to verify that there are no unaddressed releases from the unit. In situations where corrective action is necessary at the unit, the Agency encourages regulators to work with owners and operators to assure that the releases from the unit are addressed promptly.

[17] Similar provisions at 40 CFR 264.145(i) and 265.145(h) provide for release of financial assurance for post-closure care.

[18] See section VIII.C.4 of this preamble for a complete discussion of financial assurance as a condition of the exclusion for this group of facilities.

XIII. Effect on CERCLA

A primary purpose of today's final rule is to encourage the safe, beneficial reclamation of hazardous secondary materials. In 1999, Congress enacted the Superfund Recycling Equity Act (SREA), explicitly defining those hazardous substance recycling activities that may be exempted from liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (CERCLA section 127). Today's final rule does not change the universe of recycling activities that could be exempted from CERCLA liability pursuant to CERCLA section 127. Today's final rule only changes the definition of solid waste for purposes of the RCRA Subtitle C requirements. The final rule also does not limit or otherwise affect EPA's ability to pursue potentially responsible persons under section 107 of CERCLA for releases or threatened releases of hazardous substances.

XIV. Effect on Imports and Exports

The exclusion for hazardous secondary materials generated and reclaimed under the control of the generator is limited to recycling performed in the United States or its territories. However, the exclusion for hazardous secondary materials exported for reclamation and the non-waste determinations included in today's final rule do not place any geographic restrictions on movements of such hazardous secondary materials, provided they meet the conditions of the exclusion or, if stipulated, conditions of the non-waste determination. It is therefore possible that in some cases excluded hazardous secondary materials could be generated in the United States or its territories and subsequently exported for reclamation to a facility in a foreign country. It is also possible that hazardous secondary materials could be generated in a foreign country and imported for reclamation in the United States. Under today's exclusion for hazardous secondary materials exported for reclamation, hazardous secondary materials are only excluded from the definition of solid waste in the U.S. and, thus, may be considered solid and hazardous wastes in the foreign country under that country's laws and regulations. If this is the case, the U.S. facility that exports or imports hazardous secondary materials will also need to comply with any applicable laws and regulatory requirements of the foreign country. For further discussion, see section VIII.C.5. of today's preamble regarding specific export and import conditions for hazardous secondary materials excluded under today's rule.

XV. General Comments on the Proposed Revisions to the Definition of Solid Waste

EPA received hundreds of comments on the October 2003 proposal and the March 2007 supplemental proposal, most of which were quite detailed and raised multiple issues. Below is an overview of some of the major comments on general aspects of the proposals and a summary of EPA's responses to those comments. For a complete discussion of all the comments and EPA's responses to those comments, please see *Revisions to the Definition of Solid Waste Final Rule Response to Comment Document* found in the docket for today's rulemaking.

A. EPA's Legal Authority To Determine Whether a Material Is a Solid Waste

Comments: Legal Authority

EPA received many comments from environmental groups and the waste treatment and recycling industry regarding EPA's authority to define when recyclable hazardous secondary materials are solid wastes and how EPA used this authority in the proposed rulemaking. Some commenters argued that EPA has no authority under the RCRA statute to broadly exclude hazardous secondary materials from the definition of solid waste. These commenters asserted that Congress intended for hazardous secondary materials to be classified as solid wastes even when they are recycled. The commenters argued that the proposed exclusions are contrary to the plain statutory language of RCRA and that EPA may not lawfully exclude pollution control sludges and materials resulting from industrial, commercial, mining, and agricultural operations, according to accepted principles of statutory interpretation. Although the commenters acknowledged that EPA has promulgated such exclusions in the past, and that one such exclusion was recently upheld in court in *Safe Food and Fertilizer* v. *EPA*, they stated that they believed that the DC Circuit erred in *Safe Food*. The commenters argue that, in the fertilizer rule upheld in *Safe Food*, EPA considered impermissible factors (e.g., market participation, management practices, and chemical identity) in defining which materials are not discarded under RCRA, and that the Agency has done so again in the current rulemaking effort.

EPA's Response: Legal Authority

EPA disagrees with comments that state that we have exceeded our authority by the exclusions being finalized today. While EPA clearly has the authority to regulate hazardous secondary materials that are reclaimed under Subtitle C of RCRA when discard is involved, the Agency also believes (and the courts have generally confirmed) that when hazardous secondary materials are reclaimed and such recycling operations do not involve discard, the hazardous secondary materials involved are not solid wastes under RCRA. EPA also has the authority to determine which types of recycling do not involve discard and, therefore, which types of hazardous secondary materials are not solid wastes. As EPA noted in the March 2007 supplemental proposal, ''[u]nder the RCRA Subtitle C definition of solid waste, many existing hazardous secondary materials are not solid wastes and, thus, not subject to RCRA's 'cradle-to-grave' management system if they are recycled. The basic idea behind this construct is that recycling of such materials often closely resembles normal industrial manufacturing, rather than waste management'' (72 FR 14197). Existing exclusions, found in 40 CFR 261.4(a), provide a long historical precedent for EPA's authority to exclude reclaimed materials from the definition of solid waste. EPA refers these commenters to the discussion of case law, above, and asserts that this rule follows valid precedent in the DC Circuit, including the court's opinion in Safe Food.

B. Adequacy of Conditions and Restrictions Used To Determine Whether a Material Is a Solid Waste

Comments: Adequacy of Conditions

Other commenters did not dispute EPA's authority to exclude hazardous secondary materials from the definition of solid waste, but instead argued that before EPA can lawfully claim that excluded materials are not discarded, the Agency would need to strengthen the conditions to protect human health and the environment. For example, one commenter believed that all legitimacy criteria should be mandatory, that performance standards, such as secondary containment are needed for materials stored in tanks and containers, and that EPA should require engineered liner systems and monitoring for materials stored in land-based units.

EPA's Response: Adequacy of Conditions

EPA disagrees that the restrictions we are requiring for the under the control of the generator exclusions or the conditions and restrictions we are requiring for the transfer-based exclusion are inadequate. Each of the restrictions and/or conditions is specifically linked to defining when the hazardous secondary materials are not discarded and to ensuring that the regulatory authority has the information needed to oversee the exclusion. Specifically, for hazardous secondary materials reclaimed under the control of the generator, the fact that the generator maintains control and liability for the hazardous secondary materials, either by managing them on-site, within the same company, or under a specific tolling contract, is itself an indication that the materials are not discarded. The prohibition on speculative accumulation (as defined in 261.1(c)(8)), addresses both the situation in which a large percentage of the hazardous secondary material is accumulated over the year without being recycled and the situation where there is no feasible means of recycling the hazardous secondary material, regardless of volume. Finally, the requirement that the hazardous secondary materials must be contained in the unit recognizes the reality that hazardous secondary materials that are released to the environment are discarded.

For hazardous secondary materials transferred to another party for reclamation, the fact that the generator is required to make reasonable efforts to ensure that its hazardous secondary materials are properly and legitimately reclaimed demonstrates that the generator is not simply disposing of the material, but instead is taking responsibility that the hazardous secondary materials will be recycled. In addition, by maintaining a record of each shipment and a confirmation of receipt, the generator demonstrates that it continues to take responsibility for knowing the ultimate disposition of its hazardous secondary materials. Furthermore, by obtaining financial assurance, the reclamation facility demonstrates that it has also taken on the responsibility to ensure that the hazardous secondary materials will not be abandoned in the event that circumstances make it impossible for the facility to reclaim the hazardous secondary materials. For further discussion of how these and other restrictions and/or conditions of the exclusions are linked to defining when hazardous secondary materials are not discarded, see section V of this preamble, as well as sections VII–IX and sections XVI–XVIII. Support for the Agency's determination regarding which materials are not discarded is also found throughout the rulemaking record in this proceeding.

EPA also disagrees that specifying further engineering conditions, such as secondary containment, liners, and leak detection systems, is needed to determine which hazardous secondary materials are not being discarded. The restrictions EPA has established and the conditions that EPA is finalizing today address a variety of hazardous secondary materials and reclamation operations that are linked to defining the act of discard, rather than specifying a particular technology that may not be appropriate in some cases.

Furthermore, hazardous secondary materials excluded under today's rule may remain subject (or become subject) to requirements under other statutory programs. For example, hazardous secondary material generators, transporters, intermediate facilities and reclaimers may be subject to regulations developed under:

- The Occupational Safety and Health Act of 1970, which requires hazard communication programs, labeling, material safety data sheets (MSDS) and employee information and training (29 CFR part 1910). The Occupational Safety and Health Administration (OSHA) regulations also require emergency response planning and training under their Emergency Response Program to Hazardous Substance Releases (29 CFR 1910.120);
- The Hazardous Materials Transportation Act of 1975 and the subsequent Hazardous Materials Transportation Uniform Safety Act of 1990, which requires hazardous secondary materials meeting DOT's defining criteria for hazard classes and divisions to comply with hazard identification, shipping papers, labeling and placarding, incident reporting and security plans (49 CFR part 107 and parts 171–180);
- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Emergency Planning and Community Right-to-Know Act (EPCRA) and the Superfund Amendments and Reauthorization Act (SARA) of 1986 which, combined, require notification of hazardous substance releases above a reportable quantity, emergency planning and, if applicable, MSDS and inventory reporting (40 CFR 302.6, 40 CFR parts 355 and 370). Hazardous secondary material generators and reclaimers meeting defined criteria are also subject to toxic chemical release reporting (i.e., Toxics Release Inventory (TRI) under EPCRA (40 CFR part 372)).

While not exhaustive, this list provides examples of regulatory programs designed to protect human health and the environment developed under other statutory authorities alongside of RCRA. For more information on these regulatory programs, please see ''Memorandum: Requirements that other Regulatory Programs would place on Generators, Reclaimers and Transporters of Hazardous Secondary Materials'' located in the docket for this rulemaking.

C. EPA's Authority To Regulate Recycling

Comments: EPA's Authority

EPA also received comments from the hazardous waste generating industry disputing EPA's authority to promulgate today's rule. Unlike the environmental groups' and waste treatment and recycling industry's comments, which argued that EPA has no authority to deregulate hazardous secondary materials recycling, many of the generator industry comments asserted that EPA has no authority to regulate such recycling, even to prohibit speculative accumulation or require that the hazardous secondary materials be contained.

While most such commenters applauded EPA's decision in the March 2007 supplemental proposal to explicitly link the proposed exclusions to the concept of defining when hazardous secondary materials are not discarded, many of these comments argued that EPA has over-reached its statutory authority by imposing restrictions or conditions that the commenters argued have no relationship to discard.

Some commenters asserted that limiting the exclusions for hazardous secondary materials reclaimed under the control of the generator and imposing conditions on the exclusion for hazardous secondary materials transferred to a third party for reclamation, EPA has misread the intent of Congress. These comments cite previous court cases, noting the ''analysis of the statute reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned'' (*AMC I,* 824 F2d. at 1190). They go on to argue that materials being recycled do not fall into one of these enumerated activities.

Specifically, many of the comments cite the *ABR* decision (which in turn cites earlier court decisions), where the

court noted that EPA's authority is ''limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away'' and that ''[s]econdary materials destined for recycling are obviously not of that sort. Rather than throwing them away, the producer saves them, rather than abandoning them, the producer reuses them'' (*ABR* 208 F.3d at 1051). ''To say that when something is saved it is thrown away is an extraordinary distortion of the English language'' (*Id.* at 1053). The commenters assert that, by limiting the exclusion to hazardous secondary materials intended for recycling that are ''contained'' in the unit, EPA is illegally imposing conditions on a material that has not been discarded.

Other comments take issue with EPA's decision to impose conditions for the transfer-based exclusion. These comments criticize EPA's rationale that, in part, bases the conditions on the fact that ''subsequent activities are more likely to involve discard, given that the generator has relinquished control of the hazardous secondary material'' (72 FR 14178). One commenter specifically challenged the proposed financial assurance requirement, claiming that the condition does not define the absence of discard and would effectively impose a waste management requirement upon a non-waste.

EPA's Response: EPA's Authority

EPA disagrees with the comments that Congress did not intend to give EPA the authority to regulate hazardous waste recycling. As EPA noted in both the October 2003 proposal and the March 2007 supplemental proposal, the RCRA statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling (*see* 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA,* 600 F. 2d 974 (DC Cir. 1979); 48 FR 14502–04, April 3, 1983; and 50 FR 616–618). Moreover, the case law discussed above clearly shows instances where EPA properly regulated the recycling of solid and hazardous wastes.

EPA also disagrees that requiring the hazardous secondary materials to be ''contained'' contradicts the court's finding in *ABR* that EPA does not have the authority to define when hazardous secondary materials are not discarded. By limiting the exclusion to hazardous secondary materials that are contained, EPA is defining ''discard'' for this material. While it is true that the court has said that materials recycled in a continuous process by the generating industry are not solid wastes, commenters have failed to demonstrate how hazardous secondary materials that are *not* contained meet that description. By ''contained,'' EPA means not released to the environment. It is a self-evident fact that hazardous secondary materials released to the environment (e.g., causing soil and groundwater contamination) are not ''destined for recycling'' or ''recycled in a continuous process''; thus, they are part of the waste management problem. Moreover, as discussed above in section VII.C, to the extent that significant releases to the environment from a storage unit have occurred and remain unaddressed, it is reasonable to conclude that the material remaining in the unit is also actively being discarded. It is important to note that the hazardous secondary materials that remain in the unit are not solid wastes, unless the releases from the storage unit indicate that these materials are not being managed as valuable commodities and are, in fact, discarded. For examples of releases from a hazardous secondary materials storage unit that indicate that the hazardous secondary material in the unit is discarded and examples of releases that do not indicate discard, see section VII.C. of this preamble.

EPA also disagrees with comments that, under the transfer-based exclusion, EPA cannot consider the fact that the generator has relinquished control of the hazardous secondary material (along with other factors that indicate discard) in determining what conditions are needed for this exclusion. EPA's authority to regulate such transfers is clear: as the Court noted in *Safe Food,* ''materials destined for future recycling by another industry *may* be considered 'discarded'; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem'' (350 F.3d at 1268).

EPA's record for today's rulemaking demonstrates that third-party recycling of hazardous secondary materials has been and continues to be part of the waste disposal problem, and, without the conditions being finalized today, these hazardous secondary materials would be solid wastes. Of the 208 damage cases in EPA's study of environmental problems associated with post-RCRA, post CERCLA hazardous secondary materials recycling, 94% appeared to take place at commercial off-site facilities. Moreover, EPA's study of how market forces impact recycling demonstrates that these damages are consistent with our understanding of how the business model for commercial recycling can lead to sub-optimal results. As opposed to manufacturing, where the cost of inputs, either raw materials or intermediates, is greater than zero and revenue is from the sale of the output, recycling conducted by commercial hazardous secondary materials recyclers involves generating revenue from receipt of the hazardous secondary materials, as well as from the sale of the output. Recyclers of hazardous secondary materials in this situation can have a short-term incentive to accept more hazardous secondary materials than they can economically or safely recycle, resulting in the hazardous secondary materials eventually being discarded.

The financial assurance condition for the transfer-based exclusion being finalized today is directly linked to this situation. By obtaining financial assurance, the owner or operator of the reclamation facility is making a direct demonstration that it will not abandon the hazardous secondary material. Of the 208 damage cases, 69 (or 33%) were primarily caused by abandonment of the hazardous secondary material by the recycler. None of 69 facilities whose damages were primarily caused by abandonment had financial assurance.

Under the transfer-based exclusion, financial assurance is the means by which the recycler demonstrates an investment in the future of the recycled materials; even if the market changes in such a way that the recycler can no longer process the hazardous secondary materials, by obtaining financial assurance, it has made certain that the hazardous secondary materials will not be abandoned and therefore not discarded. EPA therefore disagrees with the comment that the financial assurance condition is not related to discard of the material.

Moreover, financial assurance also addresses the correlation of the financial health of a reclamation facility with the absence of discard of hazardous secondary materials. According to the successful recycling study, an examination of a company's finances is an important part of many of the environmental audits generators currently use to determine that their hazardous secondary materials will not be discarded. In addition, the environmental problems study showed that bankruptcies or other types of business failures were associated with 138 (66%) of the damage cases, and the market forces study identified a low net worth of a firm as a strong indication of a sub-optimal outcome of recycling (i.e., over-accumulation of hazardous secondary materials, resulting in releases to the environment and

abandonment of hazardous secondary materials).

In the March 2007 supplemental proposal, EPA proposed to require that reclamation facilities obtain financial assurance to ensure that the reclamation facility owner/operators who would operate under the terms of this exclusion are financially sound (72 FR 14191), and many commenters supported this condition and EPA's rationale. EPA continues to believe that the findings in the recycling studies indicate a correlation between financial health of a reclaimer and the likelihood he will not discard the hazardous secondary materials.

D. Comments on Recycling Studies

1. Environmental Problems Study

EPA completed *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* in order to identify and characterize environmental problems attributed to hazardous secondary materials recycling activities and to provide the stakeholders with a clearer picture of the recycling industry in the United States.

The environmental problems study (or study) was conducted in response to public comments received on the October 2003 proposal and to guide EPA's deliberations on how to proceed with the March 2007 supplemental proposal. In the public comments to the October 2003 proposal, a number of commenters expressed concern that deregulating hazardous secondary materials that are reclaimed in the manner described in that proposal could result in mismanagement of the hazardous secondary materials, and thus could create new cases of environmental damage requiring remedial action under federal or state authorities. Some of these commenters illustrated their concern by citing specific examples of environmental damage related to hazardous secondary materials recycling. A number of other commenters expressed the view that the great majority of the damage cases cited by commenters had occurred before RCRA, CERCLA, or other environmental regulatory programs were established in the early 1980s and, therefore, that the cases represent ''historical'' recycling-related environmental damage and are not particularly relevant or instructive for revising the RCRA Subtitle C definition of solid waste. These commenters further argued that the environmental programs—most notably RCRA's hazardous waste regulations and the liability provisions of CERCLA—have created strong incentives for the proper management of recyclable hazardous secondary materials and recycling residuals.

In response to the March 2007 supplemental proposal and to the study, made public in the rulemaking docket in conjunction with that proposal, EPA received comments on the study from a variety of commenters. In general, the comments pertain to the scope and methodology of the study and how the study reflects on today's exclusions and restrictions and/or conditions of the exclusions.

Comments: Scope and Methodology

With respect to the scope and methodology of the study, a few commenters agreed with excluding historical damage cases from the study and stated that recycling operations have in fact improved since RCRA was enacted. A few commenters provided several types of recycling-related environmental problems familiar to state agencies and a few commenters suggested the review of several additional damage cases. A few commenters argued that inclusion of their facility in the study, or the inclusion of their industry representatives' facilities, was unfounded due to one or more of the following reasons: Hazardous secondary materials were exempt from RCRA when environmental problems occurred; environmental problems stem from historical or pre-RCRA activities; numerous facilities in the study shut down during the 1980s in response to the creation of regulatory disincentives; environmental problems were addressed pursuant to CERCLA; and problematic activities were clearly a result of non-compliance. Also, a commenter suggested that one damage case profiled in the study ''is not a good example of a contaminated site caused by recycling.'' In support of their comment, the commenter cited a Record of Decision (ROD) which stated that the site's former foundry operations, which existed pre-RCRA, caused soil and groundwater contamination.

One commenter suggested EPA overlooked potential sources of information for the study, including television commentary, media reports, books, and other reports (specifically one state report), and one commenter suggested that EPA ''may have missed reviewing relevant files'' by not analyzing state and regional paper files. Another commenter expressed concern that the study was not peer reviewed.

EPA's Response: Scope and Methodology

EPA acknowledged in the preamble to the March 2007 supplemental proposal that we did not search every possible information source for damage cases for the environmental problems study. For example, we did not systematically survey all state environmental agencies for relevant cases, nor did we search paper files in EPA Regional offices. We did solicit damage cases from regional representatives and we solicited additional cases through the public comment process. We recognize that there are likely to be additional cases that we did not identify. However, we have no reason to believe that additional cases would substantially change the overall picture. In fact, information submitted to EPA does not indicate that EPA has failed to find a representative sample of environmental damage caused by recycling activities.

EPA maintains that historical recycling-related damage cases are much less relevant and instructive than cases which have occurred within the current regulatory and liability landscape, and several commenters shared our belief. We value state commenters' general discussion of environmental problems encountered at recycling operations and note that any facility taking advantage of today's exclusion will need to comply with all applicable protective restrictions and conditions.

We also appreciate the suggestion of additional damage cases to review for the study. Based on our analysis of these cases, we have added one new damage case site to the study and updated two existing damage case profiles with more information about environmental problems (*see Addendum: An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials*). We also determined that three damage cases identified in the public comments already are included in the 2007 study and additional information was not revealed to supplement the profiles; determined that one damage case identified in the public comments was previously reviewed and the damage was deemed unrelated to recycling and that no additional information was provided to change this conclusion; and determined that two sites identified in the public comments had damage unrelated to recycling. We concluded that the new damage cases and the supplemental information added to existing cases are consistent with the damage cases previously cited in the study; therefore, the additional facts do

not substantially change our understanding of the hazardous secondary materials recycling damage cases.

EPA maintains that the damage cases captured in the environmental problems study fall within the study's scope and, as such, are relevant for guiding the development of today's rulemaking. As we discussed in the study, we are interested in whether damage may be more or less prevalent for hazardous secondary materials that are explicitly exempted or excluded from RCRA regulatory controls and we are less interested in historical or pre-RCRA cases (defined in the study as before 1982). We also indicated in the study that we are interested in ''whether or not the recycler * * * went out of business'' and which ''government program is responsible for overseeing the cleanup of the site,'' and clearly we are interested in acts of non-compliance that resulted in environmental damage. These points of interest, among others cited on pages 4–5 of the study, are informative for the purpose of this rulemaking and are within the scope of the study. Consequently, we disagree with industry and association commenters who argued that certain damage cases did not warrant inclusion in the Environmental Problems Study.

We acknowledge that the particular damage case referenced by a commenter as ''not a good example'' for the study does in fact exhibit environmental damage which can be partially attributed to foundry operations pre-1982. However, as indicated in the damage case profile in Appendix II of the study, the damage case was included in the study due to the following factors, which do not include damage associated with pre-1982 operations: Abandonment of drums of spent catalyst, bankruptcy, and business closure. As a result, we maintain that this damage case is within the scope of the study.

While we acknowledge that we did not review all possible sources of information for our study and generally relied on readily available material, we did in fact rely on media reports for information and we collaborated with regional representatives who are very knowledgeable about the damage cases and who assisted us in fact checking and suggesting damage cases. With respect to a commenter's suggestion that we review the ''Final Report of the Waste and Hazardous Materials Division, Fire & Explosions Task Force,'' produced by Michigan DEQ, we regret that the state has not yet made the report publicly available. However, we note that the scope of the draft Michigan study was not limited to hazardous secondary materials recycling operations, and shows that accidents can and do occur in all types of manufacturing facilities.

Despite the fact that we did not conduct an exhaustive review of all possible sources of damage case information, we believe that the restrictions and conditions of today's exclusions are sufficient to ensure safe recycling activities. For facilities operating under the transfer-based exclusion, sudden accidental liability coverage for bodily injury and property damage to third parties is required for all units, and non-sudden accidental liability coverage is required for land-based units (see section VIII.C.4. for a more detailed discussion of liability coverage). We also note that facilities may be subject to other regulations that ensure facility safety, such as the OSHA requirements and state and local requirements (*see* ''Memorandum: Requirements that other Regulatory Programs Would Place on Generators, Reclaimers and Transporters of Hazardous Secondary Materials'' made available in the docket for today's final rulemaking). While EPA has not done a definitive study of other regulatory requirements, we are reasonably comfortable with the fact that the available information indicates oversight by other regulatory agencies would significantly mitigate potential damage from the non-discarded materials.

With respect to the comment regarding peer review, we believe that while the study was not peer reviewed, the scope and methodology are sound, as evidenced by the small number of comments received on this issue. Additionally, peer review was not warranted by EPA peer-review standards because the study is not a scientific and/or technical work product. Rather, the study is an analysis of existing and publicly available information compiled to provide a representative view of hazardous secondary materials recycling.

Comments: Study's Relation to Today's Actions

EPA received a number of comments alleging that the study does not support today's exclusions. Several commenters strongly believe that the study reflected that recycling hazardous secondary materials is a high risk activity and thus should remain fully regulated. A few commenters wrote that the study does not support the transfer-based exclusion and these commenters collectively predicted that the exclusion will create future damage cases. To bolster their feedback, one commenter stressed that the majority of all damage cases cited in the study are located off-site from the facilities that generated the hazardous secondary materials. Commenters also used the study's findings (namely damage type, damage cause, cost of cleanup) to support their opposition to the transfer-based exclusion. In particular, commenters stressed the financial impact to states and communities if additional environmental clean-ups were to result from facilities taking advantage of the exclusions.

On the other hand, EPA also received responses from several commenters stating that the environmental problems study supports the proposed conditions of the transfer-based exclusion for reclaimers and generators. While several of these commenters opposed codification of the transfer-based exclusion, other commenters supported it as long as there were requirements to ensure protection of public health and the environment. For example, commenters responded that mismanagement of hazardous secondary materials, residuals, and recycled products or intermediates in the damage cases clearly represented a need to have requirements for protective management and storage, as well as a requirement for safe residuals management. Additionally, commenters believed in the importance of a financial assurance requirement to protect against the damage noted in the study related to bankruptcy and the abandonment of hazardous secondary materials and residuals. A commenter also responded that generators should assess whether the above protections exist at reclamation facilities in order to minimize their future liability. Additionally, in response to the study, EPA received one comment suggesting that each of the following safeguards be added to the exclusions: Tracking materials, restriction on land-based storage, and 90-day storage provisions in 40 CFR part 262 for all generators, including those who recycle on-site.

EPA's Response: Study's Relation to Today's Actions

While EPA agrees that the study reflects the risk and problems involved with recycling hazardous secondary materials, we disagree with those commenters who stated that the study does not support today's exclusions because of the perceived risk posed by the exclusions. Instead, we agree that the environmental problems highlighted in the study demonstrate the need to promulgate restrictions and conditions for the exclusions (e.g., requirements for

financial assurance, reasonable efforts, shipping documentation, hazardous secondary materials management, legitimate recycling, and speculative accumulation). EPA maintains that the restrictions and conditions finalized with today's exclusions, and discussed more in depth in sections VII.C. and VIII.C., will address the problems identified in the study and will limit the exclusions to materials that EPA has determined are not discarded. We also agree with those commenters who suggest that generators should assess whether reclamation facilities adequately manage hazardous secondary materials in order to mitigate the risk of future environmental problems. Consequently, we are finalizing the reasonable efforts condition for the transfer-based exclusion.

Comments: Restrictions on Mining and Mineral Processing

A few commenters responded that the study does not support controls on land-based storage of hazardous secondary materials at mining and mineral processing facilities. They cited that only 1 of the 208 damage cases is associated with a primary mineral processing facility. Thus, the commenters argued that the small number of environmental problems stemming from recycling at mining and mineral processing facilities does not warrant the proposed regulatory oversight of the industry.

EPA's Response: Restrictions on Mining and Mineral Processing

EPA acknowledges that the environmental problems study included one damage case from primary mineral processing and two damage cases from secondary mineral processing. We note that whether an industry has a single damage case represented in the study or numerous damage cases, all industries are treated equally within the final rulemaking for hazardous secondary materials generated, reclaimed, and managed in land-based units (40 CFR 261.4(a)(23)).

Moreover, further review of publicly available data revealed four additional damage case profiles from primary and secondary mineral processing facilities, which corroborates EPA's view that the findings from the environmental problems study apply across industries, including the mining and mineral processing industries (*see Addendum: An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* to review new damage case profiles). Of the four additional damage cases, three are primary mineral processing facilities and one is a secondary mineral processing facility. Improper disposal of residuals and improper management of recyclables are the most frequently observed primary damage cause at such facilities. The primary environmental damage type resulting from the above activities are soil contamination, wildlife exposure, and groundwater and surface water contamination.

We have concluded that the additional damage cases do not substantially change the overall picture of environmental problems caused by hazardous secondary materials recycling activities at facilities, including mining and mineral processing facilities. We also disagree with the commenters' assertion that restrictions on land-based storage units are not supported by the environmental problems study. Cumulative damage causes from the study support the restrictions imposed by 40 CFR 261.4(a)(23) and the identification of additional mining and mineral processing damage cases corroborates EPA's finding that no industry should be exempt from the restrictions and/or conditions due to the limited number of damage case profiles exhibited in the environmental problems study.

2. Good Recycling Practices Study

EPA completed *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* to provide a more complete picture of the hazardous secondary materials recycling industry in the United States. The study examines what practices responsible generators and recyclers currently use to ensure that their hazardous secondary materials are recycled responsibly.

One purpose of the study was to provide the Agency with another angle from which to view the hazardous secondary materials recycling industry. EPA has long heard from representatives of that industry that management of hazardous secondary materials has changed and improved since RCRA was implemented in the early 1980s. In addition, by indicating what controls responsible recyclers are using, the study was intended to help EPA determine which kinds of regulatory requirements would be most appropriate and effective as conditions of the exclusions.

Some of the comments on the successful recycling study supported the conclusions in the study. Particularly, these commenters stated that audits are typical, that they usually cover the subjects described in the study, and that RCRA and CERCLA liability are drivers of responsible recycling behavior. Several other commenters suggested that other incentives affecting the behavior of recyclers include economic concerns, the RCRA hazardous waste regulations, and environmental and safety regulations under other statutes.

Comments: Scope of the Successful Recycling Study

EPA received several critical comments in response to the study on responsible recycling behaviors. One comment that appeared more than once was that EPA's study focused too much on large companies and that many of the practices a large company undertakes with a full environmental staff would not be possible for a smaller company and, therefore, that the practices are not widespread among smaller companies.

EPA's Response: Scope of the Successful Recycling Study

EPA agrees with the focus on larger companies in the study and discusses it in the methodology section of the report's introduction. Because many of the contacts for interviews for the report came out of the public comments on the October 2003 proposed rule, much of the information in the report came from companies large enough to have staff responsible for submitting public comments to federal proposed rulemakings. However, where possible and appropriate, the study does examine the options for small businesses, as well as what small businesses are doing that approximates the audit programs and other practices of larger companies. The Agency did find that many small companies are concerned with questions of liability in their hazardous secondary materials recycling and often either belong to auditing consortiums or already do smaller audits by mail and telephone if they cannot afford to set up visits to the recycling facilities to examine them in person.

Comments: Purpose of the Successful Recycling Study

Another comment made by several commenters expressed a concern that circular logic was in place in the March 2007 supplemental proposal. The commenters stated that it was regulation under RCRA that led to the growth of the good practices being described and stated that EPA was using these practices as justification for taking away the very regulations that led to them.

EPA's Response: Purpose of the Successful Recycling Study

The Agency believes that those making this comment misunderstood

the relationship between the successful recycling study and the March 2007 supplemental proposal. The proposal did not state that this background material was a justification for why the Agency proposed the conditional exclusion for hazardous secondary materials not under the control of the generator. Rather, the Agency looked to the study to determine what the current responsible practices are and to use that information to inform decisions on what restrictions and/or conditions would be appropriate for the transfer-based exclusion. By promulgating restrictions and/or conditions that will lead to responsible management of hazardous secondary materials, the Agency intends to encourage hazardous secondary materials recycling, while protecting human health and the environment.

3. Market Forces Study

EPA received very few comments on *Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling*. The purpose of this study is to use economic theory to describe how various market incentives can influence a firm's decision making process when the recycling of hazardous secondary materials is involved. Different economic incentives between the recycling of hazardous secondary materials and manufacturing can arise due to differences in these two business models. As opposed to manufacturing, where the cost of inputs of either raw materials or intermediates is greater than zero and revenue is generated primarily from the sale of the output, some models of hazardous secondary materials recycling involve generating revenue primarily from the receipt of the hazardous secondary materials. Recyclers of hazardous secondary materials in this situation may thus respond differently to economic forces and incentives from traditional manufacturers.

Comments and EPA's Response: Market Forces Study

Most of the commenters agreed with the underlying premise of the study that market forces affect commercial recycling differently from how they affect manufacturing from virgin materials, thus creating a potential incentive for the over-accumulation of hazardous secondary materials in some circumstances. Thus, the study supports both the proposed conditions for the transfer-based exclusion and the ''useful contribution'' factor for the legitimacy criteria. EPA agrees with these comments.

One commenter stated that as a result of the market forces study, EPA should also include a requirement that the generator evaluate the financial health of the recycler before shipping a hazardous secondary material to the recycler. While EPA agrees that evaluating the financial health of a company can be useful and informative, and encourages companies to do so, it is not an activity that lends itself to an objective standard that would be appropriate for regulation. Instead, EPA is requiring recyclers under the transfer-based exclusion to have financial assurance in order to determine that negative economic factors will not result in the hazardous secondary materials being abandoned.

One commenter disagreed with the study's conclusion that intra- and inter-company recyclers have more flexibility in their waste management decisions than commercial recyclers do. The commenter noted that company politics and internal goals can make it difficult to switch from recycling to disposal, even if the market forces make it more economical, and that it may take two or more months to find a disposal contractor.

While EPA generally agrees that there are more factors at work than those described in the study, we continue to believe that intra- and inter-company recycling have more flexibility in waste management decisions than a commercial recycler does. When a commercial recycler's entire income is from accepting hazardous secondary materials for recycling and selling recycled products, there is no economic alternative for it to stop recycling and continue to stay in business unless it can afford the cost of a hazardous waste management permit and the cost of becoming a hazardous waste disposal facility. This finding is supported by the results of the damage cases, the overwhelming majority of which were at commercial recycling facilities.

E. Use Constituting Disposal (UCD) and Burning for Energy (BFE)

Comments: UCD and BFE

EPA received extensive comments on both the October 2003 proposal and the March 2007 supplemental proposal requesting that the scope of the proposed rules be expanded to include hazardous secondary materials used in a manner constituting disposal and hazardous secondary materials burned for energy recovery. Commenters argued that these operations do not involve discard, and that they can have many environmental benefits, including resource conservation and reduction in greenhouse gas emissions. In particular, commenters argued that hazardous waste that is indistinguishable from a commercial fuel should be not a solid waste. Other commenters supported keeping the exclusion focused on reclamation and not including use constituting disposal and burning for energy recovery. Commenters noted that these types of activities, in some cases, are akin to discard, that precedents exist for regulation of these hazardous secondary materials, and that recycling and reclamation are higher on the waste management hierarchy and more likely to conserve resources than burning for energy recovery.

EPA's Response: BFE and UCD

EPA continues to maintain that comments on UCD and BFE are outside the scope of the solid waste exclusions in today's final rule, which are focused on reclamation. EPA agrees that hazardous secondary materials that are comparable to commercial fuels should not be solid wastes, and the Agency has already promulgated an exclusion for certain of these materials (40 CFR 261.4(a)(16)). However, as stated earlier, such materials are outside the scope of today's final exclusions and are best addressed under separate rulemaking efforts.

XVI. Major Comments on the Exclusion for Hazardous Secondary Materials Legitimately Reclaimed Under the Control of the Generator

A. Scope of the Exclusion

1. Exclusion for Materials Recycled On-Site

Comments: On-Site Exclusion

In our March 2007 supplemental proposal, EPA proposed to exclude from the definition of solid waste hazardous secondary materials that are generated and legitimately reclaimed at the generating facility. EPA proposed to define ''generating facility'' in 40 CFR 260.10 as ''all contiguous property owned by the generator'' (72 FR 14214). We noted that our proposed definition would include situations where a generator contracted with another company to reclaim hazardous secondary materials at the generator's facility, either temporarily or permanently. The Agency solicited comment on whether facilities under separate ownership, but located at the same site (*e.g.*, industrial parks), should be included within this proposed exclusion. We also solicited comment on other definitions which might be compatible with the concept of generator control.

Commenters who addressed this issue generally supported the proposed on-site exclusion. They agreed with EPA that hazardous secondary materials reclaimed by a generator at its facility are unlikely to be discarded because the materials will be managed and monitored by a single entity who is familiar with both the generation and recycling of the hazardous secondary materials. Several commenters also agreed with EPA that environmental risks were lessened if the hazardous secondary materials were not transported off-site, and that fewer liability questions would arise in the case of accidents or mismanagement.

With respect to companies under separate ownership, but located at the same site, commenter reaction was more mixed. Some commenters said that this situation is not compatible with generator control. They argued that unrelated companies would not be as likely to have knowledge of each other's operations and hazardous secondary materials, and that additional controls were necessary, such as financial assurance for the reclaimer and reasonable efforts on the part of the generator (conditions that EPA had proposed for the transfer-based exclusion).

Other commenters supported an exclusion for facilities under separate ownership, but located at the same site, (*i.e.*, co-located facilities). These commenters said that such an exclusion would encourage recycling. These commenters mentioned a variety of scenarios which they argued should be eligible for the exclusion. Some commenters described integrated chemical manufacturing operations with co-located facilities that are owned by different entities because of corporate mergers and acquisitions. Another commenter noted that at some steel plants, spent pickle liquor is reclaimed on-site by a company that is different from the company operating the steel plant. Other commenters noted that coke and tar plants at iron and steel facilities are sometimes owned by electric utilities. A few commenters argued that facilities at airports should be eligible for the exclusion, and other commenters mentioned various cooperative recycling ventures within the automotive industry. Some operations mentioned by commenters appeared to be prospective rather than actual.

EPA's Response: On-Site Exclusion

After evaluating these comments, EPA has decided to finalize this provision as proposed and to limit the exclusion to hazardous secondary materials that are generated and legitimately reclaimed by the hazardous secondary material generator at that generator's facility. We agree with the commenters that at least some of the situations they described are not necessarily incompatible with generator control. One of the situations—spent pickle liquor recycled on-site at a steel mill—is eligible for the generator-controlled exclusion if the generator has contracted with the company to reclaim the material at the generator's facility. However, the Agency does not have sufficient legal or factual information about other situations mentioned by the commenters to determine if there is a single entity who remains in control of the hazardous secondary material throughout the reclamation process.

For this reason, EPA believes that such situations may be more appropriately addressed under the exclusion for hazardous secondary materials transferred for reclamation (40 CFR 261.4(a)(24)) or under the case-by-case non-waste determination procedures finalized today in § 260.30.

For the sake of clarity and in response to comments, we are also adding a definition of ''hazardous secondary material'' and ''hazardous secondary material generator'' to § 260.10. ''Hazardous secondary material'' means a secondary material that, when discarded, would be identified as hazardous waste under part 261 of 40 CFR. ''Hazardous secondary material generator'' means any person whose act or process produces hazardous secondary material at the generating facility. A facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator. These definitions would apply to all of the exclusions promulgated today. We note that generators sometimes contract with a second company to collect hazardous secondary materials at the generating facility, after which the hazardous secondary materials are subsequently reclaimed at the facility of the second company. In that situation, the hazardous secondary materials would no longer be considered ''under the control of the generator'' because the materials are not reclaimed at the generating facility. The materials should instead be managed under the exclusion for materials transferred for reclamation.

EPA agrees with certain comments that a facility that generates hazardous secondary materials may lease the property where it conducts operations, rather than own the property and that our proposed definition of ''generating facility'' would not cover such arrangements. EPA has therefore changed the definition of ''generating facility'' in 40 CFR 260.10 to read ''all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator.'' We have also amended the existing definition of ''facility'' in § 260.10 to include a reference to management of hazardous secondary materials. Therefore, any references to ''facilities'' or ''units'' of a facility in today's rule also refers to facilities or units managing hazardous secondary materials excluded under this rule.

2. Exclusion for Materials Recycled by the ''Same Company''

In its March 2007 supplemental proposal, EPA proposed to exclude from the definition of solid waste hazardous secondary materials that were generated and reclaimed by the same ''person'' as defined in 40 CFR 260.10, if the generator certified the following: ''on behalf of [insert company name], I certify that the indicated hazardous recyclable material will be sent to [insert company name], that the two companies are under the same ownership, and that the owner corporation [insert company name] has acknowledged full responsibility for the safe management of the hazardous secondary material'' (72 FR 14214). ''Person,'' as defined in § 260.10, means an individual, trust, firm, joint stock company, Federal Agency, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body. EPA proposed the certification requirement because of existing complexities in corporate ownership and liability. The certification would clarify the responsibilities of the generator and reclaimer and would help regulatory authorities determine whether a facility was eligible for this exclusion. The Agency solicited comment on any other certification language that might accomplish the same end, and on other definitions of ''same-company'' (72 FR 14186).

Comments: Same-Company Exclusion

Many commenters supported this exclusion and stated that hazardous secondary materials sent from one company's facility to another remained essentially under the control of the generating company. According to these commenters, if a generator sends materials to a reclaimer that is part of the same corporate structure, the generator is likely to be familiar with the recycling and materials management processes employed by the reclaimer. In addition, questions regarding liability

and responsibility for such hazardous secondary materials are likely to be clearer than is the case with facilities from unrelated companies.

Other commenters stated that when hazardous secondary materials are generated and transported off-site for reclamation, additional controls were needed to avoid discard and protect human health and the environment even in the case of intra-company recycling. Some of these commenters preferred such reclamation to be regulated under the proposed conditional exclusion for hazardous secondary materials transferred for the purpose of reclamation. This measure would ensure that generators would have to perform reasonable efforts and that reclaimers would have to obtain financial assurance. Other commenters suggested additional notification and recordkeeping requirements for any hazardous secondary materials transported off-site.

EPA's Response: Same-Company Exclusion

After evaluating these comments, the Agency has decided to retain ''same-company'' recycling under the exclusion for hazardous secondary materials legitimately reclaimed under the control of the generator. We do not believe that facilities exchanging hazardous secondary materials within the same corporate structure should be subject to the requirements for our exclusion at § 261.4(a)(24), as long as appropriate control of the recycling process is maintained. In particular, it is unnecessary for the generator to perform reasonable efforts on the reclaimer, because the generator is likely to be knowledgeable about the reclaimer's ability to recycle the hazardous secondary materials properly and legitimately. Similarly, if the generator and reclaimer are part of the same corporate structure and if common control is maintained over the policies of both facilities, there are strong incentives to ensure that the hazardous secondary materials are properly and legitimately reclaimed, thus making a financial assurance requirement for the reclaimer unnecessary.

In response to commenters who suggested additional notification and recordkeeping requirements, we note that the Agency is revising our proposed requirements for notification and recordkeeping for all exclusions promulgated today. These revisions are discussed in sections VII.C. and VIII.C. of this preamble.

Comments: Certification of Same Company

Some commenters argued that no certification should be necessary when hazardous secondary materials are sent between the same or related companies because generator knowledge of the materials and the potential CERCLA liability should suffice to ensure safe and legitimate recycling. Other commenters supported a certification provision, but suggested alternative language that they stated would be more compatible with generator control. Still other commenters disagreed with our proposed requirement for certifying that the generator and reclaimer of hazardous secondary materials were under the same ownership and that the owner corporation must acknowledge responsibility for the safe management of the hazardous secondary materials.

According to these commenters, under existing corporate law, parent companies do not (and sometimes cannot) assume legal liability for their subsidiaries. EPA's proposed certification requirement regarding the owner company would therefore have little legal effect and could actually discourage same-company recycling. Some of these commenters suggested that either the generator or the reclaimer should acknowledge responsibility for properly managing the hazardous secondary material, not a third-party owner corporation.

Other commenters said that the proposed requirement that the hazardous secondary materials be generated and reclaimed by the same ''person'' under 40 CFR 260.10 was not appropriate because a corporation and its affiliates or subsidiaries are legally distinct and not the same ''person.'' Therefore, one commenter suggested that we refer to related ''facilities'' rather than ''companies.'' Some other commenters suggested that we focus on the concept of ''control'' rather than ''ownership.''

EPA's Response: Certification of Same Company

After evaluating these comments, EPA does not agree with the commenters who argued that a certification requirement is not needed. We note that the purpose of the certification is not to directly ensure proper and legitimate recycling, but to clarify responsibility for the hazardous secondary materials and to demonstrate to regulatory officials that the hazardous secondary materials are not discarded and are within the terms of the generator-controlled exclusion. We are therefore retaining a certification requirement for this exclusion.

However, the Agency has also decided that its proposed certification language should be revised to avoid confusion and to ensure more effective generator control. We have therefore revised our proposed regulatory definition for this exclusion to refer to ''facilities'' rather than companies. Under the definition finalized today at 40 CFR 260.10, the reclaiming facility must be ''controlled'' by the generating facility or by a person (under § 260.10) who controls both the generating facility and the reclaiming facility. ''Control,'' for purposes of this exclusion, means ''the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person shall not be deemed to ''control'' such facilities'' (see § 260.10). Our final certification language requires the generating facility to certify that it controls the reclaiming facility, or that the generating facility and the reclaiming facility are under common control. In addition, the generator must certify that either the generating facility or the reclaiming facility acknowledges full responsibility for the proper management of the hazardous secondary materials. To avoid confusion, we have also amended the definition of ''facility'' at 40 CFR 260.10 to include facilities which manage hazardous secondary materials. Therefore, any reference to ''facilities'' in this rule also includes facilities which manage materials excluded under the regulations promulgated today.

EPA believes that this revised language more appropriately reflects the concept of ''generator control'' that underlies the exclusions at 40 CFR 261.2(a)(2)(ii) and 261.4(a)(23). Requiring that a generating facility control the reclaiming facility, or that both be under common control, ensures that there is an ongoing relationship between the generator and reclaimer and that the two facilities are more likely to be familiar with each others' waste management practices, thereby minimizing the possibility of discard. If there is no such relationship, the two facilities should not be eligible for this exclusion and the use of the transfer-based exclusion would be more appropriate. In addition, requiring the hazardous secondary material generator to certify that either the generating facility or the reclaiming facility acknowledges responsibility for the safe management of hazardous secondary materials ensures that the responsibility rests with the party most capable of assuming such responsibility. This

certification should be made by an official familiar with the corporate structure of both the generating and the reclaiming facilities and should be retained at the site of the generating facility.

Comments and EPA's Response: Application to Government Agencies and Universities

Some commenters requested that EPA clarify whether two government agencies (such as the Department of Defense and the Department of Energy) would be considered the same ''person'' under 40 CFR 260.10 if hazardous secondary materials are generated by one agency and reclaimed by another. In response, we note that for purposes of RCRA, the federal government is not a single ''person''; rather, each agency or department would be considered a separate ''person.'' We also note that under today's final rule, a federal agency that is a generating facility does not normally have the power to direct the policies of a different federal agency that is a reclaiming facility, nor is there a ''person'' under § 260.10 who directs the routine policies of both facilities. In certain situations, the two different federal agencies involved may wish to apply for a case-by-case non-waste determination under 40 CFR 260.30, as appropriate, or use the transfer-based exclusion.

Other commenters requested that EPA clarify whether the same-company exclusion extends to hazardous secondary materials that are generated and reclaimed at different facilities, when both facilities are owned by the same government agency or university, but operated by a contractor. In some of these situations, the same contractor operates both the generating facility and the recycling facility, but, in other situations, the generating facility and the reclaiming facility are operated by different contractors. In those situations where the generating facility and the reclaiming facility are both owned by the same government agency or university, the two facilities would be under common control because the agency or university in question has the power to direct the policies of both the generating facility and the reclaiming facility. Under this scenario, both facilities would therefore be eligible for the same-company exclusion, even if operated by different contractors. However, if the generating facility and the reclaiming facility were each owned by a separate government agency or university, they would not be eligible for this exclusion even if both facilities were operated by the same contractor, because the element of common control would be lacking. We have revised the certification language of 40 CFR 260.10 to reflect this approach. The parties involved may apply for a case-by-case non-waste determination under 40 CFR 260.30, as appropriate, or use the transfer-based exclusion.

3. Types of Tolling Arrangements Eligible

In its March 2007 supplemental proposal, the Agency proposed to exclude from the definition of solid waste certain hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and a toll manufacturer. Through the contract, the tolling contractor would arrange for the manufacture by the toll manufacturer of a product made from unused materials specified by the tolling contractor. To be eligible for the exclusion, the tolling contractor would have to retain ownership of and responsibility for the hazardous secondary materials that were generated during the course of the production of the product. EPA solicited comment on other types of contractual arrangements under which discard is unlikely to happen and which could appropriately be covered by the exclusion for generator-controlled hazardous secondary materials. For example, one company could enter into a contractual arrangement for a second company to reclaim and reuse (or return for reuse) the first company's hazardous secondary materials. The first company could create a contractual instrument that exhibits the same degree of control over how the second company manages the hazardous secondary materials as is found in a tolling arrangement (72 FR 14186).

Comments: Tolling Arrangements

Some commenters stated that tolling arrangements are incompatible with ''generator control'' and are best regulated under the proposed exclusion for materials that were transferred for legitimate reclamation. They argued that requirements such as reasonable efforts (by generators) and financial assurance (for reclaimers) were necessary to avoid discard in the case of off-site reclamation. Some of the commenters argued that the physical generator of the hazardous secondary material (in this case, the toll manufacturer) retains legal liability for the material. They stated that contracts which reallocated resources to address financial responsibility for mismanagement or mishap could contain loopholes that would allow tolling contractors to dispose of hazardous secondary materials or send them to a third party for reclamation.

Other commenters, on the other hand, urged EPA to expand the tolling exclusion to other types of contractual arrangements. A few commenters said that the exclusion should be allowed for any contract between a generator and a reclaimer where the generator was willing to retain ownership of and/or responsibility for the hazardous secondary materials. Other commenters mentioned specific contractual situations in which they argued the hazardous secondary materials in question were clearly handled as a commodity and discard was therefore highly unlikely. One example given was a facility that reclaims metals from electric arc furnace dust and then sends the metals back to steel mills to be reused. Another example was a facility that takes spent copper etchant from manufacturers of printed wiring boards and uses the material to make new copper compounds. Still another example was a facility that collects used paint purge solvent from auto body paint operations, reclaims it, and sells regenerated solvent back to the auto body facility.

EPA's Response: Tolling Arrangements

After considering these comments, the Agency has decided to retain the tolling exclusion, but not to broaden its scope. The exclusion will therefore be limited to situations where a tolling contractor contracts with a toll manufacturer to make a product from specified unused materials. We do not agree with those commenters who said that tolling contracts are not compatible with ''generator control.'' The typical tolling contract contains detailed specifications about the product to be manufactured, including the management of any hazardous secondary materials that are generated and returned to the tolling contractor for reclamation. In addition, the tolling contractor will enter into a tolling contract with such requirements only if it has decided that the economic benefit from such recycling is justified. For these reasons, we do not believe that tolling arrangements should be subject to the conditions applicable to the transfer-based exclusion.

On the other hand, the Agency also does not agree with those commenters who urged that we should allow the generator-controlled exclusion for any hazardous secondary materials generated under a contract between a generator and a reclaimer. We believe that the exclusion should be limited to the types of tolling arrangements specified in 40 CFR 260.10. When hazardous secondary materials are

transferred off-site for reclamation, there is, in general, less likelihood of generator control, and, hence, more likelihood of discard, in the absence of conditions that ensure the hazardous secondary materials will be handled as valuable products. In these situations, additional requirements are needed for the Agency to determine that no discard has occurred. Conversely, in the specific situations included in the generator-controlled exclusion (on-site, same-company, and tolling reclamation), we believe that the generator is much more likely to be familiar with the reclaimer and to have powerful incentives to see that the hazardous secondary materials are reclaimed properly and legitimately. In these cases, the requirements that we have finalized today (notification, legitimate recycling, compliance with speculative accumulation limits, and containment) are sufficient for the Agency to determine that such hazardous secondary materials are not discarded. These requirements may not be sufficient in the case of unrelated generators and reclaimers who have a non-tolling type of contract.

To clarify the requirements for tolling contracts under today's rule, and to assist regulatory authorities in determining whether a facility is eligible for an exclusion under a tolling contract, EPA has also added a certification requirement to the definition of hazardous secondary material generated and reclaimed under the control of the generator in § 260.10 of the final rule. This provision would require the tolling contractor to certify that it has a written contract with the toll manufacturer to manufacture a product or intermediate which is made from unused materials specified by the tolling contractor, and that the tolling contractor will reclaim the hazardous secondary materials generated during the course of this manufacture. The tolling contractor must also certify that it retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process. This certification should be made by an official familiar with the terms of the written contract and should be retained at the site of the tolling contractor.

In response to those commenters who described specific types of contractual arrangements that should be eligible for the generator-controlled exclusion, we note that facilities operating under such arrangements may apply for a non-waste determination under § 260.30, as appropriate. In some cases, commenters did not include enough detail about the contracts to enable the Agency to draft appropriate regulatory language. In other cases, the arrangement suggested was industry-specific and the conditions or requirements suggested by the commenters were not appropriate for an exclusion covering many different types of facilities. We believe that such arrangements are best evaluated on a case-by-case basis by the regulatory authority, possibly under 40 CFR 260.30, to determine their eligibility for exclusion.

Comments: Terms Used in Tolling Exclusion

One commenter suggested that we replace the term ''batch manufacturer'' with ''toll manufacturer.'' This commenter stated that ''batch manufacturer'' was too broad and generally referred to a facility which engages in a distinct, short production campaign, not necessarily tied to a two-party contractual agreement. ''Toll manufacturer,'' this commenter stated, is a subset of batch manufacturers and generally refers to a party which undertakes manufacturing pursuant to a contract with a tolling contractor, such as the arrangement we proposed. This commenter also requested that EPA clarify that the ''product'' required to be produced under a tolling contract can include intermediates, as well as final products, and that materials used in toll manufacturing were sometimes specialty chemicals or intermediates that could not be described as ''raw materials,'' as would be required under our proposal. They suggested that we use the term ''specified materials'' instead.

EPA's Response: Terms Used in Tolling Exclusion

The Agency agrees that the suggested term ''toll manufacturer'' is more accurate and has revised the definition in § 260.10 accordingly. EPA also agrees that a product produced under a tolling contract can be an intermediate or a final product and has revised the definition in § 260.10 to refer to ''production of a product or intermediate.'' Finally, the Agency agrees that the term ''raw materials'' may not be accurate, but prefers to use the term ''unused materials'' instead of ''specified materials,'' because we believe that term encompasses specialty chemicals and intermediates without also including spent or secondary materials, which are not included in our definition of toll manufacturing.

B. Restrictions on Exclusions for Hazardous Secondary Materials Managed Under the Control of the Generator in Land-Based Units and Non-Land-Based Units

In its March 2007 supplemental proposal, the Agency proposed in 40 CFR 261.4(a)(23)(i) that hazardous secondary materials generated and legitimately reclaimed under the control of the generator must be contained if they were stored in land-based units (72 FR 14216). EPA proposed to use the existing definition of land-based units and defined a land-based unit in 40 CFR 260.10 as a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave. EPA did not propose a containment limitation for such materials if they were stored in non-land-based units.

EPA did not propose a regulatory definition of ''contained,'' nor did we propose specific performance or storage standards. We stated that whether hazardous secondary materials are contained would be decided on a case-by-case basis, and that such materials are generally contained if they are placed in a unit that controls the movement of the hazardous secondary materials out of the unit. We solicited comment on whether additional requirements might be necessary to demonstrate absence of discard when hazardous secondary materials were recycled under the control of the generator. In particular, we asked whether additional requirements for storage would be appropriate, such as performance-based standards designed to address releases to the environment. We also indicated that if commenters believed such requirements were appropriate, they should specify the technical rationale for each requirement suggested and why the requirement is necessary if the hazardous secondary material remains under the control of the generator.

Comments and EPA's Response: Definition of ''Land-Based Unit''

EPA received several comments expressing confusion over our proposed definition of ''land-based unit.'' We proposed land-based unit to mean ''a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.'' Commenters noted that including ''landfills'' and ''injection wells'' was not necessary for the proposed exclusion, since these management units are clearly inappropriate for

hazardous secondary materials intended for recycling. Furthermore, commenters also noted that Subtitle C defines these terms waste-centrically (i.e., as a unit that handles ''waste'' in one way or another). This could create confusion because a hazardous secondary material would not, by definition, be ''managed'' (or ''stored'') in one of these ''waste'' units. EPA agrees with these comments, and in the final rule has defined ''land-based unit'' as an area where hazardous secondary materials are placed in or on the land before recycling. However, as discussed below, the Agency has clarified that land-based units that are production units are not included in the definition.

Comments and EPA's Response: Mineral Processing Industry

Some commenters asserted that the Agency has no jurisdiction over land-based production units in the mineral processing industry. As previously stated, EPA agrees that the Agency does not regulate the production process. (*See* 63 FR 28580). Accordingly, EPA has clarified the definition of ''land-based unit'' to clarify that production units are not included in that definition. However, these commenters also asserted that EPA cannot legally require containment for these units. To the extent that these comments are intended to mean that EPA cannot regulate material that has been released into the environment, these comments are addressed in section XV.C. of this preamble, and also in the response to comments document in the record for this rulemaking.

Comments: Standards for Units (Both Land-Based and Non-Land-Based)

Other commenters, however, were opposed to allowing any land-based storage, at least without a RCRA Part B permit or strict requirements, such as secondary containment, leak detection measures, regular inspections, monitoring, or financial assurance. Most of these commenters did not appear to distinguish between land-based units under the generator-controlled exclusion and those under the exclusion for hazardous secondary materials transferred for reclamation; presumably, they wanted the same conditions for both.

Regarding non-land-based units such as tanks, containers, or containment buildings, some commenters agreed with EPA's approach, but other commenters preferred minimum storage standards for these units. Some commenters wanted Subtitle C standards to apply. Other commenters believed that the RCRA hazardous waste requirements were not necessary, but suggested other standards, such as requiring tanks to be in good condition, to be compatible with the stored material, to have secondary containment, or to be subject to routine inspections.

EPA's Response: Standards for Units (Land-Based and Non-Land-Based)

After evaluating these comments, the Agency has decided not to add performance standards or other requirements for managing hazardous secondary materials excluded under any of the exclusions promulgated today (§§ 261.2(a)(2)(ii), 261.4(a)(23), or 261.4(a)(24)). Such detailed measures are unnecessary for hazardous secondary materials that are handled as valuable products that are destined for recycling. Under today's rule, regulatory authorities can determine whether such materials in a unit are contained by considering all such site-specific circumstances. For example, local conditions can greatly affect whether hazardous secondary materials managed in a surface impoundment are likely to leak and cause damage, and, therefore, whether the unit could be considered contained. Similarly, facilities may employ such measures as liners, leak detection measures, inventory control and tracking, control of releases, or monitoring and inspections. Any or all of these practices may be used to determine whether the hazardous secondary materials are contained in the unit.

EPA also believes that detailed standards are not necessary to determine that valuable materials destined for recycling are not discarded when managed in non-land-based units. As with land-based units, the regulatory authorities can identify hazardous secondary materials that have been released from the unit and determine that the released material is discarded. To clarify this approach and to facilitate its implementation, however, EPA has revised its regulatory language to require that hazardous secondary materials that are generated and reclaimed under the control of the generator and managed in non-land-based units must also be contained (§ 261.4(a)(23)(i)).

Comments and EPA's Response: State Regulatory Program-Compliant Units

A few commenters indicated that hazardous secondary materials managed in units complying with state regulatory programs to address releases should be considered contained. Because of the variety of such programs, and because the Agency has not conducted an in-depth evaluation of such state requirements, we are not adding a definition of ''contained'' that would incorporate this suggested element. However, regulatory authorities may consider compliance with such requirements as one of the factors in determining whether the hazardous secondary materials are contained in the units.

Comments: Releases

In the March 2007 supplemental proposal, the Agency stated that hazardous secondary materials that remain contained in these units would still meet the terms of the exclusion even if a release occurred, unless the hazardous secondary materials are not managed as a valuable product, and, as a result, a significant release from the unit takes place. If such a significant release occurred, the hazardous secondary material remaining in the unit may be considered a solid and hazardous waste. Some commenters noted that a series of small releases from a unit could occur over time, causing cumulative environmental harm even though no single release was significant in terms of volume. These commenters said that such a series of releases should generally lead to the conclusion that the hazardous secondary material remaining in the unit was a waste.

EPA's Response: Releases

EPA agrees with the comment concerning small releases from a unit over time. Thus, a ''significant'' release is not necessarily large in volume, but would include an unaddressed small release from a unit that, if allowed to continue over time, could cause significant damage. Any one release may not be significant in terms of volume. However, if the cause of such a release remains unaddressed over time and hazardous secondary materials are managed in such a way that the release is likely to continue, the hazardous secondary materials in the unit would not be contained. For example, a rusting tank or containers that are deteriorating may have a slow leak that, if unaddressed, could, over time, cause a significant environmental impact. Similarly, a surface impoundment with a slow, unaddressed leak to groundwater could, over time, result in significant damage. Another example would be a large pile of lead-contaminated finely ground material without any provisions to prevent wind dispersal of the particles. Such releases, if unaddressed over time and likely to continue, would mean that the hazardous secondary materials remaining in the unit were not being

managed as a valuable raw material, intermediate, or product and that the materials had been discarded. As a result, the hazardous secondary materials in the unit would be hazardous wastes and these units would be subject to the RCRA hazardous waste regulations.

XVII. Major Comments on the Exclusion for Hazardous Secondary Materials Transferred for the Purpose of Legitimate Reclamation

A. Status of Facilities Other Than the Generator or Reclaimer (''Intermediate Facilities'')

Comments: Intermediate Facilities

In its March 2007 supplemental proposal, EPA requested comment on its proposal that under the proposed exclusion for hazardous secondary materials transferred for reclamation, such materials would have to be transferred directly from the generator to the reclaimer and not be handled by anyone other than a transporter.

EPA received many comments on this provision. Some commenters supported the provision as proposed because they were concerned that if hazardous secondary materials were transferred to a ''middleman,'' the generator would not have a reasonable understanding of who would reclaim the hazardous secondary materials and how they would be managed and reclaimed. If the generator was unable to ascertain whether the hazardous secondary materials in question could be properly and legitimately recycled, the materials should be considered discarded.

Other commenters objected to this proposed limitation. They argued that many persons who generate smaller quantities of hazardous secondary materials need help in consolidating shipments to make reclamation economically feasible. Some of these commenters also argued that intermediate facilities provided valuable assistance to generators by helping them properly transport, package, and store material, and by helping them find responsible reclaimers. These commenters believed that EPA's proposed limitation could discourage reclamation by persons who generate smaller quantities of such hazardous secondary materials.

Most of the commenters who suggested that intermediate facilities be eligible for the exclusion also suggested conditions for these facilities. These conditions included requiring the generator to select the reclaimer, requiring the generator to perform reasonable efforts on the intermediate facility, as well as the reclaimer, and requirements for notification and recordkeeping. A few commenters argued that intermediate facilities should be required to have a RCRA Part B permit or interim status.

EPA's Response: Intermediate Facilities

After evaluating these comments, the Agency has decided that intermediate facilities storing hazardous secondary materials should be eligible for the exclusion at 40 CFR 261.4(a)(24) under certain conditions. We believe that such facilities make it easier for generators that generate smaller quantities of hazardous secondary materials to send these materials for reclamation and that storage at such facilities under the conditions designed to address discard is completely consistent with handling the hazardous secondary materials as valuable commodities. To this end, we have added a new definition of ''intermediate facility'' to 40 CFR 260.10. We note that this rule does not address ''brokers'' because that term is commonly understood to mean a person who helps arrange for the transfer of hazardous waste or hazardous secondary material, but does not take possession of the material or manage it in any way. Brokers that never take possession of hazardous secondary materials would not have been affected under the supplemental proposal, nor are they affected by today's rule.

Under today's rule, an intermediate facility is a facility that stores hazardous secondary materials for more than 10 days, other than a generator or reclaimer of such materials. If an intermediate facility treats the hazardous secondary materials or commingles it with other hazardous secondary materials or with hazardous waste, it would not be eligible as an ''intermediate facility'' as defined in § 260.10 under today's regulation. Under 40 CFR 260.42, intermediate facilities must submit the same notification required of generators and reclaimers of hazardous secondary materials transferred for reclamation. In addition, under § 261.4(a)(24)(v) of today's rule, generators must also perform appropriate reasonable efforts on the intermediate facility, as well as the reclamation facility, and generators are responsible for the ultimate selection of the reclamation facility. These requirements will ensure that the intermediate facility is handling the hazardous secondary materials as a commodity.

Today's rule also requires intermediate facilities to comply with the applicable requirements for reclaimers of hazardous secondary materials under 40 CFR 261.4(a)(24)(vi), including recordkeeping, storage of excluded materials, financial assurance, and speculative accumulation. The Agency believes that these conditions are fully sufficient to ensure that hazardous secondary materials stored at intermediate facilities are handled as valuable products and not discarded. Therefore, we do not agree with those commenters who suggested that intermediate facilities should be required to operate under Part B permits or interim status.

The Agency notes that in some cases, the intermediate facility performs the physical measures associated with generator reasonable efforts to ensure that the reclaimer will properly and legitimately recycle the hazardous secondary materials. These measures may include facility inspections and preparation of audits. In those cases, the generator must carefully review such measures to ensure that any information provided is credible.

Under today's rule (*see* 40 CFR 261.4(a)(24)(ii)), if hazardous secondary materials are stored for 10 days or less at a transfer facility, the transit is not subject to the requirements applicable to intermediate facilities under the transfer-based exclusion. Instead, it must only be packaged in accordance with applicable DOT requirements. The Agency considers hazardous secondary materials stored by transfer facilities for short periods of time to be in transit, similar to hazardous waste stored by similar facilities for the same time period. They are therefore not discarded. We have revised the existing definition of ''transfer facility'' at 40 CFR 260.10 to clarify that such facilities may store hazardous secondary materials, as well as hazardous waste. The generator need not perform reasonable efforts on such facilities, nor must such facilities comply with the requirements applicable to reclaimers of hazardous secondary materials under 40 CFR 261.4(a)(24)(vi). In addition, hazardous secondary materials at transfer facilities may be repackaged from one container to another (e.g., the materials may be consolidated from smaller to larger containers) or transferred to different vehicles for shipment (*see* 45 FR 86966, December 31, 1980). However, different hazardous secondary materials may not be mixed together. In addition, if there is a release of the hazardous secondary materials at the transfer facility that is not cleaned up immediately, such materials become solid waste, and, if they exhibit a hazardous characteristic or are specifically listed by EPA, a hazardous waste as well. Depending on the nature of the release, the hazardous secondary materials remaining in the unit could

also become a solid and hazardous waste subject to Subtitle C regulation (for a discussion of when such units are considered ''contained,'' see section XVI of this preamble).

B. Reasonable Efforts Condition

EPA received many comments on the condition proposed in the March 2007 supplemental proposal that generators ''make reasonable efforts to ensure that the reclaimer intends to legitimately recycle the material and not discard it * * * and that the reclaimer will manage the material in a manner that is protective of human health and the environment.'' This condition was proposed to be fulfilled by hazardous secondary material generators sending hazardous secondary materials to any reclamation facility not operating under a RCRA Part B permit or interim status standards, and the condition would have to be satisfied prior to transferring the hazardous secondary materials to the reclamation facility (72 FR 14190–14194). Below is a summary of six major issues raised in the comments and EPA's responses. For more detailed comment responses, please see *Revisions to the Definition of Solid Waste Response to Comments Document.*

Comments: An Objective Standard for Reasonable Efforts

As proposed, the codified reasonable efforts provision for generators was a general standard, rather than a more specific standard with clearly stated requirements. EPA requested comment on establishing a more objective standard for making reasonable efforts, such as requiring generators to answer the questions discussed in the preamble. EPA acknowledged that creating an objective standard could provide generators and overseeing agencies with more regulatory certainty and requested comment on codifying the six questions outlined in the preamble.

EPA received many comments in support of an objective standard for satisfying the reasonable efforts condition. Commenters suggested that a minimum standard was needed to determine whether a generator fulfilled the condition and as a way of determining what is ''reasonable.'' Many of these commenters also believed that a standard that generators must meet was necessary to delineate liability for hazardous secondary materials that are transferred from a generator to a reclamation facility. In contrast, several commenters suggested that formalizing a minimum standard which all generators must meet is inappropriate since recycling is inherently case-specific.

On the issue of whether to codify a reasonable efforts standard, which several commenters addressed separately from the development of a standard, EPA received many comments both in support of and against codification. A large number of commenters addressed this issue by commenting on the six questions EPA discussed in the preamble. Those in favor of codification believed that establishing a minimum, objective standard was important in order to provide regulatory certainty for generators regarding what is ''reasonable'' and for overseeing agencies needing to make consistent determinations that the condition is satisfied. Industry commenters responding in support of codification believed the six questions resemble existing audit questions, and would therefore be straightforward to answer and satisfy. Recyclers and waste management commenters believed that small quantity generators would benefit from having a clear standard and also that the standard would make additional clarifying guidance unnecessary in the future. Some commenters conditionally supported codification contingent upon severance of RCRA liability for generators that meet the minimum condition. These commenters supported EPA's proposal to create what they termed as a ''safe harbor'' for generators that, having met the reasonable efforts condition, would be shielded from any future RCRA liability caused by environmental damage at a reclamation facility.

On the other hand, several commenters (mostly from the generating industry) opposed codifying a standard. They believed a standard would be unnecessary since generators that already audit recyclers have existing criteria for making reasonable efforts. Some of these commenters also stressed a need to maintain flexibility in their activities and to avoid additional burdensome requirements. One state commenter requested that EPA allow generators to establish their own standard for reasonable efforts so that generators will weigh their own level of risk and ultimately be responsible for their decisions. This commenter also believed that one standard is impractical for both ''a large industrial generator of a highly toxic hazardous secondary material'' and ''a small generator of a barely ignitable hazardous secondary material.''

Of the commenters that responded to the March 2007 supplemental proposal to codify a standard for reasonable efforts, many also provided comments on the six questions in the preamble. In general, commenters were divided between supporting and opposing codification of all six questions, but responses were generally favorable when commenters discussed the value of individual questions within a reasonable efforts inquiry. One exception to this is with respect to proposed question (B) (''Does the reclamation facility have the equipment and trained personnel to properly recycle the hazardous secondary material?''), which several commenters believed to be difficult for a hazardous secondary material generator to answer with existing knowledge. A few commenters also noted that questions (D) and (E), the two proposed questions pertaining to legitimacy within the preamble discussion of reasonable efforts, did not represent the legitimacy ''factors to be considered'' that were proposed in the March 2007 supplemental proposal at 40 CFR 261.2(g). These commenters suggested that a reasonable efforts inquiry should include all criteria and factors in the proposed legitimate recycling requirement. A few commenters also suggested including an additional question about the financial health of a reclaimer.

EPA's Response: An Objective Standard for Reasonable Efforts

After evaluating these comments, EPA agrees that an objective minimum standard is appropriate and necessary for hazardous secondary material generators to determine that they have fulfilled the reasonable efforts condition. We believe that without such a standard, both generators and the regulatory agencies would experience difficulty in determining whether the condition is met. However, in defining the standard, it would in no way limit a generator's ability to tailor and enhance its reasonable efforts inquiry to evaluate a particular industry or recycler.

We also agree with the commenters who stated that the six questions from the preamble to the March 2007 supplemental proposal, with two modifications noted below, serve as a minimum objective standard. Therefore, we are codifying them, with certain modifications. We strongly believe that any generator who takes advantage of today's transfer-based exclusion must be able to answer all reasonable efforts questions affirmatively for each reclamation facility (and intermediate facility, if such hazardous secondary materials are sent to such a facility) in order to demonstrate that its hazardous

secondary materials will be properly and legitimately recycled and not discarded. In EPA's view, a generator who is unable to satisfy the reasonable efforts condition has not demonstrated that its hazardous secondary materials are not discarded when recycled. The hazardous secondary materials would thus be ineligible for today's transfer-based exclusion.

With respect to question (4) (''Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material?''), we believe that its inclusion within reasonable efforts is appropriate and necessary since the question informs a generator's inquiry as to whether its hazardous secondary materials will be properly and legitimately recycled. If a reclamation facility were found to have inadequate equipment or untrained personnel, it would raise serious questions as to whether the facility would be engaged in proper recycling or discard. Without exploring this question, we believe that a generator cannot ascertain that a reclamation facility will properly and legitimately recycle its hazardous secondary materials. However, we also agree that, as drafted in the proposed rule, answering this question may require specialized knowledge and expertise. Accordingly, EPA is changing this question to allow the generator to rely on the reclamation facility to explain why its equipment and personnel are appropriate. Of course, the generator must have an objectively reasonable belief that the reclamation facility's equipment and trained personnel are adequate for safe recycling. Accordingly, if the equipment and personnel described by the reclamation facility would be, to an objective reasonable person, clearly inadequate for safe recycling of the generator's hazardous secondary material, then the generator would not have met this condition. However, EPA does not require nor expect the generator to have specialized knowledge or expertise of the recycling process. We also discuss in more detail how a generator can answer this question in section VIII.C.2. of this preamble.

As noted previously, we are codifying the questions with two modifications. The first modification to the questions is language that accommodates the inclusion of intermediate facilities within the transfer-based exclusion. As discussed in section VIII.C. of this preamble, if a generator sends hazardous secondary materials to an intermediate facility where they are stored for longer than 10 days prior to being transferred to a reclamation facility, the generator will need to perform reasonable efforts for both the intermediate facility and reclamation facility.

The second modification is to the questions pertaining to legitimate recycling activities. EPA acknowledges that one source of confusion for commenters regarding the relationship between the reasonable efforts condition and the legitimate recycling requirement may have been the two questions pertaining to legitimacy (proposed questions (D) and (E)) within the reasonable efforts preamble discussion and the proposed legitimacy requirement at 40 CFR 261.2(g). Questions (D) and (E) and the proposed regulatory language for legitimacy did not share the exact same wording, although both concepts were intended to be consistent. Furthermore, we understand the concern commenters raised that questions (D) and (E) did not represent the legitimacy ''factors to be considered'' that were proposed within 40 CFR 261.2(g). As a result, we have restructured the reasonable efforts questions pertaining to legitimacy to read as a single question that ensures that a reclamation facility receiving hazardous secondary materials intends to legitimately recycle the hazardous secondary materials. Because of changes to the legitimacy provision in this final rule as compared to the March 2007 supplemental proposal, this question now refers to the legitimacy requirement in § 260.43 of today's final rule.

Comments: Liability Related to Reasonable Efforts

EPA proposed the reasonable efforts condition as a way for hazardous secondary material generators to demonstrate that they met their regulatory obligation to ensure that their hazardous secondary materials, when transferred to a reclamation facility, would not be discarded. Based on our assessment of good recycling practices and the comments received, we believe that the reasonable efforts condition reflects current industry best practices of auditing or assessing reclamation facilities prior to entering into business relations; this is done to minimize potential regulatory and liability exposures and to demonstrate a commitment to environmental stewardship.

We received many comments related to liability and the reasonable efforts condition. Many commenters stated that making reasonable efforts to evaluate a reclaimer is a good method for limiting future liability and that many generators already employ some form of the practice. These commenters largely supported the provision. Other commenters expressed concern that the reasonable efforts condition is an unnecessary requirement since existing incentives, such as economic motivations and CERCLA liability, would cause a generator to perform evaluations of reclaimers without being mandated as a condition of the exclusion.

Additionally, EPA received comments about whether satisfying the reasonable efforts condition would sever a generator's regulatory liability if, after being sent to a reclamation facility, its hazardous secondary materials were discarded or involved in environmental damage. Several commenters (namely from industry) asked that EPA clarify that upon conducting a reasonable efforts evaluation of a reclamation facility, a generator would not be liable for a reclaimer's subsequent environmental violations or if a reclaimer's actions caused or contributed to some environmental harm or damage. Many of these commenters supported the codification of a reasonable efforts standard, provided that liability would be severed upon meeting the condition. Conversely, several commenters stated that generator liability should be maintained into the future regardless of satisfying the condition. In general, these commenters were concerned that hazardous secondary material generators could subvert RCRA liability by conducting incomplete and superficial evaluations of reclaimers, and that future environmental damage would result at reclamation facilities. A few of these commenters suggested that EPA clarify that a hazardous secondary material generator would be held liable for violating the condition of the exclusion into the future if it was shown that the generator did not conduct a thorough assessment of the reclaimer.

EPA's Response: Liability Related to Reasonable Efforts

EPA disagrees that the reasonable efforts condition is unnecessary in light of economic forces or CERCLA liability, which may motivate some generators to evaluate recyclers. We proposed the reasonable efforts condition as a way for hazardous secondary material generators to demonstrate that they are not discarding the hazardous secondary materials when sending them to a third party for reclamation. The language of the condition is intended to capture within the regulatory text how

responsible generators currently inquire and make decisions about recycling of hazardous secondary materials and how generators manage potential liability and regulatory non-compliance risks. Several commenters suggested that not all generators currently audit or evaluate reclamation facilities despite having economic interests and existing liability concerns. Analysis of the environmental problems study also suggests that CERCLA liability alone is not enough to prevent damage and that increased generator inquiry of reclamation facilities may help avoid future cases of abandonment or discard, residuals mismanagement, sham recycling, and improper management of hazardous secondary materials and recycled products.

By proposing the reasonable efforts condition, EPA intended to maintain RCRA liability for any hazardous secondary materials that are discarded. The condition clearly holds a generator accountable for determining that its hazardous secondary materials will not be discarded at a reclamation facility or any intermediate facility prior to transferring such materials to the facility. If a generator does not meet the condition, then the generator's hazardous secondary materials would not be eligible for the transfer-based exclusion and would be considered by EPA to be hazardous waste subject to the RCRA Subtitle C controls from the point of generation.

EPA did intend, however, that if the hazardous secondary materials generator had satisfied the reasonable efforts condition and discard subsequently occurred while hazardous secondary materials were under the control of the reclamation or intermediate facility, then the reclamation or intermediate facility, not the generator, would be liable under RCRA. EPA acknowledges that meeting this condition will not affect CERCLA liability. (*See* section XIII for more information on CERCLA liability.) We recognize commenters' concern that in order to satisfy the reasonable efforts condition and be released from RCRA liability, hazardous secondary material generators could be tempted into making incomplete evaluations of reclamation and intermediate facilities. EPA believes that codifying an objective reasonable efforts standard that all generators must meet in order to satisfy the condition will alleviate this concern (*see* section VIII.C. of today's rulemaking for more discussion). We also believe that specifying a standard that hazardous secondary material generators must satisfy will assist both regulatory agencies and the regulated community in determining whether the condition of the exclusion has been met or violated.

Comments: Relationship Between the Reasonable Efforts Condition and the Legitimate Recycling Requirement

EPA received a variety of comments on the relationship between the condition that hazardous secondary material generators must make a reasonable efforts inquiry of reclamation facilities and the requirement that hazardous secondary materials must be legitimately recycled. Several commenters stated that evaluating whether a reclaimer meets the legitimacy criteria should be part of a reasonable efforts inquiry to ensure that a generator's hazardous secondary materials are legitimately recycled. One commenter stated that while a hazardous secondary material generator would need to ensure that a recycling activity being considered is legitimate in order to protect its own liability interests, a legitimacy determination should be entirely separate from the reasonable efforts condition. Another commenter also stressed that, as a matter of good practice, many responsible generators already ensure that they send hazardous secondary materials to facilities engaged in legitimate recycling; therefore, a legitimacy evaluation within reasonable efforts is unnecessary. Furthermore, several commenters (mostly from industry) stated that a reasonable efforts condition is redundant since the proposed legitimate recycling requirement in 40 CFR 261.2(g) ensures that hazardous secondary materials transferred off-site are safely recycled.

EPA's Response: Relationship Between the Reasonable Efforts Condition and the Legitimate Recycling Requirement

EPA agrees with the commenters who stated that determining whether a recycling activity is legitimate is a sound practice and, based on comments we received, that many responsible generators already use existing legitimacy guidance as a way to manage their potential liability. The reasonable efforts condition is intended to assist generators in determining that their chosen reclamation facilities will properly and legitimately recycle the generators' hazardous secondary materials. Consequently, EPA strongly believes that the reasonable efforts condition must contain a provision that explicitly refers generators to their obligation to ensure that their hazardous secondary materials are legitimately reclaimed. Including legitimacy as part of the reasonable efforts condition means that if the generator made reasonable efforts to ensure that its hazardous secondary materials are legitimately recycled in a way that satisfies this condition and, subsequently, the reclamation facility fails to recycle the materials legitimately, the reclamation facility, not the generator, becomes liable for violating RCRA (*see* section VIII.E. for more information).

Comments: Periodic Updates to Reasonable Efforts

EPA requested comment on a requirement for making periodic updates to reasonable efforts, but did not propose an explicit time period. Some commenters favored requiring a specific time limit for updating the reasonable efforts provision, while others (a slightly smaller number) favored a flexible time frame for updating reasonable efforts, to be determined by the hazardous secondary material generator. The commenters who supported a specific time frame for updating the reasonable efforts condition included states, several representatives of the recycling industry, one industry generator, and one environmental organization. Several of these commenters stated that the hazardous secondary material generator needed to evaluate changes over time to the recycling facility (e.g., compliance status, financial assurance, permit renewals, impact of changes in recycling markets) to ensure that their hazardous secondary materials continue to be recycled properly and legitimately. Commenters also suggested that generators re-evaluate recyclers whenever the generator becomes aware of new, ''material'' information about or changes to a reclamation facility. These commenters asked EPA to set a minimum schedule for updating reasonable efforts. The suggested schedules ranged from annually to every five years.

Several industry generators and associations, as well as one waste management association, submitted comments in opposition to requiring specific periodic updates of the reasonable efforts provision. Commenters expressed concern that an arbitrary time frame would unnecessarily change generators' current schedules for auditing or making inquiries of recycling facilities. Several commenters suggested that schedules for evaluating reclaimers should vary from facility to facility and by industry and that a generator should be allowed to decide when to update reasonable efforts given a facility's history and the generator's familiarity

with the facility. One commenting organization cited its use of an internal risk-based audit schedule to determine when to review a reclamation facility. The stated criteria for judging the level of risk included facilities with lower financial health and the addition of ''new processing capabilities and when ownership changes.'' Another generator requested EPA to ''suggest, and not require, the frequency of periodic updates.''

EPA's Response: Periodic Updates to Reasonable Efforts

EPA agrees with the comments stating that requiring generators to conduct specific periodic updates of the reasonable efforts provision is critical for ensuring that reclamation facilities continue to properly and legitimately recycle the hazardous secondary materials into the future. We believe that if a hazardous secondary material generator evaluated a reclamation facility (or an intermediate facility if hazardous secondary material is sent to such a facility) only once before the initial transfer of hazardous secondary materials for recycling, it would not provide adequate assurance to regulators that hazardous secondary material generators have met the reasonable efforts condition to ensure discard will not occur 5, 10, or 20 years into the future. We understand that generators often evaluate recyclers or intermediate facilities on a recurring schedule determined by the generator's particular interests, concerns, and experience. However, EPA believes that hazardous secondary material generators are also interested in having regulatory certainty regarding the time frame for which reasonable efforts must be conducted, rather than a completely discretionary ''generator decides'' approach, which will present many disagreements and challenges as to what a ''reasonable'' schedule is. We are also aware that many generators do not currently conduct reasonable efforts, let alone re-evaluate such facilities over time. For these reasons, we are requiring that hazardous secondary material generators update their reasonable efforts evaluation at least every three years, at a minimum. Based on public comments, this appears to represent general industry practice and to be within the average time frame for those generators who currently conduct environmental audits of facilities to which they send their hazardous secondary materials.

By specifying a time frame for periodic updates, EPA in no way intends to limit a generator to conducting evaluations only every three years. In fact, we acknowledge that shorter time frames could be appropriate for certain industries. Additionally, we would expect that any hazardous secondary material generator who has concerns about a reclamation or intermediate facility, or who gains new knowledge of significant changes or extraordinary situations at such facilities, would conduct reasonable efforts regardless of the minimum required update schedule.

Comments: Requiring Generators to Certify Reasonable Efforts

EPA solicited comment on requiring hazardous secondary material generators to certify that they made reasonable efforts prior to arranging for transport of hazardous secondary materials to be recycled. As discussed in the preamble to the March 2007 supplemental proposal, the certification statement would be a form of documentation necessary for each reclamation facility and would be signed and dated by an authorized representative of the generator company. We also provided certification language as an example.

Several commenters including recyclers, all responding states but one, and a few industry generators and associations, commented in favor of requiring hazardous secondary material generators to certify that they had met the reasonable efforts condition. All commenters that responded regarding the example certification statement supported the language. A few commenters reiterated that generators must certify reasonable efforts for each reclamation facility and that certification should not be necessary for RCRA Part B permitted facilities. One commenter requested that the certification must be made ''prior to implementing exempt operations.'' Another commenter believed that a certification statement would improve the enforceability of the reasonable efforts condition. A generator that currently audits its waste facilities stated that ''a letter signed and dated by the department manager is mailed to the audited facility stating the results of the audit,'' and that the letter should act as a certification. Another commenter suggested that given the large number of facilities for which reasonable efforts are required, having a company representative, as opposed to an ''authorized representative,'' sign and date a certification should be sufficient and would be less burdensome. One recycler requested that the generator certification and signature be built into the one-time notification that EPA is requiring for the exclusion.

A smaller number of comments from generators opposed the certification requirement. A few generators found the certification statement to be overly burdensome and stated that it would stifle the use of third-party reclaimers. One generator, who currently audits reclamation facilities, stated it could not certify the accuracy of information prepared by third parties, nor could it certify responses by reclamation facilities to questions (B) through (E), which EPA discussed in the preamble. Another generator responded that without further clarification as to the minimum requirements for satisfying reasonable efforts, the generator could not certify that the condition was met. A commenter also suggested that requiring certification of reasonable efforts for reclamation facilities that recycle hazardous secondary materials was unnecessary if certification is not required for the storage, treatment, and disposal of hazardous waste.

EPA's Response: Requiring Generators To Certify Reasonable Efforts

After evaluating the comments, EPA has concluded that certifying the reasonable efforts provision is a necessary and minimally burdensome requirement for ensuring that the reasonable efforts condition is met prior to transferring the hazardous secondary materials to a reclamation facility. We also strongly believe that requiring the signature of an authorized representative of the generator company, who can be any appointed company representative, is critical for ensuring accountability for satisfying the condition. In the event of an enforcement action, we believe that the certification will lend support to hazardous secondary material generators needing to prove that the reasonable efforts condition was met. Therefore, in today's final rulemaking, we are finalizing a requirement that hazardous secondary material generators must certify that reasonable efforts were made for each reclamation and intermediate facility prior to transferring hazardous secondary materials to such facilities.

With respect to those commenters who opposed certification and specifically argued that requiring such certification would stifle the use of third-party auditors, it is our understanding that third-party auditors do not generally draw any conclusions based on their audits, but simply report the results. In addition, the reasonable efforts condition requires that the hazardous secondary material generator decide whether a reclaimer is acceptable. Therefore, we disagree with

those commenters who stated that requiring a certification would constitute a significant new burden. Rather, EPA believes that requiring a hazardous secondary material generator to certify the reasonable efforts condition would provide them the flexibility to use audits or other information necessary in certifying that the condition of the exclusion was met. We find that the commenter example of an existing practice of sending a letter with audit results to an audited facility would need to include the certification language in 40 CFR 261.4(a)(24)(v)(C)(2) in order to meet the reasonable efforts condition.

Comments: Documenting of Reasonable Efforts

While EPA proposed that generators conduct reasonable efforts before sending hazardous secondary materials to the reclamation facility, we did not propose that documentation records must be kept of such demonstrations. However, EPA requested comment on whether to require hazardous secondary material generators to maintain documentation at the generating facility demonstrating that the reasonable efforts condition was satisfied prior to transferring the hazardous secondary materials to a reclamation facility. No form of documentation or format was specified, although EPA did cite audits as one type of documentation that could be relevant. Additionally, EPA requested comment on whether hazardous secondary material generators should be required to maintain certification statements that reasonable efforts were conducted for each reclamation facility to which the generator transferred the hazardous secondary materials to be reclaimed.

A majority of commenters supported a requirement that generators maintain documentation of reasonable efforts. A few commenters asked that documentation be kept on-site, while a few commenters asked that the documentation could be kept at a headquarters or other off-site location. Other commenters specifically requested that EPA not specify a location for the documentation. Commenters in favor of this requirement stated that documentation would be necessary for showing the basis for the reasonable efforts determination, as well as for improving the enforceability of the condition. A few commenters suggested that documentation be maintained for three years and one industry commenter asked that EPA set a time requirement specifying how long such documentation must be kept.

On the other hand, a few commenters were opposed to a documentation requirement. These commenters cited the confidential and proprietary nature of the audits and reports used by generators for making reasonable efforts and stated they did not believe they should share this information with regulators. A few commenters, including one state, also argued that a certification statement of having made reasonable efforts, signed by an authorized representative of the generator company, would provide adequate documentation that reasonable efforts were made. One state commenter also suggested that it would be difficult for states to enforce the requirement of documentation, presumably because EPA proposed that ''any credible evidence available'' could be used to demonstrate that the condition is met.

EPA's Response: Documenting Reasonable Efforts

After evaluating the comments, EPA has concluded that it is important for hazardous secondary material generators to produce documentation to demonstrate that the reasonable efforts condition has been met prior to transferring hazardous secondary materials to a reclamation and/or intermediate facility. We do not believe it is necessary to mandate that, for example, audits are specifically required for documentation and we prefer to maintain some flexibility in terms of the format for documenting the condition based on commenter input and the knowledge that each reasonable efforts inquiry will be unique. This flexibility for documentation is also in response to commenter concern about the confidentiality of audits. We do not believe that this flexibility will in any way impact the ability of regulatory authorities to determine whether the condition is satisfied. We believe that the certification statement is critical for ensuring accountability for satisfying the condition and that the act of making reasonable efforts is in fact genuine. We believe this requirement helps generators support their position that hazardous secondary materials have not been discarded and helps regulators determine whether a generator has satisfied this condition. Since updates of reasonable efforts are required at a minimum of every three years, EPA believes that such generators should maintain documentation for a minimum of three years to show that the requirement to update reasonable efforts has been satisfied.

We understand that audits and evaluations of reclamation facilities are not always kept on-site and may be maintained at a generator's headquarters or at another off-site location. For this reason, EPA is requiring that documentation must be made available, upon request by a regulatory authority, within 72 hours, or within a longer period of time as specified by the regulatory authority. We understand that in the age of near-instantaneous communication, a hazardous secondary material generator that performed reasonable efforts prior to transferring hazardous secondary materials should be able to retrieve documentation with relative ease. We also note that time frames for producing documentation are generally determined by regulatory authorities on a case-by-case basis and time frames are clearly outlined by authorities within RCRA Section 3007 information request letters.

C. Financial Assurance Requirement

In EPA's March 2007 supplemental proposal, EPA proposed that reclamation facilities receiving and recycling hazardous secondary materials under the transfer-based exclusion be required to demonstrate financial assurance in accordance with the requirements of subpart H of 40 CFR part 265. As part of this proposal, EPA sought comment on whether the existing subpart H requirements should be modified in some way specifically for reclamation facilities affected by the proposed exclusion. EPA also requested comment on whether EPA should tailor the costing requirements associated with the subpart H financial assurance requirements. Because of these comments, EPA has made several revisions to the financial assurance condition, as explained below.

Comments: Financial Assurance

Many commenters supported EPA's proposal that reclamation facilities receiving and recycling hazardous secondary materials under the transfer-based approach be required to demonstrate financial assurance in accordance with the current requirements of subpart H of 40 CFR part 265 in order to demonstrate that the hazardous secondary materials are not being discarded. Commenters argued that without a codified financial assurance requirement, recyclers that mismanage hazardous secondary materials could simply close their doors (as has happened previously) and abandon their hazardous secondary materials, leaving an environmental problem for the public to address and imposing the financial burden of cleaning up recycling facilities on states and local authorities, which may not have the resources to do so.

Commenters also noted that EPA's environmental problems study shows that the primary cause of damage incidents has been the business failure of recycling facilities. Without financial assurance, the commenters argue that states and taxpayers have been left with the bill for cleaning up these abandoned sites. Finally, these commenters stated that a recycling facility that does not meet the financial test, cannot obtain an insurance policy or other financial instrument, and does not have the resources to establish a trust fund or other mechanism, should not be handling hazardous secondary materials under the conditional exclusion.

Other commenters supported EPA's proposal on financial assurance, but also made suggestions for modifications. One commenter recommended that a financial assurance program be developed specifically for reclaimers. A few commenters recommended that reclamation facilities taking advantage of the exclusion maintain a closure plan that would be available for review, upon request, that substantiates and verifies the amount of financial assurance required.

Still other commenters stated that reclamation facilities that receive hazardous secondary materials from off-site generators under the transfer-based approach should not be held to the same financial assurance standards as facilities with permits to manage hazardous waste. Instead, the financial assurance requirements for recycling facilities should reflect the relatively lower risks associated with the manufacturing/recycling activities. Commenters claimed that reclamation facilities are essentially processing raw materials for beneficial use as opposed to RCRA-permitted facilities that are treating, storing, and disposing hazardous waste.

Finally, some commenters disagreed completely with EPA's approach to financial assurance. Commenters stated that EPA lacks the authority to subject facilities to the requirements or conditions when using hazardous secondary materials in production operations in which these materials are never discarded. Commenters stated that proposed conditions for the exclusion do not define the absence of discard and would effectively impose a waste management requirement upon a non-waste.

EPA's Response: Financial Assurance

EPA finds those comments that support the financial assurance condition persuasive and agrees with their conclusions. Requiring financial assurance for reclamation facilities (and intermediate facilities, which are included in the final rule) operating under the transfer-based exclusion is appropriate and reasonable for the Agency to determine that the hazardous secondary materials managed at these facilities are not discarded and is supported by the findings of the recycling studies conducted as part of this rulemaking effort. Financial assurance as a condition will ensure that the reclamation and intermediate facilities either have the financial wherewithal themselves, as demonstrated by qualifying for self insurance under the financial test, or that funds from a third party will be available to ensure that the hazardous secondary materials will not be abandoned. An owner or operator who must fully fund a trust to cover the retirement cost estimate will be careful not to discard the hazardous secondary materials so that he may recover the funds from the trust. Sureties, banks providing letters of credit and insurers will screen applicants to ensure that they are only providing assurance for good risks who are unlikely to abandon or discard such materials, thus demonstrating that the hazardous secondary material is not being discarded. As noted by the commenters, at least 138 of the 208 damage cases were firms that had gone out of business and abandoned the ''hazardous secondary material,'' a material that they presumably believed could be reclaimed.

In addition, the market forces study indicates that recyclers of hazardous secondary materials can behave differently from traditional manufacturers due to differences in the economic forces and incentives involved in recycling. Unlike manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, some models of hazardous secondary materials recycling involve generating revenue primarily from receipt of the hazardous secondary materials. This situation can lead to over-accumulation and abandonment of hazardous secondary materials, particularly in cases where the product of the recycling process has low value, the prices are unstable, and/or the firm has a low net worth.

By requiring financial assurance, the public and federal, state and local governments can have confidence that the recycler's business model takes these market factors into consideration and that it will therefore not abandon the hazardous secondary materials, even if unforeseen market changes occur. The successful recycling study indicated that one of the main reasons that generators audit recyclers is to evaluate their financial health and resources to respond to accidents or other problems that could cause adverse environmental or human health consequences. This is primarily because of the joint-and-several liability provisions of CERCLA, under which a generator becomes a ''responsible party'' obligated to pay (in part or in whole) for remediation expenses if (in this example) a recycler to whom he sent recyclable hazardous secondary materials were to create contamination problems, but lacked the resources to pay for the cleanup.

Because American manufacturers have considerable experience with these types of CERCLA liability issues, evaluating the financial health of the reclamation facility before shipping recyclable hazardous secondary materials to them has become a standard business precaution for responsible generators. The condition for financial assurance thus can be seen as a way of addressing the same concern, thus ensuring that the reclamation and intermediate facility owner/operators who operate under the terms of this exclusion are financially sound and will not abandon or otherwise discard their hazardous secondary materials.

Thus, EPA disagrees with the commenters who argued that recycling hazardous secondary materials is, as a general matter, the same as processing raw materials for beneficial use. Because of the nature of these materials (i.e., hazardous spent materials and listed by-products and listed sludges), they are frequently more difficult to process than most raw materials, and the nature of the economics of the transfer of these materials can create an incentive for discard. Requiring financial assurance is essential for helping to define those situations where the hazardous secondary material is not being discarded.

However, EPA agrees that some adjustments to the existing 40 CFR part 265 financial assurance requirements would help better tailor them to hazardous secondary material reclamation and intermediate facilities. The current hazardous waste financial assurance regulations include provisions (such as post-closure) not appropriate to hazardous secondary material units, and the terminology is directed towards permitted TSDFs. EPA also agrees that the regulations need to be more explicit as to the documentation requirements for the financial assurance cost estimate. The financial assurance requirements in 40 CFR part 265 subpart H in turn

reference and rely on certain requirements in the 40 CFR part 265 subpart G closure regulations. Although the hazardous secondary material units are not required to undergo Subtitle C closure, some of the provisions of 40 CFR part 265 subpart G are important to implementing 40 CFR part 265 subpart H and need to be clarified. As a convenience to the regulated community, EPA has placed the financial assurance requirements applicable to hazardous secondary materials in a stand-alone regulation (see 40 CFR part 261 subpart H). Substantively, these regulations generally mirror and include the same requirements as the 40 CFR part 265 financial assurance regulations, but they have been condensed and reframed to refer to reclamation and intermediate facilities rather than TSDFs and to directly incorporate (rather than just referencing) those aspects of 40 CFR part 265, subpart G that are necessary for implementing the financial assurance condition.

For further discussion of how the financial assurance condition operates and how the provisions map to the requirements in 40 CFR part 265, see section VIII.C of today's preamble.

D. Ability of Excluded Reclamation Facility To Accept Manifested Hazardous Waste

In the March 2007 supplemental proposal, EPA proposed that reclaimers receiving hazardous secondary materials from generators that continue to manage such materials under the current hazardous waste regulatory system would still be able to claim the exclusion for those hazardous secondary materials. In essence, this would allow manifested hazardous waste to be sent to an unpermitted facility, as long as that facility met the conditions of the exclusion.

Comments and EPA's Response: Excluded Reclamation Facilities Accepting Manifested Waste

Most of the commenters on this issue raised serious concerns about this provision, among other things arguing the fact that it would be unworkable. Commenters also raised concerns about the generator's liability under such a situation, particularly if the reclaimer failed to inform the generator that its hazardous waste would be managed under the exclusion. Commenters also noted that the lack of a requirement for ''reasonable efforts'' on the part of the generator is contrary to the basic premise of the exclusion, which is that generators will be responsible and ensure reclaimers properly manage and recycle the hazardous materials.

After considering the comments received, EPA is not allowing reclaimers to manage manifested federal hazardous waste under the exclusion. Although this provision may have increased recycling opportunities, the fact that the hazardous secondary material generator manages the hazardous secondary materials as manifested hazardous wastes would have decoupled the exclusion from the underlying rationale that the materials are not discarded.

E. Imports and Exports

In the March 2007 supplemental proposal, the Agency proposed to exclude hazardous secondary materials that are exported from the United States for reclamation at a facility located in a foreign country, provided the hazardous secondary material generator complies with the generator requirements under the transfer-based exclusion (e.g., notification, reasonable efforts, etc.), as well as notice and consent regarding planned exports of such hazardous secondary materials. We also requested comment on whether the Agency should allow exports under the generator-controlled exclusion.

Comments: Scope of Exports

Overall, commenters expressed few concerns with the specifics of the proposed export regulations, although a few disagreed with allowing exports of hazardous secondary materials under the proposed rule altogether. These commenters believed that allowing exports of such hazardous secondary materials would run contrary to international agreements (such as agreements established by the Organization for Economic Cooperation and Development (OECD) and the Basel Convention regarding transport of hazardous waste) and may also increase the risk of environmental damage in other countries. At least two commenters suggested limiting exports to our bilateral partners only (i.e., Canada and Mexico). On the other hand, some industry commenters argued that many companies have worldwide operations and would therefore benefit from broader provisions allowing exports of hazardous secondary materials to be managed under the control of the generator because it would improve the companies' ability to recycle hazardous secondary materials.

EPA's Response: Scope of Exports

After considering these comments, the Agency is largely maintaining the export provisions as proposed, with some minor modifications described below. We believe that hazardous secondary materials exported for legitimate reclamation in accordance with today's final rule are not discarded and, thus, not solid wastes and, therefore, we have no basis for prohibiting exports when a hazardous secondary material generator complies with the regulatory requirements.

We also disagree with commenters who believe today's rule runs contrary to international agreements controlling the movement of hazardous waste. We note the U.S. is an OECD Member and is, therefore, legally bound to comply with the OECD's ''Decision of the Council C(2001)107/FINAL, Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations, as amended by C(2004)20,'' which provides a framework for OECD Member countries to control transboundary movements of recoverable waste in an environmentally sound manner. The Amended 2001 Decision recognizes that Member countries may develop their own regulations to determine whether or not materials are controlled as hazardous wastes. Under today's rule, hazardous secondary materials meeting certain conditions and exported for reclamation are not solid wastes under U.S. regulation. The Agency notes, however, that once hazardous secondary materials reach the border of the receiving country, the hazardous secondary material is regulated in accordance with the receiving country's laws and regulations. In other words, such hazardous secondary materials that are not solid and hazardous wastes under the U.S. hazardous waste regulations may be solid and hazardous wastes under the receiving country's regulations and, therefore, facilities should be aware of the requirements that competent authorities of receiving countries may impose.

Additionally, some commenters asserted that today's rule was inconsistent with the Basel Convention, a separate multilateral international agreement governing the transboundary movements of hazardous wastes. The U.S., however, is not a party to the Basel Convention and thus is not held to the Convention's agreements (although, because the Convention prohibits exports between a Basel party and a non-Basel party, the U.S. may not export hazardous waste to any Basel party, absent a bilateral or multilateral agreement with that party). Beyond this point, EPA, in any case, considers today's rule to be consistent with Basel for the same reason that it is consistent with the OECD agreement described above.

In response to comments on allowing exports under the generator-controlled exclusion, we note this exclusion is subject to few restrictions and is largely based on the assumption that hazardous secondary materials are unlikely to be discarded because they would be closely managed and monitored by a single entity. However, this same assumption does not pertain to exports of hazardous secondary materials because EPA would not be able to ensure the close management and monitoring by a single entity of hazardous secondary materials in a foreign country. Accordingly, we believe that hazardous secondary materials exported for reclamation is excluded only if the receiving country has consented and is provided an opportunity to determine and ensure that hazardous secondary materials exported to its reclamation facilities are not discarded.

Additionally, we note that in today's rule we have replaced the term ''exporter,'' which was used in the March 2007 supplemental proposal, with the term ''hazardous secondary material generator.'' This is because, under the exclusion for hazardous secondary materials exported for reclamation (today's 40 CFR 261.4(a)(25)), the ''exporter'' is required to comply with the generator responsibilities listed under the transfer-based exclusion (such as reasonable efforts), as well as notice and consent and annual reports. By replacing the term ''exporter'' with ''hazardous secondary material generator,'' we are clarifying that for hazardous secondary materials exported for reclamation, the hazardous secondary material generator is responsible for notice and consent and for submitting annual reports. We would also like to clarify that intermediate facilities can still be used for exports (as with the transfer-based exclusion), but the generator, not the intermediate facility, must comply with the notice and consent and annual report requirements. This is because the intermediate facility cannot perform the generator responsibilities under the transfer-based exclusions and, therefore, cannot perform the duties of the ''exporter'' under this rule. We also note that this exclusion specifically references the condition in § 261.4(a)(24)(iv) that recycling be legitimate as specified in § 260.43.

Comments: Annual Reports

In the proposed rule, we solicited comment on whether facilities managing hazardous secondary materials under the exclusions should be required to submit periodic (e.g., annual) reports detailing their recycling activities, such as information on the types or volumes of hazardous secondary materials reclaimed or other relevant information.

With respect to exports, a few commenters suggested that we add to 40 CFR 261.4(a)(25) a requirement that hazardous secondary material generators submit annual reports regarding the exports of their hazardous secondary materials. This requirement would be similar to the requirement currently in 40 CFR part 262 subpart E, in which primary exporters must submit annual reports regarding exports of hazardous waste. Conversely, a few commenters urged EPA to finalize the export requirements, as proposed with at least one commenter explicitly agreeing with EPA's proposal not to require annual reports for hazardous secondary material generators.

EPA's Response: Annual Reports

The Agency agrees with those commenters who supported a requirement for hazardous secondary material generators to submit to EPA annual reports regarding the exports of their hazardous secondary materials. We believe that such a requirement will help determine that hazardous secondary materials exported for reclamation are handled as commodities and not discarded. We have, therefore, added a provision to 40 CFR 261.4(a)(25) requiring hazardous secondary material generators who export hazardous secondary materials to file a report with the Office of Enforcement and Compliance Assurance [19] that summarizes the types, quantities, frequency, and ultimate destination of all hazardous secondary materials exported for reclamation during the previous calendar year. Such reports would document the total amount of hazardous secondary materials exported during the calendar year, which is often not the same as the amount specified in an export notice. Such a report would also enable EPA to compare actual shipments in the annual report against proposed shipments in the export notice to ensure that the shipments occurred under the terms approved by the receiving country. Finally, such a report would enable EPA to provide summary information, if requested by a receiving country, that could assist the receiving country in determining what amount of hazardous secondary materials was received in that country for reclamation.

Comments and EPA's Response: Tacit Consent

In the March 2007 supplemental proposal, we specified that the hazardous secondary material generator must receive consent (through EPA) in writing from the receiving country before the hazardous secondary materials could be exported. Some commenters pointed out that under the existing export regulations for hazardous wastes exported to OECD Member countries, the receiving country may use tacit consent to respond to the notification (40 CFR part 262 subpart H). Commenters expressed concern that this was a point of confusion, as fully regulated hazardous wastes are eligible for tacit consent, whereas excluded hazardous secondary materials would require consent in writing. To eliminate this confusion, EPA has added a provision to the regulations that allows tacit consent for hazardous secondary materials exported to OECD Member countries similar to that allowed for hazardous wastes under 40 CFR part 262 subpart H. We note that Canada and Mexico, though OECD Member countries, typically require written consent for exports to their countries.

For a detailed description of today's exclusion for hazardous secondary materials exported for reclamation, see section VIII.C.5. of today's preamble.

F. Notification and Other Recordkeeping and Reporting Requirements

EPA proposed a total of three recordkeeping and reporting requirements in the March 2007 supplemental proposal: (1) A one-time notification to be submitted by hazardous secondary material generators and reclaimers (required for both the generator-controlled and the transfer-based exclusions); (2) for the transfer-based exclusion, a requirement for both the hazardous secondary material generator and reclaimer to maintain for three years records of all off-site shipments of excluded hazardous secondary materials (either sent by the generator or received by the reclaimer); and (3) notice and consent for hazardous secondary materials exported for reclamation in foreign countries.

Comments: General Recordkeeping and Reporting Requirements

Many commenters supported increasing the recordkeeping and reporting requirements in order to adequately monitor compliance with the exclusions and to measure increases in

[19] The Office of Enforcement and Compliance Assurance (OECA) is the office within EPA that implements the notice and consent process for exports.

safe hazardous waste recycling. Alternatively, some commenters urged EPA to finalize the requirements as proposed, cautioning that onerous reporting and recordkeeping requirements would discourage facilities from taking advantage of the exclusions. A few commenters questioned EPA's authority for including recordkeeping and reporting requirements altogether; these commenters argued that, since hazardous secondary materials are not solid wastes and thus not subject to regulation, recordkeeping and reporting requirements should not apply.

EPA's Response: General Recordkeeping and Reporting Requirements

EPA agrees with the majority of commenters and believes that additional recordkeeping and reporting requirements are necessary to enable effective and credible oversight. We therefore consider the recordkeeping and reporting requirements in today's rule to be the minimum information necessary to determine that hazardous secondary materials are reclaimed and not discarded. Some of the recordkeeping requirements that we are finalizing today are discussed in detail within other relevant sections of today's preamble (see section XVII.B. for our response to comments on documentation and certification of reasonable efforts and section VII.C. for a detailed description of financial assurance). This section focuses on our response to comments regarding the notification requirement and, for the transfer-based exclusion, the requirement that the generator maintain confirmations of receipt of hazardous secondary materials from the reclamation facility and intermediate facility.

Comments: Notification as a Condition of the Exclusion

In the March 2007 supplemental proposal, EPA noted that the one-time notification requirement under the authority of RCRA section 3007 would not be a condition of the exclusions, and that failure to notify, while constituting a violation of the notification regulations, would not affect the excluded status of the hazardous secondary materials.

A number of commenters disagreed with this rationale and argued instead that the notification requirement should be made a condition of the exclusions. These commenters stated that, as proposed, the notification requirement would create an unintended incentive for hazardous secondary material generators and reclaimers *not* to notify, because those who chose not to notify would likely evade oversight for many years and, if caught, could simply regard the ''paperwork violation,'' and possible penalty for that violation, as a cost of doing business. These commenters maintained that the failure of a hazardous secondary material generator or reclaimer to provide notification is a strong indication that these entities are either unaware of or trying to circumvent the regulatory requirements, in both cases possibly increasing the likelihood for environmental damage. Therefore, these commenters argued that failure to notify should be regarded as more serious than a reporting violation and should, therefore, remove the excluded status of the hazardous secondary materials.

Conversely, some commenters supported EPA's proposed approach, agreeing that if an entity fails to notify, it does not necessarily indicate that the hazardous secondary materials were discarded and, therefore, should not automatically affect the excluded status of the materials.

EPA's Response: Notification as a Condition of the Exclusion

At issue here is not the requirement to submit a notification, but rather the consequences an entity would face for failing to notify. Notification as a *requirement* under the authority of RCRA section 3007 of the exclusion means failure to notify would constitute a violation of the notification regulations. On the other hand, notification as a *condition* of the exclusion means failure to notify would potentially result in the loss of the exclusion for the hazardous secondary materials (i.e., the hazardous secondary materials would become solid and hazardous wastes and subject to full Subtitle C regulation). In context with this issue, EPA considered the intent of the notification, which is to provide basic information to regulatory agencies about who will be managing hazardous secondary materials under the exclusions. This basic information enables regulatory agencies to administer oversight and set enforcement priorities, but does not allow regulatory agencies to directly determine that hazardous secondary materials were discarded. In other words, a generator or reclaimer could fail to notify yet still be legitimately recycling their hazardous secondary materials according to the conditions of the exclusion. Therefore, EPA is retaining notification as a requirement under the authority of RCRA section 3007, and, thus, notification is not a condition of today's exclusions.

Comments: Format of Notification

In the March 2007 supplemental proposal, EPA requested comment on whether the notification should be submitted in a particular format and discussed the option of using the Subtitle C Site Identification Form (EPA Form 8700–12) to collect the information. By far, the majority of commenters were in favor of using the Site ID form, pointing out that EPA would effectively minimize burden by leveraging this form because it is already familiar to the regulated community. Of the very few commenters opposed to using the Site ID form, some argued that the form was not appropriate for collecting information on hazardous secondary materials because it is primarily used to collect information regarding hazardous wastes. However, other commenters thought the Site ID form was appropriate because it is currently used to collect information on other types of recycling activities not subject to full Subtitle C regulation, such as used oil and universal waste activities. Finally, some commenters supported use of the Site ID form because it would result in standardized and consistent data that users could electronically access through EPA's databases.

EPA's Response: Format of Notification

EPA agrees with the majority of commenters and is requiring hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers and intermediate facilities managing hazardous secondary materials to use the Site ID form (EPA Form 8700–12) when notifying in accordance with today's rule. We believe that the Site ID form will provide standardized data, while minimizing the collection burden because many facilities notifying under today's rule are already familiar with the form and will not need to invest resources in learning a new form and process. EPA also agrees with commenters who stated that the form is appropriate for today's rule, since it already collects information on other types of recycling activities. However, EPA will modify the current Site ID form in order to accommodate the notification requirement for today's rule.

Comments: Types of Information in Notification

In the March 2007 supplemental proposal, EPA proposed that generators and reclaimers of hazardous secondary materials include in the notification the name, address, and EPA ID number (if

applicable) of the generator or reclaimer; the name and number of a contact person; the type of hazardous secondary materials that would be managed according to the exclusion; and when the hazardous secondary materials would begin to be managed in accordance with the exclusion. Many commenters, particularly states, argued that this information was insufficient to monitor hazardous secondary material generators and reclaimers adequately and, instead, suggested additional types of information to include in the notification, such as quantity of the hazardous secondary materials managed under the exclusion, the name and EPA ID number of the reclaimer receiving the hazardous secondary materials and a description of the recycling process. These commenters argued that additional information was important to monitor compliance of the facilities with the exclusions and to measure increases in safe hazardous secondary materials recycling.

On the other hand, some commenters urged EPA to retain the basic information in the notification as proposed. These commenters questioned how additional information would assist with defining discard and also noted that EPA, historically, has not required notification for the existing self-implementing exclusions from the definition of solid waste located in 40 CFR 261.4.

EPA's Response: Types of Information in Notification

After carefully considering these comments, we agree with those commenters who support requiring additional information in the notification in order to monitor compliance with the exclusions adequately. We believe today's notification requirement reflects the minimum amount of information needed to identify which facilities will be managing hazardous secondary materials under today's rule in order to enable regulatory agencies to administer oversight and ensure that hazardous secondary materials are reclaimed and not discarded. We, however, did not include suggested data elements that might be difficult or complex to collect, such as a description of the recycling process, and did not include information that is more appropriately documented and maintained at the facility. For example, some commenters suggested adding a requirement that generators indicate the identity of the reclaimer receiving their hazardous secondary materials for reclamation; however, under today's transfer-based exclusion, this information is already documented as part of the requirement for hazardous secondary material generators to keep records of all off-site shipments.

We consider the information we are requiring in the notification under today's rule to reflect what responsible companies would routinely collect as part of their normal business operations. For example, responsible companies track quantities of valuable commodities that are managed on-site or shipped off-site and, thus, we believe reporting quantities of hazardous secondary materials managed in the notification will not present an undue burden.

Furthermore, we note that EPA currently requires notification under certain of the 261.4 exclusions, such as for spent materials generated and recovered within the primary mineral processing industry (40 CFR 261.4(a)(17)) and for hazardous secondary materials used to make zinc micronutrient fertilizers (40 CFR 261.4(a)(20)) and, thus, we do not agree with those commenters who believe that the notification requirement is inconsistent with the existing solid waste exclusion requirements.

For a detailed discussion on the notification requirement that EPA is finalizing today, see sections VII.C. and VIII.C.

Comments: Periodic Reporting

In the March 2007 supplemental proposal, EPA proposed that hazardous secondary material generators and reclaimers submit a one-time notification, but asked for comment on whether facilities using the exclusion should be required to submit periodic (e.g., annual) reports detailing their recycling activities.

Several commenters supported requiring periodic reports (or periodic notification). These commenters argued that data collected in a one-time notification would become obsolete very quickly and would likely require substantial investment in order to 'clean up' the information before it could be used, a resource burden that would likely fall on the states. For example, over time, some facilities that originally submitted a one-time notification would cease managing hazardous secondary materials according to the exclusion. Some commenters argued that, by using a one-time notification approach, it would be a challenge to identify these facilities and, subsequently, a challenge to compile a list of facilities who are currently managing hazardous secondary materials according to the exclusions, thereby inhibiting the states' ability to monitor compliance at these facilities.

Furthermore, as one state commenter said, some generators managing hazardous secondary materials will go out of business and without a steady feed of updated information, states have no way of knowing which generating facilities have closed and, thus, are unable to ensure that their hazardous secondary materials were reclaimed and not discarded. This leaves states acutely vulnerable to costs incurred from potential environmental damage caused by abandonment of the hazardous secondary materials.

Other commenters noted that periodic notifications would allow public agencies to compile credible information regarding hazardous secondary materials recycling that can be used to demonstrate success, target additional recycling opportunities, and improve the public's understanding and acceptance of recycling practices. One commenter also supported a clear requirement to file periodically in order to reduce confusion regarding when to re-notify and also to ensure that the information was kept accurate and current.

On the other hand, some commenters urged EPA to finalize the notification requirements as proposed and stressed that numerous recordkeeping and reporting requirements may inhibit facilities from taking advantage of the exclusions, thereby discouraging further increases in recycling.

EPA's Response: Periodic Reporting

In considering these comments, EPA reflected on the intent of the notification requirement, which is to provide basic information to regulatory agencies about who is managing hazardous secondary materials under the exclusions in order to monitor compliance with the exclusions. As commenters noted, with a one-time notification approach, there is no assurance that the information collected in EPA's databases over time will accurately reflect facilities that are managing hazardous secondary materials according to the exclusion. Therefore, the Agency can imagine instances where precious resources are required to be spent on 'cleaning up' the data before regulatory authorities can use it to identify facilities who are currently managing hazardous secondary materials under the exclusions. With a one-time notification, we can also foresee problems where regulatory agencies spend time and resources monitoring compliance at facilities that have since stopped managing hazardous secondary materials at some point in the past. This inefficient use of resources would serve to lower the effectiveness of regulators

to monitor compliance overall and could potentially increase the risk of environmental damage from abuse of today's exclusions.

EPA further believes that responsibility for submitting and maintaining updated information lies with the hazardous secondary material generators, reclaimers, and intermediate facilities that use today's exclusions. We understand arguments made by commenters that, as originally proposed, the one-time notification would in effect reverse this responsibility, placing an unreasonable burden on the states and EPA to 'clean up' the data every time a regulating agency sought to use the information. Instead, the incremental burden to facilities who must submit periodic notifications is minimal compared to the considerable public expense that states and EPA would likely incur over time in order to use the information submitted in a one-time notification. Once an initial notification is submitted, to re-notify, a facility need only review the previous notification and either make changes if necessary or confirm that the information remains accurate. EPA has chosen to use the Site ID form for this notification because it is standardized, electronically-accessible, and familiar to the regulated community and, therefore, will assist facilities by reducing the overall time and effort required to report the information. Currently, large quantity generators on average spend $364 a year on biennial reporting under full Subtitle C regulation, whereas under today's rule, an initial notification is estimated to be only a third of that cost, with subsequent notifications likely costing even less.[20] EPA has designed the notification requirement in today's rule to strike an appropriate balance between providing essential information to regulators, while keeping additional burden at a minimum.

We are convinced of the validity of the above arguments raised by commenters in support of periodic reporting and agree that the limitations of a one-time notification approach would undermine the purpose of the notification. Therefore, EPA is requiring hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities managing hazardous secondary materials to notify the Regional Administrator prior to operating under the exclusions and by March 1 of each even-numbered year thereafter. We chose the two-year time frame to reflect both commenters' suggestions (of those who supported periodic reporting, most suggested annual or biennial reporting) and to best fit with the biennial reporting process for hazardous wastes (pursuant to 40 CFR 262.41, biennial reports are due by March 1 of each even-numbered year). Since many facilities are accustomed to the biennial reporting process and likely have structured their processes around the biennial report schedule, we chose the same calendar date for the notification requirement in order to allow facilities to leverage their existing processes and submit the notification at the same time their biennial report is due.

Comments: Confirmation of Receipt

In the March 2007 supplemental proposal, EPA requested comment on whether hazardous secondary material generators should be required to maintain confirmations of receipt of the hazardous secondary materials by the reclaimer. Many commenters expressed support for this requirement, citing that responsible commercial recyclers routinely issue receipt confirmations or ''recycling certificates'' to assure the generator that its hazardous secondary materials reached the intended destination and were not discarded. Of those who supported the requirement, many argued that EPA should not specify a specific form of documentation so that facilities could leverage existing business practices already in place to track valuable commodities. A few commenters continued to urge EPA to be conscious of the imposition of additional recordkeeping and reporting requirements lest the Agency discourage recycling of hazardous secondary materials.

EPA's Response: Confirmation of Receipt

We agree with commenters who support requiring confirmation of receipts and are, therefore, adding to 40 CFR 261.4(a)(24) a requirement that generators maintain confirmation of receipts from reclaimers and intermediate facilities for all off-site shipments of excluded hazardous secondary materials for a period of three years. Under today's rule, hazardous secondary materials may be transferred to intermediate facilities for storage or, where reclamation consists of multiple steps occurring at separate facilities, may be transferred to more than one reclaimer. This requirement would confirm that the hazardous secondary materials did in fact reach the reclaimer (or each reclaimer, if reclamation occurs at separate facilities) and any intermediate facility as originally intended and were not discarded. EPA also agrees with commenters that responsible companies would produce and maintain receipts as part of their normal business operations and, thus, the Agency believes this requirement will not pose an undue burden. The Agency is not specifying a certain form or format for this documentation, but instead provides examples of routine business records that would contain the appropriate information in section VIII.C.4. of today's preamble and in today's rule.

XVIII. Major Comments on Legitimacy

A. Codification of Legitimacy Factors

EPA's October 2003 proposal to codify the legitimacy criteria was in response to the comments that have been made over the years by both industry and states that the existing legitimacy guidance is useful, but somewhat hard for members of the regulated community to know about because it could only be found in preamble discussions and guidance. The March 2007 supplemental proposal made some adjustments to the October 2003 proposal, including a change from the term ''criteria'' to ''factors,'' but left intact the general intention to codify those legitimacy factors for all recycling. As expected, the Agency received public comments from both state environmental agencies and from industry on our approach.

Comments: Codification of Legitimacy.

State commenters were unanimously in favor of codifying the legitimacy factors in the regulations. In response to the October 2003 proposal, twenty-three states expressed their support for codification. In comments to the March 2007 supplemental proposal, two additional states supported codification of the proposed factors. All twelve states that commented on legitimacy in both proposals expressed their strong support for codification in both their 2003 and 2007 comments.

States have long advocated for establishing regulations that specifically address the legitimacy of recycling. In response to EPA's proposals, many states commented that they are currently relying on the concept of legitimacy as laid out in definition of solid waste preambles and in the 1989 ''Lowrance Memo'' guidance because they are the best sources of information that can be used in evaluating a recycling operation. Codification is a

[20] Estimates are from the Regulatory Impact Analysis for U.S. EPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions from the Definition of Solid Waste.

priority to the states because, as a regulation, the requirement for recycling to be legitimate would be better known and understood by the regulated community and it would be easier for states to monitor compliance. One commenter stated that it makes more sense to implement a regulation than a collection of statements found in guidance.

Industry commenters, on the other hand, were split on the issue of codification. Including comments from both the October 2003 proposal and the March 2007 supplemental proposal, just over half of the industry commenters opposed codification of the legitimacy factors, although they tended to express support in their comments for the purpose and goals of the legitimacy factors and agree with the goal of identifying which processes are true recycling and which are sham recycling. Several industry commenters stated that the guidance is working well already and many of those opposed to codification expressed concern that if the legitimacy factors were codified, they would lose the flexibility in the guidance that allows the factors to apply to many varied industrial sectors and processes, automatically becoming more stringent. Another concern expressed by the commenters regarding codification of the legitimacy factors was that, in their view, the terms used in the regulatory text are too ambiguous and should be clarified before they can be part of a regulation. These commenters argue that codification of the factors without addressing these concerns would automatically be more stringent than having guidance, thereby inappropriately inhibiting legitimate recycling.

About one-third of the forty-two industry commenters on the issue of whether or not to codify backed the codification of the legitimacy factors. Many of these commenters represented segments of the waste management industry, but a number of representatives of generating industries also made this comment. The industry commenters that supported codification stated that they did so because it would provide clarity, consistency, and predictability by making it more apparent which hazardous secondary materials and processes are covered by the recycling exclusions. One commenter noted the value in the legitimacy factors going through the notice and comment process since they are being used by the states in implementation of the regulations and another expressed an expectation that the codified requirements would lead to more uniformity in interpretation between implementing agencies. Several of these commenters also stated that they also valued the flexibility of the structure of the Lowrance memo and stressed the importance of the codified legitimacy factors retaining that flexibility.

In addition, several more industry commenters stated that they saw the value in codifying the legitimacy factors and could support its codification under certain conditions. The suggested conditions included the codification of only the two proposed mandatory factors, codification of the factors in conjunction with finalizing what we called the ''broader exclusion'' option in the October 2003 proposal, and codification of legitimacy factors to be used only with the definition of solid waste exclusions that were included within the supplemental proposal in March 2007.

EPA's Response: Codification of Legitimacy.

In today's final rule, EPA is codifying the legitimacy factors as a requirement for today's exclusions and for the non-waste determinations, but not for all recycling. To avoid confusion among the regulated community, as well as the state and other implementing regulatory agencies about the status of recycling under the existing exclusions, EPA is not codifying the legitimacy factors as specifically applicable to existing exemptions in today's final rule. In developing the codified legitimacy language, we did not intend to raise questions about the status of legitimacy determinations that underlie existing exclusions from the definition of solid waste, or about case-specific determinations that have been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports, remain in effect.

In codifying the legitimacy provisions for the exclusions and non-waste determinations in today's final rule, EPA has taken into consideration all the comments it received in response to the October 2003 proposal and March 2007 supplemental proposal on the structure of the legitimacy factors, as well as on the individual factors themselves and has made the appropriate changes to the factors to address those comments.

In response to a general comment, EPA is aware of the comments that each of the terms in the legitimacy regulations should be more clearly defined and the suggestions for specific tests for each of the factors. We are, however, seeking a balance between having a set of specific tests and having the flexibility needed for a requirement that applies to the range of recycling practices in various industries in different industrial or commercial settings.

Therefore, in response to comments, the discussion of legitimacy in today's preamble describes more clearly what EPA means by the terms we use in the regulatory text for this element of the final rule. The Agency also is providing more examples of both legitimate and sham recycling than were included in the discussions of the individual factors in the preambles for the October 2003 proposal and March 2007 supplemental proposal to illustrate the meaning of the legitimacy factors. The Agency also is stressing the importance of case-by-case determinations that are based on the facts of a specific situation.

B. Effect on Current Determinations of Legitimate Recycling Activities

In the March 2007 supplemental proposal, EPA stated its opinion that the concept of legitimate recycling originally proposed in October 2003 is not substantively different from our longstanding policy, as articulated in the 1989 Lowrance Memo and subsequent preambles. We stated that we were simply reorganizing, streamlining, and clarifying the existing legitimacy principles. Thus, we stated in the March 2007 supplemental proposal that we believe that the regulatory definition of legitimate recycling, when applied to specific recycling scenarios, would result in determinations that were consistent with EPA's earlier policy. We went on to say that we did not believe the regulated community or implementing agencies would need to revisit previous legitimacy determinations. However, we did request examples of determinations which could be impacted by the codification.

Comments: Relationships With Existing Determinations

Commenters expressed concern that, in spite of EPA's intentions, the codification could prompt implementing agencies to revisit past legitimacy determinations. In addition, comments on the October 2003 proposed rule suggested that implementing agencies could interpret the proposed regulatory text as meaning that a recycling activity must satisfy all four of the factors to be considered legitimate. Several commenters on the March 2007 supplemental proposal stated that legitimacy should not apply to the existing recycling exclusions in the current regulations and others were

concerned that codification may lead implementing agencies to consider only the four factors and not consider other key information about the recycling activity.

EPA's Response: Relationships With Existing Determinations

Regarding the existing exclusions in the regulations, EPA acknowledges that, in establishing a specific exclusion, we have already determined in the rulemaking record that the specific recycling practice is excluded from the definition of solid waste provided all the conditions of the rule are met. However, the Agency has always enforced its rules on the basis that any recycling must be legitimate (See *U.S.* v. *Self*, 2 F. 3d 1071, 1079 (10th Cir. 1993); *U.S.* v. *Marine Shale Processors*, 81 F. 3d 1361, 1366 (5th Cir. 1996): *Marine Shale Processors* v. *EPA*, 81 F. 3d 1371, 1381–83 (5th Cir. 1996)). This is meant to prevent a company from claiming to be operating under an existing exclusion and simply using that as a way to avoid full RCRA Subtitle C regulation.

However, to avoid confusion among the regulated community and state and other implementing agencies about the status of recycling under existing exclusions, we have decided that the focus of this rule should be the specific changes it is making to the definition of solid waste in the form of the exclusions and non-waste determinations finalized today. Thus, the legitimacy factors codified in 40 CFR 260.43 only apply to the exclusions and non-waste determination process being finalized in this rule and we do not expect implementing agencies to revisit past legitimacy determinations based on this final rule preamble language.

Also, it should be noted that the regulatory language does not preclude other considerations when looking at the codified factors for making legitimacy determinations. We recognize that additional information about the recycling activity could be helpful and could be used when assessing the four legitimacy factors and in making a determination about whether a specific recycling activity is legitimate. In fact, we encourage the regulated community and implementing agencies to use any and all information about the recycling process to come to an informed decision on the legitimacy of a hazardous secondary material recycling operation. However, given the public comment on the October 2003 proposed rule and the March 2007 supplemental proposal, no other factors have been identified and we believe that the four legitimacy factors codified in this rule include the relevant principles of legitimate recycling for the purposes of the exclusions and non-waste determinations being finalized today.

C. Revised Structure for the Definition of Legitimate Recycling

In the March 2007 supplemental proposal, we proposed a new structure for the definition of legitimate recycling. The first part consisted of those factors that must be met, which included a requirement that the hazardous secondary materials being recycled provide a useful contribution to the recycling process or to the product of the recycling process and a requirement that the product of the recycling process be valuable. EPA considers these two factors to be fundamental to legitimate recycling and if a recycling process does not meet them, it is sham recycling (i.e., treatment or disposal of a hazardous waste under the guise of recycling).

The second part of the proposed structure included two additional factors that must be taken into account when a legitimacy determination is being made. We explained that while these two additional factors are important in determining whether a particular process is legitimate, there may be circumstances under which a legitimate recycling process might not conform to one or both of these factors. The two additional factors are whether the hazardous secondary materials are managed as a valuable commodity and whether the product of the recycling process contains significant concentrations of hazardous constituents. We note, however, that in cases where a recycling practice does not meet one or both of these factors, the hazardous secondary material generator and/or recycler should be able to demonstrate why the recycling is in fact still legitimate.

Comments: Revised Structure

The public comments on the individual factors in the March 2007 supplemental proposal showed that, as in the comments to the October 2003 proposal, there continues to be general agreement from industry and state commenters on two factors (useful contribution and valuable product/intermediate). Commenters were virtually unanimous in their agreement that these two factors are crucial indicators of legitimacy and should be included in the concept of legitimacy. In other words, there was agreement that recycling cannot be legitimate if the material being recycled does not provide a useful contribution to the process or to the product and if the recycling process does not yield a product or intermediate that is valuable to someone. Certain commenters requested that EPA provide additional information on how it defines these terms and, while there was some disagreement with the specifics laid out in the preamble, there was little disagreement with the basic overarching concepts.

Although there was support for the structure for legitimacy that was proposed in the March 2007 supplemental proposal, most states, the environmental community, and the waste management industry argued that all four of the factors should be mandatory requirements-that is, they must all be met for the recycling activity to be considered legitimate recycling. Industry had a more mixed response to this issue with some supporting the proposed structure and others preferring that the factors be finalized as balancing factors. Others expressed their opinion that while they preferred non-mandatory criteria, the proposed approach was reasonable. Several commenters expressed their preference for keeping the legitimacy factors as guidance, but stated that if the Agency decided to codify the legitimacy factors, they preferred the structure as proposed in the March 2007 supplemental proposal.

EPA's Response: Revised Structure

EPA agrees with the commenters on the importance of the two factors (useful contribution and valuable product/intermediate) that were proposed to be mandatory in evaluating legitimate recycling and, for this final rule, we have decided that these two concepts are, in fact, at the very core of what it means to recycle legitimately. Therefore, the final regulatory language states in 40 CFR 260.43(b) that ''[l]egitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process, and the recycling process must produce a valuable product or intermediate.'' This statement is followed by clauses (1) and (2) that give more details on how the Agency defines these concepts.

EPA has determined that the other two factors are still important in making legitimacy determinations, but do not necessarily have to be met for the recycling activity to be considered legitimate. Instead, the regulations state that a person making a legitimacy determination must consider these two factors, which are found in § 260.43(c) of the final language. In stating that the factors must be considered, EPA expects that those making legitimacy determinations will evaluate how the

hazardous secondary materials in question are managed as compared to analogous raw materials and how levels of hazardous constituents in their products compare with the levels of hazardous constituents in analogous products. If the generator or recycler determines that one or both of these factors are not met, that person should be prepared to explain why their recycling activity is nevertheless still legitimate. As described in § 260.43(c)(3) of the regulatory text, in evaluating the extent to which these factors are met and in determining whether a process that does not meet one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations. We would note that the facility may be requested to demonstrate the legitimacy of their recycling process and explain why failure to meet one or both of these factors does not affect the legitimacy of the recycling process.

Comments: Mandatory Factors

As part of the October 2003 proposal, the Agency solicited comment on whether the factors should continue to be used in the same way as the previous guidance had been used, as factors to be balanced or considered in making an overall determination, or whether the factors should be structured differently in the final rule, such as in the form of mandatory requirements that must all be met. Based on the comments received on that proposed rulemaking, we proposed a new structure in the March 2007 supplemental proposal with two mandatory factors and two factors that must be taken into account, but not necessarily met in every situation (72 FR 14198).

Many state implementing agencies argued that all the factors should be written as mandatory requirements that must be met. Most industry commenters (but not all) did not. The main argument in favor of making the factors mandatory requirements is that commenters argued that this approach would result in legitimacy determinations that are more objective and more enforceable. The main arguments against making all the factors mandatory requirements is that the overall determination is made on a case-by-case basis, which is often facility-specific, and not all legitimate recycling can fit into such a rigid system.

EPA's Response: Mandatory Factors

The Agency can see both state and industry viewpoints and, in the end, as described above, has decided upon a course of action that results in a compromise between the two approaches. In section IX of this preamble, we explain in detail the final design of the legitimacy factors, which includes two factors that must be met (useful contribution and valuable product/intermediate) and two factors that must be taken into account in making an overall legitimacy determination. We believe this approach and the attendant regulatory language is clearer than the existing guidance, yet retains enough flexibility to account for the variety of legitimate hazardous secondary materials recycling practices that exist today.

D. Comments on the Specific Factors

In developing the legitimacy factors, the Agency sought a balance between having a set of specific tests and having the flexibility that is necessary to allow the four legitimacy factors to apply to hazardous secondary material recycling practices in the many industrial or commercial settings to which the factors would be applied. As a result, each of the legitimacy factors included a term or terms that drew public comments arguing that the factors were not clearly enough defined. The underlined terms in the following excerpts from the regulatory text demonstrate what these terms are:

- Factor 1: ''Legitimate recycling must involve a hazardous secondary material that provides a *useful contribution* to the recycling process or to a product of the recycling process.''
- Factor 2: ''The recycling process must produce a *valuable* product or intermediate.''
- Factor 3: ''The generator and recycler should manage the material as a *valuable* commodity * * * Where there is no analogous raw material, the hazardous secondary material should be *contained*.''
- Factor 4: ''The product of the recycling process does not contain *significant* concentrations of hazardous constituents [or] contain concentrations * * * at levels that are *significantly* elevated from those found in analogous products.''

The October 2003 proposal gave some narrative descriptions of these terms to explain what they mean in the context of legitimate recycling, but that proposal did not provide any concrete tests for how those specific terms are to be used when judging whether a process and/or hazardous secondary material meets these factors.

Comments: Defining Legitimacy Terms

For each of the four factors, the Agency received public comments that focused specifically on the meaning of and the difficulties in implementing these factors when the terms are not accompanied by a test for the hazardous secondary material generators and recyclers to use when making determinations of legitimacy. For the first factor, the Agency received several comments on the definition of ''useful contribution'' from the October 2003 proposal. For the second factor, over twenty commenters submitted comments on the definition of ''valuable'' in response to the October 2003 proposal. In addition, the Agency received several comments on the definition of ''valuable'' and on the definition of ''contained'' related to the third factor and over twenty comments on the definition of ''significant'' in the fourth factor. We also received some additional comments on the March 2007 supplemental proposal relating to the same definitional terms in each factor.

The comments on these terms will be described in more depth in the discussion below for each of the applicable factors, but, in general, the comments showed a wide range of opinions: Some commenters found the discussion in the preamble to define the terms was adequate and appropriate, other commenters objected to the terms as not being clearly defined, while still other commenters found the terms to be too subjective to be a useful tool. We also received comments that suggested alternative ways to define the terms to be clearer or to better meet the Agency's objectives.

EPA's Response: Defining Legitimacy Terms

The Agency has incorporated the ideas generated by the comment process into the final rule, as appropriate. The final language and decisions regarding the legitimacy factors are laid out below in this section and in section IX of this preamble, where the final legitimacy language is discussed more fully. However, after considering the comments, we have decided that we would not develop specific definitions or precise tests that hazardous secondary material generators and recyclers must use when making legitimacy determinations. Instead, the Agency has bolstered our preamble discussion on the meaning of these terms and has included more examples than we had in the preambles to the October 2003 proposal and the March 2007 supplemental proposal.

EPA's decision not to include specific bright-line tests for the final legitimacy factors reflects the fact that legitimacy determinations do not lend themselves to the application of absolute distinctions, especially given the breadth of recycling practices and recycled hazardous secondary materials that exist in industry. The main argument we received for developing specific tests was that, without specific tests, those making legitimacy determinations may be uncertain about whether their regulatory agency would agree with that interpretation of the recycling scenario. This may lead to reduced recycling rates if companies choose not to take advantage of the exclusions for recycling rather than risk interpreting their activities differently than the regulator does.

Although we understand the concerns behind this argument, we are addressing them by including more discussion and explanations of the final factors in the preamble to the final rule. The complexities of defining ''valuable commodity/product,'' ''useful contribution,'' ''contained,'' and ''significant'' so that they can be determined through a bright-line test and are still appropriate for all industries, all recycling processes, and all recycled hazardous secondary materials are too great for the Agency to be able to design a simple and straightforward system of tests to be used in making such determinations. The complex regulatory system of tests for different types of industries or different processes that would be necessary would not be efficient or accessible to most generators, especially small businesses.

In addition, we believe that legitimacy determinations are best made on a case-by-case basis, which has always been the case, with the facts of a specific situation in hand. In a case-by-case determination, a series of specific tests may not be as useful and as accurate in determining legitimacy as careful consideration of the hazardous secondary material, the recycling process, and the specifics of the situation would be. If a person has any questions as to the legitimacy of a particular recycling activity, he can always approach the appropriate regulatory agency for assistance in making a legitimacy determination.

Comments: Factor 1—The Hazardous Secondary Material Provides a Useful Contribution

Factor 1 expresses the fundamental principle that hazardous secondary materials must actually be useful (i.e., contribute positively) to the recycling process and is intended to prevent the practice of incorporating hazardous secondary materials within manufacturing operations simply as a means of disposing of them. The Agency firmly believes that this concept is crucial to the definition of legitimacy and is finalizing it as part of the core definition. This factor, along with the second factor described below, must be met for any recycling activity to be considered legitimate recycling. The regulatory text for this factor is found in 40 CFR 260.43(b)(1).

In general, we received much support for and agreement with the underlying principle of this factor—that the hazardous secondary materials must provide some useful contribution to either the recycling process or the recycled product. Commenters asked for clarification on a number of issues related to this factor, specifically in regard to the October 2003 proposal and how the economics of recycling is connected to this factor and how the economics of recycling should be evaluated. In the March 2007 supplemental proposal, we described how the economics of recycling relates not only to the useful contribution factor but, in fact, to all of the factors of legitimacy and explained our thinking about how evaluating the economics of recycling transactions should be undertaken.

EPA's Response: Factor 1—The Hazardous Secondary Material Provides a Useful Contribution

The Agency is today finalizing this factor as part of the core definition of legitimate recycling and as a factor that must be met for the recycling to be considered legitimate under § 260.43. We also revised the October 2003 proposal discussion regarding the consideration of economics related to this criterion, and we expanded its consideration beyond just the useful contribution criterion. Today, we are offering further guidance, similar to the March 2007 supplemental proposal, which explains how economics may be considered in making legitimacy determinations and how it may apply to the mandatory factors and the factors that must be taken into account.

Comments and EPA's Response: Factor 1—Contribution to the Process

EPA also received comments on our statements in the October 2003 proposal that indicated that not every component of a hazardous secondary material does or must contribute to the recycling process or product of the recycling process in order for there to be an overall contribution. In particular, one state agency favored allowing the non-hazardous component of hazardous secondary materials to provide the useful contribution and one industry commenter agreed that not all of the hazardous secondary material would have to contribute for this factor to be met. Another state agency asked us to clarify that the statement ''not every component of a hazardous secondary material would necessarily have to contribute to the product or the process to meet this criterion'' was applicable only in the context of this factor.

It has been the Agency's longstanding policy that in a legitimacy determination not every constituent or component in a hazardous secondary material would have to contribute to a product of the recycling process or intermediate or to the recycling process in order for there to be an overall contribution and this applies to the provision in § 260.43 as well. For example, the use of hazardous secondary materials in zinc fertilizer is considered legitimate recycling when the zinc, a non-hazardous constituent, is the main contribution to the fertilizer. Another example is the use of CRT glass used in copper smelters as a fluxing agent. In this case, the glass provides a useful contribution by facilitating the manufacturing process. Thus, we agree with those commenters who raised questions about this issue and are restating our position here.

Comments and EPA's Response: Factor 1—Efficiency of the Process

Another issue that was discussed in the October 2003 proposal arising in the context of useful contribution was the efficiency of a recycling process in recovering or regenerating the useful component of the hazardous secondary material. One example we used was the recovery of copper from a hazardous secondary material. We stated that where the process was reasonably efficient and recovered all but a small percentage of the copper, it looked like legitimate recycling. However, where a small percentage of copper in the hazardous secondary material is recovered, sham recycling may be indicated. However, we did not discuss recovery rates in the middle range (e.g., 50% of copper recovered from a particular recycling process) and some commenters asked for clarification, including how the factor applies to hazardous secondary materials that are contributing to the recycling process either as a carrier or a catalyst.

The Agency is clarifying in today's preamble and regulatory text that the useful contribution of a hazardous secondary material to the recycling

process or product can be demonstrated in a number of ways. We provided a number of different ways such a material could contribute to the process in the preamble to the October 2003 proposed rule (68 FR 61584–61585) and did not mean to imply that the hazardous secondary material would have to meet all of the examples to provide a useful contribution. For example, hazardous secondary materials could provide a useful contribution to a process by serving as a carrier or catalyst and the process efficiency would not factor into the demonstration of this factor in this example.

In general, the regulated community should look to typical industry recovery rates to determine if the recycling recovery rates are reasonably efficient in terms of making a useful contribution to the recycling process or product. In addition, it should be noted that EPA would generally look at the quantity or the rate of recovery of the overall process, not the recovery rate of a single step in the process, when analyzing this factor for legitimacy. For example, if one step in the process recovers a small percentage of the constituent, but the overall process recovers a much larger percentage, the Agency would consider the overall efficiency of the recycling process in determining whether hazardous secondary materials are providing a useful contribution. This assumes that there is enough of the target constituent present in the hazardous secondary materials to contribute meaningfully to the recycling activity.

Comments and EPA's Response: Factor 1—Residuals

In the discussion of useful contribution in the October 2003 proposal, in the context of process efficiency, we stated that a ''pattern of mismanagement of the residues'' may be an indicator of sham recycling (68 FR 61584). We received several comments asking us to explain the connection between useful contribution of the hazardous secondary materials and management of residues. Several commenters questioned this statement and disagreed that how a facility managed its residues had any bearing on whether the hazardous secondary materials going into a recycling process were being legitimately recycled.

We agree with the commenters who suggested that the management of residuals from the recycling process is not an indicator of whether the hazardous secondary materials provide a useful contribution and thus is not a factor in determining whether legitimate recycling is occurring. For these reasons, we are making it clear that the management of recycling residuals is not a consideration in making legitimacy determinations. Instead, as part of today's final rule, we are requiring that any residuals that are generated from the recycling process be managed in a manner that is protective of human health and the environment. Specifically, there is a requirement for hazardous secondary material generators to make reasonable efforts to ensure that the hazardous secondary materials are legitimately recycled and, among other things, that the reclaimer manages the hazardous secondary materials in a manner that is protective of human health and the environment, including how any recycling residuals are managed. Finally, we note that the generation of residuals that are solid wastes are subject to the waste characterization and identification requirements in 40 CFR Part 261 as a newly generated waste.

Comments: Factor 2—The Recycling Process Yields a Valuable Product/ Intermediate

This factor is intended to capture the fundamental concept that legitimate recycling must produce something of value. For the purposes of evaluating this factor, a product of the recycling process or intermediate would be considered valuable if it can be shown to have either economic value or value that is more intrinsic (*i.e.*, it is useful to the end user, even though it may not be salable as a product or commodity in the open marketplace). The regulatory text for this factor can be found in 40 CFR 260.43(b)(2).

In general, most commenters agreed with the concept that the recycling process must produce something of value. Many commenters also stressed the importance of keeping the concept of ''intrinsic'' value—that is, a product does not have to be sold to have value. Instead, it can be used as an effective substitute for a commercial product or as a useful ingredient in an industrial process. However, other commenters disagreed, contending that intrinsic value is too subjective to use to determine compliance. One commenter also thought this factor was redundant with the factor that hazardous secondary materials must provide a useful contribution and should be deleted.

Another common concern in the comments was how to evaluate whether the product or intermediate is valuable. Some commenters stressed the importance of evaluating this factor over time, given that markets and prices fluctuate, and others argued that it must be done on a case-by-case basis.

EPA's Response: Factor 2—The Recycling Process Yields a Valuable Product

In general, the Agency agrees with the commenters who stated that a product's value can be either monetary or intrinsic. Clearly, not all valuable products are sold. For example, many legitimate recycling situations exist where the intermediate or product of the recycling process has value and is used on-site, sent off-site to another facility owned by the same company, or even traded between companies. There are a number of already established networks where hazardous secondary materials are exchanged among and across industries. This rule does not interfere with those ongoing exchanges where such materials are being legitimately recycled. One example of such a program is the U.S. Business Council for Sustainable Development's by-product synergy program which has conducted a number of regional pilots in which diverse industries are brought together to facilitate feedstock and by-product exchanges. No money is exchanged in these types of programs.

We are also clarifying in the regulatory text that the product of the recycling process can be either a commercial product or intermediate, as long as it has value to the end user. In addition, we are further clarifying that the regulated community does not need to evaluate each step in the recycling process to determine if the final products or intermediates are valuable. Rather, an individual recycler or generator would look at its final product or intermediate and must be able to demonstrate why it has value.

We understand the concerns of some commenters that intrinsic value is harder to demonstrate than the value of a product of the recycling process that is sold in the open marketplace. While this demonstration is not as straightforward, there are a number of ways the end user can demonstrate the intrinsic value of the recycled intermediate or product. Some examples include showing that the product of the recycling process replaces an alternative product or material that would otherwise have to be purchased or by demonstrating that a product of the recycling process or intermediate meets specific product specifications or established industry standards. Another approach to demonstrating the value of a product of the recycling process or intermediate would be to compare its characteristics (e.g., its physical/ chemical properties or its usefulness for

certain applications) with comparable products or intermediates made from raw materials.

Finally, we disagree with the commenter who stated that this factor is equivalent to the hazardous secondary material making a useful contribution to a product or intermediate. It is certainly possible for a recycling process to result in the production of a valuable product or intermediate without the hazardous secondary materials added to the process making any contribution whatsoever. For example, this would be the case when hazardous secondary materials are added to the process and all of the hazardous secondary materials, including the hazardous constituents, end up in the residuals, which are discarded, and the materials added to the process provide no benefit whatsoever. This is the essence of sham recycling. A vast majority of the commenters saw the need for both factors and after exploring the concept of legitimate recycling further, we were unable to find any examples of legitimate recycling that did not meet both of the core factors (i.e., the hazardous secondary material provides a useful contribution and the recycling process produces a product of value), nor did any commenters provide us with such examples. Thus, we are retaining both concepts as factors that must be met in order for a process to be considered legitimate recycling.

Comments: Factor 3—How the Hazardous Secondary Material To Be Recycled Is Managed

This factor on the management of hazardous secondary materials was designed to illustrate that hazardous secondary materials that are bound for recycling should be managed to prevent releases into the environment in the same way that valuable commodities would reasonably be expected to be managed. Hazardous secondary materials that are recycled are valuable production inputs. As such, we believe that such materials should be managed in a way that retains their value and prevents significant losses to the environment. Hazardous secondary materials that are mismanaged to the extent that they are released into the environment are not recycled.

This factor is one of the two legitimacy factors that EPA believes needs to be considered. However, in some cases, it may not be clear that the factor is met or it may not be met, yet the recycling activity can still be legitimate. The regulatory text for the factor can be found in 40 CFR 260.43(c)(1) and it states that the handler should manage the hazardous secondary material ''as a valuable commodity.'' If an analogous raw material exists, the hazardous secondary material should be managed, ''at a minimum, in a manner consistent with the management of the raw material.'' If there is no analogous raw material, the proposal states that the hazardous secondary material should be ''contained.''

The response from commenters on this factor was mixed in response to both the October 2003 proposal and the March 2007 supplemental proposal. Many states and environmental organizations commented that the factor should be mandatory and some argued that it should include a strict test. Many commenters from the generating industry and the waste management industry stated that they support this factor and believe that it is a fair and reasonable indicator of legitimacy. Some industry commenters thought that this factor should be mandatory, whereas others commented that the factor should neither be codified nor mandatory. At least one commenter stated that the factor was not necessary because of other existing disincentives for mismanagement. Representatives from extractive industries were most strongly opposed to this factor, stating that EPA cannot include legitimacy requirements on secondary materials that are going to be recycled because they are not in EPA's jurisdiction.

EPA's Response: Factor 3—How the Hazardous Secondary Material To Be Recycled Is Managed

Today, we are finalizing this factor as one of the two factors that must be considered during a legitimacy determination, but not necessarily met. We modified the language of this factor since the October 2003 proposal and are finalizing it basically as proposed in the March 2007 supplemental proposal.

EPA has decided that it is most appropriate to finalize this factor as one of the factors that must be considered rather than as a mandatory factor. Although we believe that this factor is an important part of a legitimacy determination because hazardous secondary materials that are not being managed carefully may be materials that the recycler does not value for its process, the factor is not part of what the Agency considers the core of legitimacy. In addition, as discussed in section IX of this preamble, EPA and commenters were able to identify situations in which this factor is not met, but the recycling appears to be legitimate because the hazardous secondary materials are still being managed in a responsible manner. EPA does not want to restrict legitimate recycling and, therefore, in these cases, the facility could make a determination of legitimacy without meeting this factor, but should be prepared to explain why its recycling is legitimate.

EPA also believes that this factor can be critical when considering whether hazardous secondary materials are legitimately recycled and EPA disagrees with commenters who argued that evaluating ''materials management'' is outside the scope of RCRA because hazardous secondary materials are not solid wastes due to being excluded. EPA believes that the commenters' argument is circular. The hazardous secondary materials are excluded only if the recycling is legitimate. How materials are managed is part of determining legitimate recycling. EPA has the authority to define legitimate recycling and, therefore, has the authority to require this evaluation.

Comments: Definition of Terms in Factor 3

Commenters stated that compliance with this factor is dependent on the regulated community and regulators understanding what EPA means by it. In the October 2003 proposal, we proposed that the factor read, ''[w]here there is no analogous raw material, the secondary material should be managed to minimize the potential for releases to the environment.'' Many commenters stated that the term ''minimize'' in this context was particularly unclear. State commenters argued that the term ''minimize'' did not provide enough guidance or could be interpreted to allow unclear amounts of hazardous secondary materials to be released, leaving room for potential mismanagement of that material, whereas some industry commenters asked if this standard meant they would have to meet or exceed controls required for regulated hazardous wastes in their recycling operations. Several commenters also asked about the term ''valuable commodity'' and how ''valuable'' is defined.

EPA's Response: Definition of Terms in Factor 3

EPA agrees that terms for this factor should be more clear to facilitate compliance. Although we have not developed a specific test or codified definitions to explain this factor, we have adjusted some of the language in the factor to address this concern and are providing further explanation of what we intend by this factor in today's preamble so that it is better understood and can be consistently applied.

In the March 2007 supplemental proposal, we modified the language for this factor to state instead that ''[w]here there is no analogous raw material, the hazardous secondary material should be contained.'' This change addressed the ambiguity of the word ''minimize,'' as well as state comments that the storage requirements in this factor needed to be better defined. The Agency believes that facilities that value hazardous secondary materials as part of their manufacturing process will contain those materials to prevent their release. The term ''contained'' is also being used elsewhere in the exclusions being finalized. EPA is defining this term in the same way throughout: A recyclable material is ''contained'' if it is placed in a unit that controls the movement of that material out of the unit into the environment. We also believe that the standard for contained is more clear for states and industry than the standard to minimize potential releases to the environment was in the October 2003 proposal.

We also want to clarify the use of several other terms on which we received comments. These terms are discussed briefly here and in more depth in section IX of this preamble, where the legitimacy factors are fully described. ''Analogous raw material,'' also defined elsewhere in the exclusions, is a raw material for which a hazardous secondary material is a substitute and which serves the same function and has similar physical and chemical properties as the hazardous secondary material. Materials generally would not be considered analogous if their chemical makeup were very different from one another—particularly if the hazardous secondary materials contain hazardous constituents that necessitate management processes that the raw material does not—or if their physical properties are different.

Regarding the term ''valuable commodity,'' EPA believes that hazardous secondary materials should be managed in the same or similar manner as raw materials that have been purchased or obtained at some cost. The legitimacy criteria are designed to determine whether a process is like manufacturing rather than like waste management. We believe that the standard for management of the hazardous secondary materials is reasonable for helping assess whether disposal in the guise of normal manufacturing is occurring.

Comments: Factor 4—Comparisons of Toxics in the Product

This factor was designed to prevent hazardous constituents from being ''discarded'' by being incorporated into a product made from hazardous secondary materials. The factor identifies this situation as being hazardous constituents that are in a product made from hazardous secondary materials when they are not in analogous products, or when hazardous constituents are at significantly higher levels in products made from hazardous secondary materials than in analogous products that contain such hazardous constituents, or when the product exhibits one or more of the hazardous characteristics and the analogous product does not. An analogous product can either be the final product of manufacturing or, in some cases, an intermediate in a process. These hazardous constituents are often called ''toxics along for the ride'' (TARs) and, if present, could be an indicator of discard.

This factor is the second of the two legitimacy factors that EPA believes needs to be considered but, in some cases, does not need to be met for the recycling activity to be considered legitimate. We modified the language of this factor since the October 2003 proposal and are finalizing the factor basically as proposed in the March 2007 supplemental proposal. The regulatory text for the factor can be found in 40 CFR 260.43(c)(2) and it states that the person making the determination should look at the product of the recycling process and compare it to analogous products that are made without hazardous secondary materials. The person making the determination should examine the concentrations of hazardous constituents to learn whether the product of the recycling process contains significant concentrations of hazardous constituents when the analogous product contains none, whether it contains significantly elevated levels of hazardous constituents when compared to the analogous product that contain such hazardous constituents, or whether it exhibits a hazardous characteristic when the analogous product does not.

The Agency received many comments on the fourth factor in response to both the October 2003 proposal and the March 2007 supplemental proposal. The comments the Agency received on Factor 4 were very mixed, ranging from commenters who argued that this factor should be one of the factors that must be met to those who stated that the factor is irrelevant and should not be considered as part of a legitimacy determination.

EPA's Response: Factor 4—Comparisons of Toxics in the Product

Today, we are finalizing this factor as one of the two factors that must be considered during a legitimacy determination, but not necessarily met. EPA maintains that this factor is an important way of determining whether a recycling process is, in fact, true recycling rather than a ''sham.''

If hazardous secondary materials with a toxic constituent or toxic constituents in amounts or concentrations greater than analogous raw materials are simply being run through a manufacturing process, it is an indication that those hazardous secondary materials may be being discarded in the guise of recycling. Toxics that are illegally disposed of in this manner can become exposure risks and could harm human health and the environment. EPA has jurisdiction over materials being discarded and, therefore, is requiring that this factor be considered in legitimacy determinations. The factor is not one of the mandatory factors because the Agency has identified situations where higher levels of toxic constituents may not be relevant or applicable and, thus, would not be an indicator of ''sham'' recycling if this factor is not met, as discussed in section IX of this preamble. In these cases, the facility could make a determination of legitimacy without meeting this factor, but should be prepared to explain why its recycling is legitimate.

Comments: Factor 4—the Term ''Significant'' and Alternative Approaches

Many of these comments sought further guidance on the meaning of the term ''significant'' in the proposed regulatory text, stating that the definition in the proposal was unclear or subjective, which may lead to a wide range of possible interpretations of the term. Commenters also expressed concern that a definition that is too vague may discourage recycling. In a related topic, commenters also responded to EPA's request for comments on two alternate approaches in the October 2003 proposal: (1) An approach that would establish a ''bright line'' for complying with the factor by specifically defining the terms ''significant amounts'' and ''significantly elevated'' in the regulatory text and (2) an approach that would require the use of risk assessment tools to determine if a product with elevated levels of a hazardous constituent due to use of hazardous secondary materials in its manufacture process posed a greater risk to human

health or the environment than the analogous product made from raw materials.

On the whole, commenters were not enthusiastic about the two alternative approaches that EPA suggested. Most commenters stated that a specific test of either nature would not be appropriate because of the wide variety of recycling situations to which it would have to apply.

EPA's Response: Factor 4—the Term ''Significant'' and Alternative Approaches

The Agency believes that designing a specific test, such as those described in the preamble to the October 2003 proposal, that is applicable to the many different recycling scenarios possible in the exclusions and non-waste determinations would be difficult, if not impossible. Thus, we agree with those commenters who argued against adopting such a specific test. Therefore, the Agency has more clearly described in this preamble to the final rule what it means by ''significant'' so that members of the regulated community can be confident in their evaluations of whether their products made from hazardous secondary materials contain ''toxics along for the ride.'' Therefore, members of the regulated community will neither be discouraged from recycling nor be forced to seek an opinion from a regulatory agency in every case. Details on implementation of this factor are in section IX of today's preamble.

Comments: Factor 4—Comparing the Products Instead of Hazardous Secondary Materials

Most commenters responded positively to a change the Agency made in its October 2003 proposal to compare the product of the recycling process to the analogous product made from raw materials rather than comparing the hazardous secondary materials to the analogous raw materials. EPA discussed this shift in its October 2003 proposal at 68 FR 61586–61587.

However, several commenters argued that the change is an attempt by the Agency to regulate products or stated that certain unique elements of their production processes made it so that this factor should not apply to their industry or their particular process. In addition, some commenters were concerned that under this factor, in some cases, the generator would have to know what was being done with its hazardous secondary material several steps downstream in the recycling process when it was incorporated into a final product.

EPA's Response: Factor 4—Comparing the Products Instead of Hazardous Secondary Materials

The Agency believes that for an entity to ensure that hazardous secondary materials are being legitimately recycled and not discarded, it needs to know what happens to the hazardous secondary materials once they leave the generator's control. However, in response to these comments, we are clarifying in today's preamble that the final legitimacy factor allows the entity conducting the legitimacy determination to make the comparison on ''toxics'' either between the final products or between the hazardous secondary material and the analogous raw material it replaces. If the comparison of materials going into the process shows no significant difference in levels of toxics, the product of the recycling process will not significantly differ from analogous products in those levels either. In cases where the generator finds it too complex to compare the product from its recycling process to the analogous product made from the virgin raw material, it can, instead, compare the chemistry of the materials going into the process to evaluate this factor.

Comments and EPA's Response: Relevance of Factor 4 to a Particular Process

Regarding the implementation of this factor, several commenters raised the concern that many products that are made from hazardous secondary materials do not have analogous products made from raw materials because they are always or have always been made from a combination of primary and in-process materials and that these are cases where this factor is not relevant to that particular recycling process. The commenters stated that this is especially true in the mineral extraction industries, but also may be the case in other industries as well.

The Agency is aware that there are situations where there may not be analogous products made from raw materials. In that case, the facility can opt to compare the toxic constituents in the hazardous secondary material it is using against those in an analogous raw material instead. We also note that while this factor needs to be considered, it is not mandatory because EPA recognizes that in some situations, it will not be relevant to a particular industrial process. In the case where the facility considers this factor and decides that it is not applicable to its process, the Agency suggests that the facility evaluate the presence of hazardous constituents in its product and document both that it considered this factor and the reasons it believes the factor is not relevant.

E. Consideration of Economics in Legitimacy

Comments: Economics Considerations

EPA received several comments in response to the preamble discussion about how to consider economics in the context of making legitimacy determinations in the March 2007 supplemental proposal. EPA did not propose that economic consideration be codified within the regulatory definition of legitimate recycling and instead offered guidance on how economic consideration is relevant to determining the legitimacy of a recycling operation.

EPA received only positive comments on the preamble discussion about consideration of economics in legitimacy. Specifically, EPA agrees with commenters who supported our position on the following: The economics of recycling are relevant to making legitimacy determinations, the economics of recycling are in fact different from traditional manufacturing, a recycling activity can be legitimate if a recycler charges a fee to accept hazardous secondary materials, economic considerations need to take into account the fluctuations in market prices of raw materials, and negative economic factors can contribute to environmental problems, such as speculative accumulation, abandonment, and sham recycling.

However, EPA received many comments from both industry and recycling associations that opposed the October 2003 proposal to codify the economics consideration as a separate ''factor to be considered.'' These commenters generally argued that consideration of economics was inherent within the four legitimacy factors (e.g., both of the mandatory factors, as well as the two factors which must be considered) and, therefore, a separate factor was not warranted. On the other hand, a few commenters (primarily states) requested that EPA codify a separate economics factor to be considered and they supported the inclusion of an enforceable factor for legitimacy determinations.

EPA's Response: Economics Considerations

EPA agrees with those commenters who argued that economic considerations are inherent within the legitimacy factors. We believe that one specific factor cannot encompass all

economic scenarios for the entire universe of hazardous secondary materials recycling. Furthermore, we do not believe that a separate enforceable factor in the regulations strengthens the definition of legitimate recycling, but we do believe that articulating how economic considerations can influence the legitimacy factors adds real value to the legitimacy determinations made by state regulators and the regulated community.

Based on the comments we received, the Agency is not codifying specific regulatory language on economic considerations. Instead, today's preamble offers guidance and clarification on how economics may be considered in making legitimacy determinations, similar to the preamble discussion in the March 2007 supplemental proposal. For more detailed information on economic considerations, please refer to ''How consideration of economics applies to legitimacy'' in section IX of today's rulemaking.

Comments and EPA's Response: Specific Test for Economics

EPA received some comments on the need for a specific test for consideration of economics. Commenters that supported a specific test believed it could include an accounting of economic flows over a period of time to determine longevity; an annual regulatory review of markets and a facility's economics; a ''rebuttable presumption that the recycling is legitimate where the recycler pays for the secondary materials,'' similar to manufacturing operations; and a requirement that payment for recycled products and intermediates be more than nominal if considered to be a sign of positive economics. One comment was also submitted which expressly opposed a specific test, citing that markets fluctuate too much to analyze the flows of revenues.

EPA believes that none of the examples suggested by the commenters are applicable to a broad universe of recycling activities. We also acknowledge that fluctuations in markets for hazardous secondary materials and recycled products, and subsequent impacts in revenue flows, create another challenging aspect of developing a test for the consideration of economics. Therefore, we believe that it is not possible to craft an economic test for legitimacy that can accommodate all legitimate recycling activities. As stated in section IX of today's rulemaking, we believe that this preamble discussion provides sufficient guidance on how to consider economics in legitimacy determinations.

F. Documentation of Legitimacy

Comments and EPA's Response: Documentation of Legitimacy

Several of the public comments stated that it is important that the hazardous secondary material generator or recycler of a recycled material maintain documentation that substantiates how the recycling activity complies with the legitimacy requirements. The comments stated that these records would show how the recycling activity meets the factors or, if a factor is not applicable, the records would document why it is not necessary for it to meet that factor. In this way, the hazardous secondary material generator or recycler could show that it considered all the factors. Other commenters objected to any recordkeeping requirements documenting that a recycling activity is legitimate.

After considering the comments, the Agency has determined that for the purpose of the legitimacy factors in the final rule, 40 CFR 261.2(f) applies. Section 261.2(f) states that, in the context of an enforcement action to implement Subtitle C of RCRA, a person claiming that a material is not a solid waste or is conditionally exempt from regulation is responsible for showing that they meet the terms of the exclusion and must provide appropriate documentation to show why they are eligible. For the legitimacy requirements finalized today, this provision would require that persons claiming that their recycling activity is legitimate would have the burden to provide documentation showing how the hazardous secondary materials provide a useful contribution to the recycling process and how the product of the recycling activity—whether it is a consumer product or a process intermediate—is valuable. In addition, the documentation would have to show that the hazardous secondary material generator or recycler considered the other two factors and determined for each of them that either the activity meets the factor or that the factor does not apply to this recycling activity and why it is not relevant or appropriate to consider.

In addition, as part of today's transfer-based exclusion, the hazardous secondary material generator has to undertake reasonable efforts to ensure its hazardous secondary materials will be legitimately recycled pursuant to § 260.43. As part of the reasonable efforts requirements, generators must document their reasonable efforts per § 261.4(a)(24)(v)(C).

XIX. Major Comments on the Non-Waste Determination Process

In the March 2007 supplemental proposal, EPA proposed a non-waste determination process that would provide persons with an administrative process for receiving a formal determination that their hazardous secondary materials are not discarded and, therefore, not solid waste. The process would be voluntary and available in addition to the two self-implementing exclusions. EPA proposed three types of non-waste determinations: (1) For hazardous secondary materials reclaimed in a continuous industrial process; (2) for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate; and (3) for hazardous secondary materials reclaimed under the control of the generator, such as through contracts similar to tolling arrangements. For each type of non-waste determination, EPA proposed a set of criteria which the hazardous secondary materials would have to meet in order to receive a formal non-waste determination from the regulatory authority. For a detailed description of the non-waste determination process that EPA is finalizing today, see section X of today's preamble.

Comments: Finalizing the Non-Waste Determination Process

Overall, many commenters supported the non-waste determination process because it provides persons with regulatory certainty and offers a flexible alternative to the self-implementing exclusions included in today's rule. On the other hand, some commenters argued that the non-waste determination process would be resource-intensive, placing a significant burden on the states that would have to perform a case-by-case review of each application. One commenter said that, historically, many hazardous waste facilities have sought formal approval of their recycling practices from regulators and that EPA may be underestimating the number of applications that states would receive from the regulated community. Additionally, one state commenter mentioned that the non-waste determination process would increase regulatory inconsistency between states and at least two state commenters saw no reason to establish a formal non-waste determination process since they viewed the current variance procedure under 40 CFR 260.33 and their own state

determination processes as an effective means to the same end. Finally, a few commenters did not support the non-waste determination process because of its lack of explicit conditions, such as those conditions required for the two self-implementing exclusions in today's rule.

EPA's Response: Finalizing the Non-Waste Determination Process

EPA agrees with the majority of commenters who support the non-waste determination process as an alternative way for hazardous secondary material generators to seek regulatory certainty in circumstances involving reclamation of hazardous secondary materials which do not clearly fit under today's self-implementing exclusions. EPA, however, does not agree with commenters who believe the non-waste determination would cause significant burden to states. Instead, we anticipate that the vast majority of persons will choose to use the self-implementing exclusions because this would be less resource intensive for the facility. In fact, the Agency does not envision any person submitting such an application if they are considered ''under the control of the generator'' because there are relatively few restrictions for this exclusion, and, indeed, it would probably require less effort than seeking a non-waste determination. Thus, the Agency only expects a limited number of persons to submit applications where the regulatory status is unclear under today's exclusions and a formal non-waste determination may be appropriate. EPA further believes that, by modeling the non-waste determination process after the current variance procedures, it has kept the additional burden to the states at a minimum because states can leverage their existing processes.

EPA believes that requiring explicit conditions, such as those required for today's self-implementing exclusions, is not warranted for hazardous secondary materials receiving non-waste determinations because persons are, instead, required to make specific demonstrations as to how the hazardous secondary materials meet the eligibility criteria. Furthermore, regulatory authorities, if they so choose, may stipulate conditions within the non-waste determination as appropriate and relevant on a case-by-case basis. One purpose of the non-waste determination is to provide a measure of flexibility not provided by the self-implementing solid waste exclusions and specifying the conditions to be imposed would defeat this purpose.

With respect to the comment regarding inconsistency among state non-waste determinations, EPA notes that, by allowing states to become authorized to conduct their own RCRA hazardous waste programs, the RCRA statute provides states flexibility to regulate hazardous waste more stringently than required under the federal regulations. Additionally, states sometimes take different interpretations of the same or similar regulations. This situation ultimately leads to variations between state regulations and interpretations, which EPA views as inherent to the RCRA structure and, thus, not a quality unique to the non-waste determination process.

We also want to clarify that, although today's non-waste determination process is similar to the current variance procedures, non-waste determinations are technically not variances in which EPA regulations otherwise classify materials as solid wastes and facilities may apply for an exception. Instead, the new procedure would apply to cases in which hazardous secondary materials are not discarded, but which do not fit within the self-implementing exclusions, or for which the restrictions and conditions of the exclusions are not applicable.

A. Eligibility for Non-Waste Determination Process

Comments: Scope of Non-Waste Determinations

In the March 2007 supplemental proposal, EPA indicated that non-waste determinations would be limited to reclamation activities and would not apply to recycling of ''inherently waste-like'' materials, as defined at 40 CFR 261.2(d), recycling of materials that are ''used in a manner constituting disposal,'' or ''used to produce products that are placed on the land,'' (40 CFR 261.2(c)(1)), or ''burning materials for energy recovery'' or ''used to produce a fuel or otherwise contained in fuels'' (40 CFR 261.2(c)(2)).

EPA received a number of comments urging the Agency to broaden the non-waste determinations to include all recycling scenarios in which hazardous secondary materials are not discarded. Some commenters supported expanding the scope to allow recycling for ''burning for energy recovery'' and ''use constituting disposal.'' These commenters argued that EPA could achieve further increases in recycling if the Agency broadened the scope of the hazardous secondary materials eligible to apply for a non-waste determination. On the other hand, some commenters agreed with EPA's proposed scope and supported limiting eligibility to only hazardous secondary materials being reclaimed. Alternatively, a few commenters supported limiting eligibility only to those circumstances where the recycling of hazardous secondary materials would not meet either a condition of the self-implementing exclusions or one of the legitimacy criteria, but still would not be considered discard. These commenters also argued that narrowing the eligibility would effectively limit the number of applications submitted and thus reduce the overall burden on the states.

EPA's Response: Scope of Non-Waste Determinations

EPA agrees with those commenters who supported limiting non-waste determinations to reclamation activities. With respect to ''burning for energy recovery'' and ''use constituting disposal,'' EPA confirms that these types of recycling are ineligible for today's non-waste determination process. EPA believes that these types of recycling activities would best be left to other rulemaking proceedings. Furthermore, we disagree with those commenters who suggest further limiting the eligibility to only those cases where reclamation of the hazardous secondary materials would specifically violate a condition of today's self-implementing exclusions. We believe that by modeling the non-waste determination procedure after the existing variance procedure, we have ensured that any additional burden to the states will be kept at a minimum and thus further limits on eligibility are not necessary.

Comments: Whether the Hazardous Constituents in the Hazardous Secondary Materials Are Reclaimed Rather Than Released to the Air, Water, or Land

Overall, we received only a few comments that discussed the specific criteria that EPA proposed for the non-waste determinations. For the criterion regarding whether the hazardous constituents in the hazardous secondary materials are reclaimed rather than released to the air, water, or land at significantly higher concentrations, some commenters argued that this criterion was inappropriate for determining discard because these types of releases are inevitable when reclaiming hazardous secondary materials. At least two commenters suggested that EPA should establish a ''bright line'' to clearly define ''significantly higher concentrations'' in order to provide persons with greater

regulatory certainty. Other commenters expressed concern that this criterion (as well as the other criteria within 40 CFR 260.34) would be construed to apply to other types of recycling, including those eligible for today's self-implementing exclusions.

EPA's Response: Whether the Hazardous Constituents in the Hazardous Secondary Materials Are Reclaimed Rather Than Released to the Air, Water, or Land

EPA disagrees with commenters who believe this criterion is not relevant for determining if hazardous secondary materials are being discarded. By indicating that such releases must not be at ''significantly higher concentrations'' than would otherwise be released during the production process, we believe we have set a reasonable and meaningful bar that applicants must meet in order to demonstrate that their hazardous secondary materials are reclaimed and not discarded. Hazardous secondary materials that fail to meet this criterion may exhibit an indication that they are discarded and that such handling may present a greater risk of adverse impacts to human health and the environment. Regarding those commenters who support a ''bright line'' in order to define ''significantly higher concentrations,'' EPA believes that, given the wide variety of production processes and recycling practices, establishing a ''one size fits all'' objective standard is not practical and would invite inefficiency.

EPA also confirms that this criterion, and the other criteria in 40 CFR 260.34, are specific to the relevant non-waste determinations, and thus are not required for the self-implementing exclusions or those exclusions found in 40 CFR 261.4, unless they are specifically included under state regulations as a criteria to consider.

Comments and EPA's Response: Whether the Capacity of the Production Process Would Allow for Use of the Hazardous Secondary Material in a Reasonable Time Frame

For the criterion regarding whether the capacity of the production process would allow for use of the hazardous secondary material in a reasonable time frame (proposed explicitly for the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process), some commenters regarded this criterion as consistent with judicial direction and, thus, supported adding this criterion to the other non-waste determinations. Since EPA would consider hazardous secondary materials that were eternally ''stored'' for future recycling to be akin to discard, EPA agrees with these commenters that all non-waste determinations should take into account whether the hazardous secondary materials will be reclaimed within a ''reasonable time frame.'' Therefore, in this final rule, EPA has added this criterion (with appropriate modifications to the language) to the non-waste determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate. As with the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process, a person does not need to demonstrate that the hazardous secondary material meets the speculative accumulation limits per 40 CFR 261.1(c)(8), but he must provide sufficient information about the hazardous secondary material and the process to demonstrate that the material will in fact be reclaimed in a reasonable time frame and will not be abandoned. However, a person may still choose to use the speculative accumulation time frame as a default if he so chooses.

Comments: Non-Waste Determination for Hazardous Secondary Materials Reclaimed Under the Control of the Generator

A few commenters disagreed with the non-waste determination for hazardous secondary materials reclaimed under the control of the generator via a tolling arrangement or similar contractual arrangement. These commenters believed that the generator would be unable to maintain control over its hazardous secondary materials and residuals once at the reclamation facility and, thus, could not reliably meet the criteria for this non-waste determination. One state foresaw major enforcement problems with situations involving a commercial facility that handles hazardous secondary materials from multiple customers in a single process and then mismanages the residuals from that unit. As the residuals would be linked back to multiple generators, the liability for the mismanaged residuals would be difficult to detangle. On the other hand, some commenters felt that all tolling arrangements, including those eligible for the self-implementing exclusion, would best be evaluated through the non-waste determination process. These commenters argued that the regulatory authority should be required to review all tolling arrangements and their respective liability provisions in order to ensure that the hazardous secondary materials will not be discarded.

EPA's Response: Non-Waste Determination for Hazardous Secondary Materials Reclaimed Under the Control of the Generator

We did not intend for such circumstances where a hazardous secondary material generator was unable to maintain control and responsibility over his hazardous secondary materials to be eligible for a non-waste determination for hazardous secondary materials reclaimed under the control of the generator. Where an applicant's hazardous secondary materials are intermingled with materials from other hazardous secondary material generators in a way that renders the applicant unable to maintain control and liability over his specific materials, the applicant would have been effectively precluded from obtaining this formal non-waste determination since he would ultimately fail the first criterion.

EPA, however, has decided not to finalize the non-waste determination for materials reclaimed under the control of the generator because EPA could not identify any comments which described in detail other specific situations involving tolling or contractual arrangements that would not already be covered under today's self-implementing generator-controlled exclusion. We, therefore, remain unclear as to what other arrangements exist where the generator would retain control over its hazardous secondary materials to ensure they are reclaimed and not discarded. Without this clear picture, EPA believes we cannot finalize this non-waste determination and thus we are not including it in today's final rule.

B. Process for Non-Waste Determinations

In the March 2007 supplemental proposal, EPA proposed that the non-waste determination process would be the same as that for the solid waste variances found in 40 CFR 260.33. In order to obtain a non-waste determination, a facility must apply to the Administrator or the authorized state. The Administrator or authorized state evaluates the application and issues a draft notice and opportunity for comment in the locality where the facility is located. The Administrator or authorized state would then issue a final decision based on the evaluation of the comments received.

Comments and EPA's Response: Requirement To Renew Applications

A few commenters argued that non-waste determinations should be

renewed, either periodically or in the event of certain changes to the recycling process, so that regulators can ensure that the hazardous secondary materials continue to be reclaimed and not discarded.

EPA agrees with those commenters who believe that certain changes in the recycling process should logically trigger a re-review of the circumstances. Therefore, in the event of a change that affects how hazardous secondary materials meet one or more of the criteria upon which a non-waste determination has been based, EPA is requiring persons to re-apply to the Administrator or the authorized state for a formal determination that the hazardous secondary material continues to meet the relevant criteria and is not discarded and, therefore, not a solid waste.

Comments and EPA's Response: Timelines for Regulators

Some commenters expressed concerns about the length of time an applicant would need to wait before receiving a formal determination from their regulatory authority, explaining that particularly lengthy delays would adversely affect business operations. Although we understand this concern, requiring non-waste determinations to be made within a specific time frame would be difficult, as each case varies in complexity with some requiring more time to review than others. Furthermore, EPA would be challenged to prescribe one time frame that would accommodate numerous state regulatory agencies that vary in staffing and workloads. Therefore, we are not requiring regulators to issue determinations within a certain period of time.

Comments and EPA's Response: Public Comment Process

At least two commenters suggested updating the format for public notice. For example, instead of requiring notice through a ''newspaper advertisement or radio broadcast'' (as EPA proposed), public notice should be allowed to include electronic formats, such as posting on a Web site or distribution through e-mail, in order to reduce costs. Other commenters supported requiring public notice for a broader audience, not necessarily limited to the ''locality where the recycler is located.'' These commenters argued that non-waste determinations may have national implications and would be more appropriately published in the **Federal Register** or made available through the EPA Docket Center.

In response to these comments, EPA notes the non-waste determination process was purposely structured to follow the same procedures as outlined for solid waste variances in 40 CFR 260.33 in order to leverage the existing structure and keep additional burden on the states to a minimum. EPA, furthermore, believes that any changes to the type of format required for public notice would be more appropriately handled as part of a separate, wholesale effort to update all public notice requirements in the federal hazardous waste regulations. Therefore, for today's rule, EPA is retaining the same public notice provisions as proposed and required in 40 CFR 260.33.

XX. How Will These Regulatory Changes Be Administered and Enforced in the States?

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer the RCRA Subtitle C hazardous waste program within the state. Following authorization, EPA retains Subtitle C enforcement authority, although authorized states have primary enforcement responsibility. EPA retains authority under sections 3007, 3008, 3013, 3017 and 7003. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. The federal requirements no longer applied in the authorized state and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (*see* 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

B. Effect on State Authorization

Today's rule eliminates specific requirements that apply to hazardous secondary materials currently managed as hazardous waste. EPA believes that today's final rule describes the appropriate scope of the federal program under RCRA. These exclusions will encourage recycling and are consistent with RCRA's statutory objective of conserving valuable material and energy resources.

EPA strongly encourages states to adopt the regulations being finalized today. When EPA authorizes a state to implement the RCRA hazardous waste program, EPA determines whether the state program is consistent with the federal program and whether it is no less stringent. This process, codified in 40 CFR part 271, ensures national consistency and minimum standards, while providing flexibility to the states in implementing the rules. In making this determination, EPA evaluates the state requirements to ensure they are no less stringent than the federal requirements. Because today's rule eliminates specific requirements for hazardous secondary materials that are currently managed as hazardous waste, state programs would no longer need to include those specific requirements in order to be consistent with EPA's regulations.

However, if a state were, through implementation of state waiver authorities or other state laws, to allow compliance with the provisions of today's rule in advance of adoption or authorization, EPA would not generally consider such implementation a concern for purposes of enforcement or state authorization. Of course, the state could not implement the requirements in a way that was less stringent than the federal requirements in today's rule.

In the case of the case-by-case non-waste determinations found in 40 CFR 260.34, a non-waste determination may be granted by the state if the state is either authorized for this provision or if the following conditions are met: (1) The state determines the hazardous secondary material meets the applicable criteria for the non-waste determination; (2) the state requests that EPA review its determination; and (3) EPA approves the state determination.

It should be noted that, under RCRA section 3009, a state may adopt standards that are more stringent than the federal program. Thus, a state is not required to adopt today's final rule or a state may choose to adopt only parts of today's final rule. Some states incorporate the federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, EPA anticipates that the exclusions in today's final rule will be adopted by these states, consistent with state laws and state administrative procedures, unless they take explicit action as specified by their respective state laws to decline the revisions. We note that if states choose not to adopt the provisions of today's final rule concerning exports, then any hazardous secondary materials that are exported would be subject to the hazardous waste export requirements in 40 CFR part 262 subparts E or H, or analogous export requirements that are part of a state's RCRA authorized program. EPA also notes that, as described in this preamble, we believe that the legitimacy provision finalized in § 260.43 is substantially the same as and no more stringent than the existing regulatory scheme in which all recycling must be legitimate. If a state agency were to adopt the four legitimacy factors in § 260.43 for all recycling, EPA would consider their regulations to be equivalent to the federal requirements.

XXI. Administrative Requirements for This Rulemaking?

A. Executive Order 12866: Regulatory Planning and Review

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because today's action contains novel policy issues (EO 12866 Section 3(f)(4)) and because its potential impact on the economy will be greater than the $100 million or more annual effect, meeting the ''economically significant'' threshold of EO 12866 Section 3(f)(1). Because this rule meets two of the EO 12866 ''significant'' criteria, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB's recommendations have been documented in the docket for this action. EPA also prepared an analysis of the potential economic costs and benefits associated with this proposed action. The analysis is contained in our ''Regulatory Impact Analysis'' (RIA) which is available from the docket (*http://www.regulations.gov*) and is briefly summarized below.

Assuming full adoption of this final rule by all RCRA-authorized states, EPA's best estimate (i.e., ''expected value'') of the future average annual net benefits of this final rule to the national economy is $95 million per year, affecting about 5,600 facilities in 280 industries in 21 economic sectors. However, the sensitivity analysis section of our RIA for this final rule identifies 11 numerical uncertainty factors behind our calculation of this best estimate. Future variation in one or more of these factors may result in future annual net benefits ranging between $19 million to $333 million in any given future year. Therefore, EPA is classifying this final rule as ''economically significant'' because the $333 million per year upper-bound of our net benefits uncertainty range exceeds the $100 million ''annual effect'' threshold established by section 3(f)(1) of the 1993 Executive Order 12866.''

This action is expected to remove from RCRA regulation 1.5 million tons per year of hazardous secondary materials currently managed as RCRA hazardous waste. These affected hazardous secondary materials consist of about 98% that are currently reclaimed as RCRA hazardous waste, and about 2% of hazardous waste that is currently disposed of (e.g., landfilled, incinerated, or deepwell injected), which EPA expects may switch from disposal to reclamation as a result of this action. This $95 million annual net cost savings estimate is 11% less than the $107 million annual net cost savings estimated in our 2007 RIA in support of the March 2007 supplemental proposal for this action. This difference is largely explained by enhancements made to the methodology of the RIA based on public comments received from 30 organizations on our 2003 and 2007 RIA's in support of this action, as well as by updates of key data underlying the RIA.

These impact estimates are EPA's best estimates within the economic impact estimation uncertainty range of $19 million to $333 million in annual materials management cost savings for the net effect of the exclusions. These impact ranges reflect the overall uncertainty range of −80% to +249% across eleven different uncertainty factors addressed as a sensitivity analysis in our RIA. The specific uncertainty factors evaluated are (1) state government adoption, (2) future fluctuations in affected hazardous secondary materials generation tonnages, (3) within-year discrepancies between hazardous secondary materials generation and corresponding management tonnages, (4) future industrial production levels, (5) omission of SQG facility counts in our impact estimates by artifact that we based the impacts on LQG and TSDRF data from the RCRA Biennial Report database, (6) Biennial Report database quality assurance considerations, (7) physical and chemical quality of the hazardous secondary materials affected, (8) impact estimation methodology level of effort, (9) changes in future market price of commodities recovered from recycled material, (10) the possibility of same-company facilities sharing offsite captive recycling facility, and (11) the possibility of baseline disposal switchover to onsite recycling. Concerning the uncertainty of state government adoption, included as one component of potential industry cost savings is the transfer effect of an expected $5 million reduction in future annual state government hazardous waste fee revenues if all state governments adopt today's rule.

With respect to each of the regulatory exclusions in today's action, the $95 million per year net cost savings effect consists of approximately (a) $7 million per year for hazardous secondary materials reclaimed under the control of the generator in either land or non-land based units (which includes on-site, same-company, and tolling exclusions), plus (b) $87 million per year cost savings for exclusion of other offsite transfers, plus (c) $1 million per year in cost savings for case-by-case non-waste determinations.

Embedded in this overall impact estimate is $4.7 million per year in potential commodity market value of three categories of 15 constituents in affected materials we expect may begin to be recovered from hazardous secondary materials that would otherwise continue to be disposed of as hazardous wastes in the absence of today's action: (1) Commodity metals (chromium, copper, lead, molybdenum disulfide, nickel, zinc), (2) commodity solvents (acetone, alkyl benzenes, C9–C10 alkyl benzenes, methanol, methyl ethyl ketone, toluene, xylene), and (3)

other commodity materials (acids, carbon). However, the RIA estimate of potential new induced recycling does not include an evaluation of whether the U.S. or global recycling markets are large enough to sustain this potential future increase in supply of recovered materials. Market conditions for recycled hazardous secondary materials can vary considerably over time. Demand for recycled solvents, for example, is largely dependent on the petroleum market because virgin solvents are made from petroleum products, and high petroleum prices encourage solvent recycling. Similarly, high metals prices obviously favor the recycling of metal-bearing hazardous secondary materials.

The RIA, available from the docket (*http://www.regulations.gov*), provides many more details and descriptions about these assorted components of expected economic impacts, including potential distributional effects on other industries not directly subject to today's action.

B. Paperwork Reduction Act (Information Collection Request)

The information collection requirements in this rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The information collection request has been updated since the March 2007 supplemental proposal to reflect the final rule requirements and to respond to public comments.

The information requirements established for this action are voluntary to the extent that the exclusions being finalized today are voluntary and represent an overall reduction in burden as compared with the alternative information requirements associated with managing the hazardous secondary materials as hazardous waste. The information requirements help ensure that (1) entities operating under the regulatory exclusions contained in today's action are held accountable to the applicable requirements; (2) state inspectors can verify compliance with the restrictions and conditions of the exclusions when needed; and (3) hazardous secondary materials exported for recycling are actually handled as commodities abroad.

For the recordkeeping and reporting requirements applicable to hazardous secondary materials sent for reclamation, the aggregate annual burden to respondents over the three-year period covered by this ICR is estimated to be 11,552 hours, with a cost to affected entities (*i.e.*, industrial facilities) of $1,417,242. However, this represents an annual reduction in burden to respondents of 52,050 hours, representing a cost reduction of $3,474,035 per year. The estimated annual operation and maintenance costs to affected entities are $739,469 per year, primarily for purchasing audit or other similar type reports. There are no startup costs and no costs for purchases of services. Administrative costs to the Agency are estimated to be 1,257 hours per year, representing an annual cost of $49,891. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. For more information regarding the expected economic impact of this action, please refer to our ''Regulatory Impact Analysis'' available from the docket for this final rule.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Because today's action is designed to lower the cost of industrial hazardous secondary materials management for entities subject to today's requirements, this final rule will not result in an adverse economic impact effect on affected small entities. EPA therefore concludes that today's action will relieve regulatory burden for all size entities, including small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed

under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not include a Federal mandate that may result in expenditures of $100 million or more for state, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this rule imposes no enforceable duty on any state, local, or tribal governments. Although one public commenter noted that many states choose to incorporate EPA's regulations by reference, EPA does not require them to do so. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Therefore, today's rule is not subject to the requirements of sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. Policies that have federalism implications are defined in the Executive Order to include regulations that have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no state and local government bodies that incur direct compliance costs by this rulemaking. State and local government implementation expenditures are expected to be less than $500,000 in any one year. Thus, the requirements of Section 6 of the Executive Order do not apply to this final rule. Although one public commenter noted that many states choose to incorporate EPA's regulations by reference, EPA does not require them to do so.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure a meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. This final rule does not have tribal implications, as specified in Executive Order 13175. It does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this final rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. An assessment of countervailing risk and a discussion of how today's rule addresses those risks can be found in Chapter 11 of the Regulatory Impact Analysis, found in the docket for today's rulemaking.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule reduces regulatory burden and as explained in our Regulatory Impact Analysis, may possibly induce fuel efficiency and energy savings from the voluntary shifting of some types of hazardous secondary materials, where it is cost-effective for firms to do so, from current landfill and incineration to reclamation. It therefore should not adversely affect energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations of when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Environmental Justice

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to the concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

This final rule would streamline the requirements for certain hazardous secondary materials sent for reclamation. Facilities that would be affected by today's final rule include those generating hazardous secondary materials, as well as facilities which reclaim such materials. Disposal and treatment facilities would not be affected by this final rule. While commenters assert that minorities now comprise a majority in neighborhoods

with commercial hazardous waste facilities, and much larger (over two-thirds) majorities can be found in neighborhoods with clustered facilities, EPA does not believe that such neighborhoods will be adversely impacted by today's rule. As explained in Chapter 11 of the Regulatory Impact Analysis found in the docket to today's rule, EPA has performed an assessment of potential countervailing risks and has determined that the conditions address those risks and no net impact is expected. Thus, overall, no disproportionate impacts to minorities or low income communities are expected.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally provides that before a rule may take effect, the agency promulgating the rule must submit a report containing the rule and other required information to the U.S. Senate, the U.S. House of Representatives, and to the Comptroller General of the United States, prior to publication of the rule in the **Federal Register**. Furthermore, a ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**. Today's action is expected to be a ''major rule'' as defined by 5 U.S.C. 804(2) according to the first of its three ''major rule'' definitions: ''The term ''major rule'' means any rule that the Administrator of the Office of Information and Regulatory Affairs of OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.'' EPA has submitted a copy of this rule to each House of the Congress and to the Comptroller General, and this rule will be effective December 29, 2008.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements, Permit application requirements, Permit modification procedures, Waste treatment and disposal.

Dated: October 7, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended to read as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6935, 6937, 6938, 6939 and 6974.

Subpart B—Definitions

■ 2. Section 260.10 is amended by revising the definitions of ''Facility'' and ''Transfer facility'' and by adding in alphabetical order the definitions of ''Hazardous secondary material,'' ''Hazardous secondary material generated and reclaimed under the control of the generator'' and ''Hazardous secondary material generator,'' ''Intermediate facility,'' and ''Land-based unit'' to read as follows:

§ 260.10 Definitions.

* * * * *

Facility means:

(1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(2) For the purpose of implementing corrective action under 40 CFR 264.101 or 267.101, all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h).

(3) Notwithstanding paragraph (2) of this definition, a remediation waste management site is not a facility that is subject to 40 CFR 264.101, but is subject to corrective action requirements if the site is located within such a facility.

* * * * *

Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.

Hazardous secondary material generated and reclaimed under the control of the generator means:

(1) That such material is generated and reclaimed at the generating facility (for purposes of this defintion, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

(2) That such material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in § 260.10, and if the generator provides one of the following certifications: ''on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert the name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material,'' or ''on behalf of [insert generator facility name] I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material.'' For purposes of this paragraph, ''control'' means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to ''control'' such facilities, or

(3) That such material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: ''On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name], has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will

reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process. For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

Hazardous secondary material generator means any person whose act or process produces hazardous secondary materials at the generating facility. For purposes of this paragraph, ''generating facility'' means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator. For the purposes of § 261.2(a)(2)(ii) and § 261.4(a)(23), a facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator.

* * * * *

Intermediate facility means any facility that stores hazardous secondary materials for more than 10 days, other than a hazardous secondary material generator or reclaimer of such material.

* * * * *

Land-based unit means an area where hazardous secondary materials are placed in or on the land before recycling. This definition does not include land-based production units.

* * * * *

Transfer facility means any transportation-related facility, including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste or hazardous secondary materials are held during the normal course of transportation.

* * * * *

■ 3. Section 260.30 is amended by revising the section heading, the introductory text, paragraph (b), and adding paragraphs (d) and (e) to read as follows:

§ 260.30 Non-waste determinations and variances from classification as a solid waste.

In accordance with the standards and criteria in § 260.31 and § 260.34 and the procedures in § 260.33, the Administrator may determine on a case-by-case basis that the following recycled materials are not solid wastes:

* * * * *

(b) Materials that are reclaimed and then reused within the original production process in which they were generated;

* * * * *

(d) Hazardous secondary materials that are reclaimed in a continuous industrial process; and

(e) Hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

* * * * *

■ 4. Section 260.33 is amended by revising the section heading, the introductory text, paragraph (a) and adding paragraph (c) to read as follows:

§ 260.33 Procedures for variances from classification as a solid waste, for variances to be classified as a boiler, or for non-waste determinations.

The Administrator will use the following procedures in evaluating applications for variances from classification as a solid waste, applications to classify particular enclosed controlled flame combustion devices as boilers, or applications for non-waste determinations.

(a) The applicant must apply to the Administrator for the variance or non-waste determination. The application must address the relevant criteria contained in § 260.31, § 260.32, or § 260.34, as applicable.

* * * * *

(c) For non-waste determinations, in the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in § 260.34 upon which a non-waste determination has been based, the applicant must re-apply to the Administrator for a formal determination that the hazardous secondary material continues to meet the relevant criteria and therefore is not a solid waste.

■ 5. Section 260.34 is added to Subpart C to read as follows:

§ 260.34 Standards and criteria for non-waste determinations.

(a) An applicant may apply to the Administrator for a formal determination that a hazardous secondary material is not discarded and therefore not a solid waste. The determinations will be based on the criteria contained in paragraphs (b) or (c) of this section, as applicable. If an application is denied, the hazardous secondary material might still be eligible for a solid waste variance or exclusion (for example, one of the solid waste variances under § 260.31). Determinations may also be granted by the State if the State is either authorized for this provision or if the following conditions are met:

(1) The State determines the hazardous secondary material meets the criteria in paragraphs (b) or (c) of this section, as applicable;

(2) The State requests that EPA review its determination; and

(3) EPA approves the State determination.

(b) The Administrator may grant a non-waste determination for hazardous secondary material which is reclaimed in a continuous industrial process if the applicant demonstrates that the hazardous secondary material is a part of the production process and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43 and on the following criteria:

(1) The extent that the management of the hazardous secondary material is part of the continuous primary production process and is not waste treatment;

(2) Whether the capacity of the production process would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

(3) Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

(4) Other relevant factors that demonstrate the hazardous secondary material is not discarded.

(c) The Administrator may grant a non-waste determination for hazardous secondary material which is indistinguishable in all relevant aspects from a product or intermediate if the applicant demonstrates that the hazardous secondary material is comparable to a product or intermediate and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately

recycled as specified in § 260.43 and on the following criteria:

(1) Whether market participants treat the hazardous secondary material as a product or intermediate rather than a waste (for example, based on the current positive value of the hazardous secondary material, stability of demand, or any contractual arrangements);

(2) Whether the chemical and physical identity of the hazardous secondary material is comparable to commercial products or intermediates;

(3) Whether the capacity of the market would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

(4) Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

(5) Other relevant factors that demonstrate the hazardous secondary material is not discarded.

■ 6. Section 260.42 is added to Subpart C to read as follows:

§ 260.42 Notification requirement for hazardous secondary materials.

(a) Hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities managing hazardous secondary materials which are excluded from regulation under § 261.2(a)(2)(ii), § 261.4(a)(23), (24), or (25) must send a notification prior to operating under the exclusion(s) and by March 1 of each even numbered year thereafter to the Regional Administrator using EPA Form 8700–12 that includes the following information:

(1) The name, address, and EPA ID number (if applicable) of the facility;

(2) The name and telephone number of a contact person;

(3) The NAICS code of the facility;

(4) The exclusion under which the hazardous secondary materials will be managed (e.g., § 261.2(a)(2)(ii), § 261.4(a)(23), (24), and/or (25));

(5) For reclaimers and intermediate facilities managing hazardous secondary materials in accordance with § 261.4(a)(24) or (25), whether the reclaimer or intermediate facility has financial assurance (not applicable for persons managing hazardous secondary materials generated and reclaimed under the control of the generator);

(6) When the facility expects to begin managing the hazardous secondary materials in accordance with the exclusion;

(7) A list of hazardous secondary materials that will be managed according to the exclusion (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes);

(8) For each hazardous secondary material, whether the hazardous secondary material, or any portion thereof, will be managed in a land-based unit;

(9) The quantity of each hazardous secondary material to be managed annually; and

(10) The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

(b) If a hazardous secondary material generator, tolling contractor, toll manufacturer, reclaimer or intermediate facility has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the exclusion(s), the facility must notify the Regional Administrator within thirty (30) days using EPA Form 8700–12. For purposes of this section, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages and/or reclaims hazardous secondary materials under the exclusion(s) and does not expect to manage any amount of hazardous secondary materials for at least one year.

■ 7. Section 260.43 is added to Subpart C to read as follows:

§ 260.43 Legitimate recycling of hazardous secondary materials regulated under § 260.34, § 261.2(a)(2)(ii), and § 261.4(a)(23), (24), or (25).

(a) Persons regulated under § 260.34 or claiming to be excluded from hazardous waste regulation under § 261.2(a)(2)(ii), § 261.4(a)(23), (24), or (25) because they are engaged in reclamation must be able to demonstrate that the recycling is legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address the requirements of § 260.43(b) and must consider the requirements of § 260.43(c) below.

(b) Legitimate recycling must involve a hazardous secondary material that 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.

(1) The hazardous secondary material provides a useful contribution if it

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

(2) The product or intermediate is valuable if it 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 an ingredient or intermediate in an industrial process.

(c) The following factors must be considered in making a determination as to the overall legitimacy of a specific recycling activity.

(1) The generator and the recycler should manage the hazardous secondary material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material. Where there is no analogous raw material, the hazardous secondary material should be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(2) The product of the recycling process does not

(i) Contain significant concentrations of any hazardous constituents found in Appendix VIII of part 261 that are not found in analogous products; or

(ii) Contain concentrations of any hazardous constituents found in Appendix VIII of part 261 at levels that are significantly elevated from those found in analogous products; or

(iii) Exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit.

(3) In making a determination that a hazardous secondary material is legitimately recycled, persons must evaluate all factors and consider legitimacy as a whole. If, after careful evaluation of these other considerations, one or both of the factors are not met, then this fact may be an indication that the material is not legitimately recycled.

However, the factors in this paragraph do not have to be met for the recycling to be considered legitimate. In evaluating the extent to which these factors are met and in determining

whether a process that does not meet one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 8. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

Subpart A—[Amended]

■ 9. Section 261.1 is amended by revising paragraph (c)(4) to read as follows:

§ 261.1 Purpose and scope.

* * * * *

(c) * * *

(4) A material is ''reclaimed'' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of §§ 261.2(a)(2)(ii), 261.4(a)(23), and 261.4(a)(24) smelting, melting and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in § 266.100(d)(1)–(3) of this chapter, and if the residuals meet the requirements specified in § 266.112 of this chapter.

* * * * *

■ 10. Section 261.2 is amended by revising paragraph (a)(1), (a)(2), (c)(3) and Table 1 in paragraph (c)(4) to read as follows:

§ 261.2 Definition of solid waste.

* * * * *

(a)(1) A *solid waste* is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31 or that is not excluded by a non-waste determination under §§ 260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

(C) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(D) A military munition identified as a solid waste in § 266.202.

(ii) A hazardous secondary material is not discarded if it is generated and reclaimed under the control of the generator as defined in § 260.10, it is not speculatively accumulated as defined in § 261.1(c)(8), it is handled only in non-land-based units and is contained in such units, it is generated and reclaimed within the United States and its territories, it is not otherwise subject to material-specific management conditions under § 261.4(a) when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2), it does not meet the listing description for K171 or K172 in § 261.32, and the reclamation of the material is legitimate, as specified under § 260.43. (See also the notification requirements of § 260.42). (For hazardous secondary materials managed in land-based units, see § 261.4(a)(23)).

* * * * *

(c) * * *

(3) Reclaimed. Materials noted with a ''—'' in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an ''*'' in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

(4) * * *

TABLE 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§ 261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	—	—
Scrap metal other than excluded scrap metal (see 261.1(c)(9))	(*)	(*)	(*)	(*)

Note: The terms ''spent materials,'' ''sludges,'' ''by-products,'' and ''scrap metal'' and ''processed scrap metal'' are defined in § 261.1.

* * * * *

■ 11. Section 261.4 is amended by adding new paragraphs (a)(23), (24), and (25) to read as follows:

§ 261.4 Exclusions.

(a) * * *

(23) Hazardous secondary material generated and reclaimed within the United States or its territories and managed in land-based units as defined in § 260.10 of this chapter is not a solid waste provided that:

(i) The material is contained;

(ii) The material is a hazardous secondary material generated and reclaimed under the control of the generator, as defined in § 260.10;

(iii) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(iv) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2 of this chapter), and it does not meet the listing description for K171 or K172 in § 261.32;

(v) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter; and

(vi) In addition, persons claiming the exclusion under this paragraph (a)(23) must provide notification as required by § 260.42 of this chapter. (For hazardous secondary material managed in a non-land-based unit, see § 261.2(a)(2)(ii)).

(24) Hazardous secondary material that is generated and then transferred to another person for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in § 260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR Parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, it is not a spent lead-acid battery (see § 266.80 and § 273.2 of this chapter), and it does not meet the listing description for K171 or K172 in § 261.32;

(iv) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

(A) The material must be contained.

(B) Prior to arranging for transport of hazardous secondary materials to a reclamation facility (or facilities) where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make reasonable efforts to ensure that each reclaimer intends to properly and legitimately reclaim the hazardous secondary material and not discard it, and that each reclaimer will manage the hazardous secondary material in a manner that is protective of human health and the environment. If the hazardous secondary material will be passing through an intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator, and the hazardous secondary material generator must perform reasonable efforts to ensure that the intermediate facility will manage the hazardous secondary material in a manner that is protective of human health and the environment. Reasonable efforts must be repeated at a minimum of every three years for the hazardous secondary material generator to claim the exclusion and to send the hazardous secondary materials to each reclaimer and any intermediate facility. In making these reasonable efforts, the generator may use any credible evidence available, including information gathered by the hazardous secondary material generator, provided by the reclaimer or intermediate facility, and/or provided by a third party. The hazardous secondary material generator must affirmatively answer all of the following questions for each reclamation facility and any intermediate facility:

(1) Does the available information indicate that the reclamation process is legitimate pursuant to § 260.43 of this chapter? In answering this question, the hazardous secondary material generator can rely on their existing knowledge of the physical and chemical properties of the hazardous secondary material, as well as information from other sources (e.g., the reclamation facility, audit reports, etc.) about the reclamation process. (By responding to this question, the hazardous secondary material generator has also satisfied its requirement in § 260.43(a) of this chapter to be able to demonstrate that the recycling is legitimate).

(2) Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to § 260.42 of this chapter and have they notified the appropriate authorities that the financial assurance condition is satisfied per paragraph (a)(24)(vi)(F) of this section? In answering these questions, the hazardous secondary material generator can rely on the available information documenting the reclamation facility's and any intermediate facility's compliance with the notification requirements per § 260.42 of this chapter, including the requirement in § 260.42(a)(5) to notify EPA whether the reclaimer or intermediate facility has financial assurance.

(3) Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified as a significant non-complier with RCRA Subtitle C? In answering this question, the hazardous secondary material generator can rely on the publicly available information from EPA or the state. If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly? In answering this question, the hazardous secondary material generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials.

(4) Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material? In answering this question, the generator may rely on a description by the reclamation facility or by an independent third party of the equipment and trained personnel to be used to recycle the generator's hazardous secondary material.

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment? In answering these questions, the hazardous secondary material generator can rely on publicly available information from EPA or the

state, or information provided by the facility itself.

(C) The hazardous secondary material generator must maintain for a minimum of three years documentation and certification that reasonable efforts were made for each reclamation facility and, if applicable, intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards prior to transferring hazardous secondary material. Documentation and certification must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. The certification statement must:

(1) Include the printed name and official title of an authorized representative of the hazardous secondary material generator company, the authorized representative's signature, and the date signed;

(2) Incorporate the following language: ''I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of excluded hazardous secondary materials to [insert name(s) of reclamation facility and any intermediate facility], reasonable efforts were made in accordance with § 261.4(a)(24)(v)(B) to ensure that the hazardous secondary materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information.''

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(3) The type and quantity of hazardous secondary material in the shipment.

(E) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt); and

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in § 260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;

(3) The type and quantity of hazardous secondary material in the shipment; and

(4) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility has financial assurance as required under subpart H of 40 CFR part 261.

(vii) In addition, all persons claiming the exclusion under this paragraph (a)(24) of this section must provide notification as required under § 260.42 of this chapter.

(25) Hazardous secondary material that is exported from the United States and reclaimed at a reclamation facility located in a foreign country is not a solid waste, provided that the hazardous secondary material generator complies with the applicable requirements of paragraph (a)(24)(i)–(v) of this section (excepting paragraph (a)(v)(B)(*2*) of this section for foreign reclaimers and foreign intermediate facilities), and that the hazardous secondary material generator also complies with the following requirements:

(i) Notify EPA of an intended export before the hazardous secondary material is scheduled to leave the United States. A complete notification must be submitted at least sixty (60) days before the initial shipment is intended to be shipped off-site. This notification may cover export activities extending over a twelve (12) month or lesser period. The notification must be in writing, signed by the hazardous secondary material generator, and include the following information:

(A) Name, mailing address, telephone number and EPA ID number (if applicable) of the hazardous secondary material generator;

(B) A description of the hazardous secondary material and the EPA hazardous waste number that would

apply if the hazardous secondary material was managed as hazardous waste and the U.S. DOT proper shipping name, hazard class and ID number (UN/NA) for each hazardous secondary material as identified in 49 CFR parts 171 through 177;

(C) The estimated frequency or rate at which the hazardous secondary material is to be exported and the period of time over which the hazardous secondary material is to be exported;

(D) The estimated total quantity of hazardous secondary material;

(E) All points of entry to and departure from each foreign country through which the hazardous secondary material will pass;

(F) A description of the means by which each shipment of the hazardous secondary material will be transported (e.g., mode of transportation vehicle (air, highway, rail, water, etc.), type(s) of container (drums, boxes, tanks, etc.));

(G) A description of the manner in which the hazardous secondary material will be reclaimed in the receiving country;

(H) The name and address of the reclaimer, any intermediate facility and any alternate reclaimer and intermediate facilities; and

(I) The name of any transit countries through which the hazardous secondary material will be sent and a description of the approximate length of time it will remain in such countries and the nature of its handling while there (for purposes of this section, the terms ''Acknowledgement of Consent'', ''receiving country'' and ''transit country'' are used as defined in 40 CFR 262.51 with the exception that the terms in this section refer to hazardous secondary materials, rather than hazardous waste):

(ii) Notifications submitted by mail should be sent to the following mailing address: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, (Mail Code 2254A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand-delivered notifications should be delivered to: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, Environmental Protection Agency, Ariel Rios Bldg., Room 6144, 12th St. and Pennsylvania Ave., NW., Washington, DC 20004. In both cases, the following shall be prominently displayed on the front of the envelope: ''Attention: Notification of Intent to Export.''

(iii) Except for changes to the telephone number in paragraph (a)(25)(i)(A) of this section and decreases in the quantity of hazardous secondary material indicated pursuant to paragraph (a)(25)(i)(D) of this section, when the conditions specified on the original notification change (including any exceedance of the estimate of the quantity of hazardous secondary material specified in the original notification), the hazardous secondary material generator must provide EPA with a written renotification of the change. The shipment cannot take place until consent of the receiving country to the changes (except for changes to paragraph (a)(25)(i)(I) of this section and in the ports of entry to and departure from transit countries pursuant to paragraphs (a)(25)(i)(E) of this section) has been obtained and the hazardous secondary material generator receives from EPA an Acknowledgment of Consent reflecting the receiving country's consent to the changes.

(iv) Upon request by EPA, the hazardous secondary material generator shall furnish to EPA any additional information which a receiving country requests in order to respond to a notification.

(v) EPA will provide a complete notification to the receiving country and any transit countries. A notification is complete when EPA receives a notification which EPA determines satisfies the requirements of paragraph (a)(25)(i) of this section. Where a claim of confidentiality is asserted with respect to any notification information required by paragraph (a)(25)(i) of this section, EPA may find the notification not complete until any such claim is resolved in accordance with 40 CFR 260.2.

(vi) The export of hazardous secondary material under this paragraph (a)(25) is prohibited unless the receiving country consents to the intended export. When the receiving country consents in writing to the receipt of the hazardous secondary material, EPA will send an Acknowledgment of Consent to the hazardous secondary material generator. Where the receiving country objects to receipt of the hazardous secondary material or withdraws a prior consent, EPA will notify the hazardous secondary material generator in writing. EPA will also notify the hazardous secondary material generator of any responses from transit countries.

(vii) For exports to OECD Member countries, the receiving country may respond to the notification using tacit consent. If no objection has been lodged by any receiving country or transit countries to a notification provided pursuant to paragraph (a)(25)(i) of this section within thirty (30) days after the date of issuance of the acknowledgement of receipt of notification by the competent authority of the receiving country, the transboundary movement may commence. In such cases, EPA will send an Acknowledgment of Consent to inform the hazardous secondary material generator that the receiving country and any relevant transit countries have not objected to the shipment, and are thus presumed to have consented tacitly. Tacit consent expires one (1) calendar year after the close of the thirty (30) day period; renotification and renewal of all consents is required for exports after that date.

(viii) A copy of the Acknowledgment of Consent must accompany the shipment. The shipment must conform to the terms of the Acknowledgment of Consent.

(ix) If a shipment cannot be delivered for any reason to the reclaimer, intermediate facility or the alternate reclaimer or alternate intermediate facility, the hazardous secondary material generator must re-notify EPA of a change in the conditions of the original notification to allow shipment to a new reclaimer in accordance with paragraph (iii) of this section and obtain another Acknowledgment of Consent.

(x) Hazardous secondary material generators must keep a copy of each notification of intent to export and each Acknowledgment of Consent for a period of three years following receipt of the Acknowledgment of Consent.

(xi) Hazardous secondary material generators must file with the Administrator no later than March 1 of each year, a report summarizing the types, quantities, frequency and ultimate destination of all hazardous secondary materials exported during the previous calendar year. Annual reports submitted by mail should be sent to the following address: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division (Mail Code 2254A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand-delivered reports should be delivered to: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, Environmental Protection Agency, Ariel Rios Bldg., Room 6144, 12th St. and Pennsylvania Ave., NW., Washington, DC 20004. Such reports must include the following information:

(A) Name, mailing and site address, and EPA ID number (if applicable) of

the hazardous secondary material generator;

(B) The calendar year covered by the report;

(C) The name and site address of each reclaimer and intermediate facility;

(D) By reclaimer and intermediate facility, for each hazardous secondary material exported, a description of the hazardous secondary material and the EPA hazardous waste number that would apply if the hazardous secondary material was managed as hazardous waste, DOT hazard class, the name and U.S. EPA ID number (where applicable) for each transporter used, the total amount of hazardous secondary material shipped and the number of shipments pursuant to each notification;

(E) A certification signed by the hazardous secondary material generator which states: ''I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment.''

(xii) All persons claiming an exclusion under this paragraph (a)(25) must provide notification as required by § 260.42 of this chapter.

* * * * *

Subparts F–G [Reserved]

■ 12. In part 261, Subpart F and Subpart G are added and reserved.

■ 13. Part 261 is amended by adding new Subpart H to read as follows:

Subpart H—Financial Requirements for Management of Excluded Hazardous Secondary Materials

Sec.

Subpart H—Financial Requirements for Management of Excluded Hazardous Secondary Materials

§ 261.140 Applicability.

(a) The requirements of this subpart apply to owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR § 261.4(a)(24), except as provided otherwise in this section.

(b) States and the Federal government are exempt from the financial assurance requirements of this subpart.

§ 261.141 Definitions of terms as used in this subpart.

The terms defined in § 265.141(d), (f), (g), and (h) of this chapter have the same meaning in this subpart as they do in § 265.141 of this chapter.

§ 261.142 Cost estimate.

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of disposing of any hazardous secondary material as listed or characteristic hazardous waste, and the potential cost of closing the facility as a treatment, storage, and disposal facility.

(1) The estimate must equal the cost of conducting the activities described in paragraph (a) of this section at the point when the extent and manner of the facility's operation would make these activities the most expensive; and

(2) The cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct these activities. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of parent corporation in § 265.141(d) of this chapter.) The owner or operator may use costs for on-site disposal in accordance with applicable requirements if he can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

(3) The cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under § 265.5113(d) of this chapter, facility structures or equipment, land, or other assets associated with the facility.

(4) The owner or operator may not incorporate a zero cost for hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under § 265.5113(d) of this chapter that might have economic value.

(b) During the active life of the facility, the owner or operator must adjust the cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with § 261.143. For owners and operators using the financial test or corporate guarantee, the cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Regional Administrator as specified in § 261.143(e)(3). The adjustment may be made by recalculating the cost estimate in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified in paragraphs (b)(1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the cost estimate by the inflation factor. The result is the adjusted cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator must revise the cost estimate no later than 30 days after a change in a facility's operating plan or design that would increase the costs of conducting the activities described in paragraph (a) or no later than 60 days after an unexpected event which increases the cost of conducting the activities described in paragraph (a) of this section. The revised cost estimate must be adjusted for inflation as specified in paragraph (b) of this section.

(d) The owner or operator must keep the following at the facility during the operating life of the facility: The latest cost estimate prepared in accordance with paragraphs (a) and (c) and, when this estimate has been adjusted in accordance with paragraph (b), the latest adjusted cost estimate.

§ 261.143 Financial assurance condition.

Per § 261.4(a)(24)(vi)(F) of this chapter, an owner or operator of a reclamation or intermediate facility must have financial assurance as a condition of the exclusion as required under § 261.4(a)(24) of this chapter. He must choose from the options as specified in paragraphs (a) through (e) of this section.

(a) *Trust fund.* (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund which conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement must be identical to the wording specified in § 261.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see § 261.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current cost estimate covered by the agreement.

(3) The trust fund must be funded for the full amount of the current cost estimate before it may be relied upon to satisfy the requirements of this section.

(4) Whenever the current cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(5) If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate.

(6) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate covered by the trust fund.

(7) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a) (5) or (6) of this section, the Regional Administrator will instruct the trustee to release to the owner or operator such funds as the Regional Administrator specifies in writing. If the owner or operator begins final closure under subpart G of 40 CFR part 264 or 265, an owner or operator may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Regional Administrator. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. No later than 60 days after receiving bills for partial or final closure activities, the Regional Administrator will instruct the trustee to make reimbursements in those amounts as the Regional Administrator specifies in writing, if the Regional Administrator determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Regional Administrator has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, in accordance with § 265.143(i) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Regional Administrator does not instruct the trustee to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(8) The Regional Administrator will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(b) *Surety bond guaranteeing payment into a trust fund.* (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Regional Administrator. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in § 261.151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements specified in paragraph (a) of this section, except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Regional Administrator with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in paragraph (a) of this section;

(B) Updating of Schedule A of the trust agreement (see § 261.151(a)) to show current cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before loss of the exclusion under § 261.4(a)(24) of this chapter or

(ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin closure issued by the Regional Administrator becomes final, or within 15 days after an order to begin closure is issued by a U.S. district court or other court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the Regional Administrator's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section.

(7) Whenever the current cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current cost estimate and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current cost estimate decreases, the penal sum may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Regional Administrator. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Regional Administrator, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the Regional Administrator has given prior written consent based on his receipt of evidence of alternate

financial assurance as specified in this section.

(c) *Letter of credit.* (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph and submitting the letter to the Regional Administrator. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in § 261.151(c).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Regional Administrator will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements of the trust fund specified in paragraph (a) of this section, except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Regional Administrator with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in paragraph (a) of this section;

(B) Updating of Schedule A of the trust agreement (see § 261.151(a)) to show current cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: The EPA Identification Number (if any issued), name, and address of the facility, and the amount of funds assured for the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Regional Administrator by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Regional Administrator have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section.

(7) Whenever the current cost estimate increases to an amount greater than the amount of the credit, the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current cost estimate and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current cost estimate decreases, the amount of the credit may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

(8) Following a determination by the Regional Administrator that the hazardous secondary materials do not meet the conditions of the exclusion under § 261.4(a)(24), the Regional Administrator may draw on the letter of credit.

(9) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Regional Administrator will draw on the letter of credit. The Regional Administrator may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Regional Administrator will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Regional Administrator.

(10) The Regional Administrator will return the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(d) *Insurance.* (1) An owner or operator may satisfy the requirements of this section by obtaining insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the Regional Administrator At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) The wording of the certificate of insurance must be identical to the wording specified in § 261.151(d).

(3) The insurance policy must be issued for a face amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section. The term ''face amount'' means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(4) The insurance policy must guarantee that funds will be available whenever needed to pay the cost of removal of all hazardous secondary materials from the unit, to pay the cost of decontamination of the unit, to pay the costs of the performance of activities required under subpart G of 40 CFR parts 264 or 265, as applicable, for the facilities covered by this policy. The policy must also guarantee that once funds are needed, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Regional Administrator, to such party or parties as the Regional Administrator specifies.

(5) After beginning partial or final closure under 40 CFR parts 264 or 265, as applicable, an owner or operator or any other authorized person may request reimbursements for closure expenditures by submitting itemized bills to the Regional Administrator. The owner or operator may request reimbursements only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure activities, the Regional Administrator will instruct the insurer to make reimbursements in such amounts as the Regional Administrator specifies in writing if the Regional Administrator determines that the expenditures are in accordance with the approved plan or otherwise justified. If the Regional Administrator has reason to believe that the maximum cost over the remaining life of the facility will be significantly greater than the face